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OFFICE OF SPECIAL COUNSEL

5 CFR Part 1820

Revision of Regulations Governing Freedom of Information Act Requests and Appeals, and Revision of Touhy Regulations Governing Release of Information in Response to Legal Proceedings

AGENCY: U.S. Office of Special Counsel.

ACTION: Final rule.

SUMMARY: Final rule.

This final rule updates and clarifies the procedures for submitting Freedom of Information Act (FOIA) requests and appeals to the U.S. Office of Special Counsel (OSC). The rule describes additional methods for submitting FOIA requests and appeals. It also promotes efficiency in FOIA administration by enhancing OSC's ability to respond to certain requests on an expedited basis. The final rule makes minor technical revisions to the name of an OSC unit and to OSC's Internet, fax, and physical address information. The rule also establishes procedures that requesters must follow when making demands on or requests to an OSC employee to produce official records or provide testimony relating to official information in connection with a legal proceeding in which the OSC is not a party.

DATES: This final rule is effective October 24, 2016.

FOR FURTHER INFORMATION CONTACT: Amy Beckett, Senior Litigation Counsel, U.S. Office of Special Counsel, 202–254–3657

SUPPLEMENTARY INFORMATION: OSC published a proposed rule on May 5, 2015, FR Doc No: 2016–09799 and solicited public comment on that rule. OSC has considered the comments and is issuing this final rule in due course.

I. Background

FOIA Regulations. The U.S. Office of Special Counsel (OSC) revises its FOIA regulations to account for the additional electronic methods by which requesters may submit FOIA requests and appeals, and modifies the manner by which requests qualify for expedited processing. OSC also makes minor technical revisions to the name of an OSC unit and to OSC's Internet, fax, and physical address information.

The existing language of 5 CFR 1820.2 and 1820.6 describes regular mail and fax as the methods by which to submit FOIA requests and appeals. The final rule adds email or other electronic submission methods.

The existing language of 5 CFR 1820.1 refers to the main OSC Internet and FOIA page addresses. The final rule describes Internet access to OSC FOIA resources through the main OSC Internet address. The first commenter suggested that subsection (a)(1) identify OSC's fax number and email address. At the risk of the contact information later being changed, OSC considered and adopted the suggested change to subsection (a)(1). The commenter also suggested a minor grammatical change to subsection (c), which OSC also considered and adopted. The first commenter also proposed changes to Section 1820.3 regarding whether OSC may consult with entities the commenter argues are not ''agencies'' for FOIA purposes. OSC is postponing consideration of this suggested change pending its mandated update to the regulation required by the recently enacted FOIA Improvement Act of 2016, Public Law 114–185.

The existing language of 5 CFR 1820.2 and 1820.6 regarding OSC's physical address would be modified in a minor, technical manner. The first commenter also suggested that subsection (a)(3) allow requesters to submit appeals by email in addition to ''other electronic means.'' OSC has accepted email requests and appeals for several years, so OSC adopts the suggested change both to conform the rule to OSC's current practice and to specify that OSC accepts email submissions. The commenter also urged OSC to notify requesters of the mediation services offered by the Office of Government Information Services and to add that OSC will respond to administrative appeals within the statutory deadline. OSC has already adopted this practice pursuant to the recently enacted FOIA Improvement Act of 2016, Public Law 114–185. OSC has also begun to notify new requesters as of June 30, 2016 that they have 90 days to appeal an adverse determination and will revise the regulation to reflect this, and other updated practices, when it issues its mandated update to the regulation required by the recently enacted FOIA Improvement Act of 2016, Public Law 114–185. The existing language of 5 CFR 1820.6 refers to an OSC unit as the ''Legal Counsel and Policy Division.'' The name of that unit is updated in the final rule to the ''Office of General Counsel.''

The existing language of 5 CFR 1820.4(c)(1)(iii) discusses one of the three criteria under which a FOIA request can be processed out of order of receipt and addressed on an expedited basis. That language provides, in part, expedited treatment of a FOIA request when the requested records relate to ''an appeal that is pending before, or that the requester faces an imminent deadline for filing with'' another administrative or judicial tribunal, ''seeking personal relief pursuant to a complaint filed by the requester with OSC, or referred to OSC pursuant to title 38 of the U.S. Code.''

The final rule clarifies that the criteria discussed at 5 CFR 1820.4(c)(1)(iii) applies only when the requested records relate to an appeal for which the requester faces an imminent deadline for filing with another administrative or judicial tribunal. In addition, the final rule specifies that a grant of expedited treatment applies only to the following requested records: Letters sent to a complainant by OSC, and the official complaint form submitted to OSC by the complainant or the original referred complaint if referred to OSC pursuant to title 38 of the U.S. Code. All other requested records would be processed according to the order in which OSC received the request.

By narrowing the focus of expedited status to certain records that are of interest to complainant-requesters, and are typically readily available for disclosure to the complainant-requesters, OSC is able to process and respond to expedited requests more efficiently. Any other requested records will generally be processed in the order OSC received the request.

Touhy Regulations. OSC also revises its regulations relating to the release of information in response to requests made in connection with legal proceedings, such as summonses, complaints, subpoenas, and other litigation-related requests or demands for OSC's records or official information. These regulations are often referred to as *Touhy* regulations.

Federal agencies often receive demands consisting of informal requests for production of records, information, or testimony in judicial, legislative, or administrative proceedings in which the agency is not a named party. OSC revises its regulation to improve its evaluation and processing of such requests.

The United States Supreme Court upheld this type of regulation in *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951), holding that provisions in the federal ''housekeeping'' statute authorize agencies to promulgate rules governing record production and employee testimony. *See* 5 U.S.C. 301.

The prior language of 5 CFR1820.10 referred to the ''[p]roduction of official records or testimony in legal proceedings.'' This revision provides the agency with more clearly delineated standards for releasing information or witness testimony. Generally, this revision re-establishes that no OSC employee or former employee shall release official information or records without the prior approval of the Special Counsel or the Special Counsel's duly authorized designee.

Under this final rule, OSC establishes procedural requirements for the form and content of requests for official OSC information made through a litigation request or demand, as well as establishing procedures for responding to the requests. This final rule also states the factors that OSC will consider in determining whether to authorize a release of official information in response to a request.

II. Overview of Comments Received

In response to the proposed rule, OSC received two comment letters regarding the proposed changes to the FOIA regulation, including suggestions for changing additional sections of the regulation. The first commenter suggested that OSC include additional contact details within the text of the FOIA regulation, that OSC amend the section governing consultations and referrals, and that OSC make additional changes as to the appeals process. The second commenter suggested changes regarding the definition of ''representative of the news media,'' fees, records preservation, and records management. OSC will postpone consideration of several of the proposed changes pending its mandated update to the regulation required by the recently enacted FOIA Improvement Act of 2016l, Public Law 114–185.

OSC did not receive any comments concerning its *Touhy* regulation. Accordingly, OSC will issue the final rule without modification to the *Touhy* provisions.

In section IV below, OSC set forth its final rule, a section by section summary of the two comments it received to the proposed final rule, and OSC's responses to these comments.

Subpart A, Sections 1820.10, 11, and 12

III. Procedural Determinations

Administrative Procedure Act (APA): This action is taken under the Special Counsel's authority at 5 U.S.C. 1212(e) to publish regulations in the **Federal Register**.

Executive Order 12866 (Regulatory Planning and Review): OSC does not anticipate that this final rule will have significant economic impact, raise novel issues, and/or have any other significant impacts. Thus this final rule is not a significant regulatory action under 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under 6(a)(3) of the Order.

Congressional Review Act (CRA): OSC has determined that this final rule is not a major rule under the Congressional Review Act, as it is unlikely to result in an annual effect on the economy of $100 million or more; is unlikely to result in a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies or geographic regions; and is unlikely to have a significant adverse effect on competition, employment, investment, productivity, or innovation, or on the ability of U.S.-based enterprises to compete in domestic and export markets.

Regulatory Flexibility Act (RFA): The Regulatory Flexibility Act does not apply, even though this final rule was offered for notice and comment procedures under the APA. This final rule will not directly regulate small entities. OSC therefore need not perform a regulatory flexibility analysis of small entity impacts.

Unfunded Mandates Reform Act (UMRA): This revision does not impose any federal mandates on state, local, or tribal governments, or on the private sector within the meaning of the UMRA.

National Environmental Policy Act (NEPA): This final rule will have no physical impact upon the environment and therefore will not require any further review under NEPA.

Paperwork Reduction Act (PRA): This final rule does not impose any new recordkeeping, reporting, or other information collection requirements on the public. The final rule sets forth procedures by which litigants may serve summonses, complaints, subpoenas, and other legal process, demands, and requests upon the OSC. The final rule imposes special procedural requirements for those who seek to serve third-party subpoenas upon the OSC in accordance with *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). These requirements may increase the time and burden associated with obtaining records of the OSC in response to such third-party subpoenas.

Executive Order 13132 (Federalism): This final revision does not have new federalism implications under Executive Order 13132.

Executive Order 12988 (Civil Justice Reform): This final rule meets applicable standards of 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 5 CFR Part 1820

Administrative practice and procedure, Freedom of Information, Government employees, Touhy regulations.

IV. Authority and Issuance

For the reasons stated in the preamble, OSC revises 5 CFR part 1820 as follows:

PART 1820—FREEDOM OF INFORMATION ACT REQUESTS; PRODUCTION OF RECORDS OR TESTIMONY

■ 1. The authority citation for 5 CFR part 1820 continues to read as follows:

Authority: 5 U.S.C. 552 and 1212(e); Executive Order No. 12600, 52 FR 23781.

■ 2. Revise § 1820.1 to read as follows:

§ 1820.1 General provisions.

This part contains rules and procedures followed by the U.S. Office of Special Counsel (OSC) in processing requests for records under the Freedom of Information Act (FOIA), as amended, at 5 U.S.C. 552. These rules and procedures should be read together with the FOIA, which provides additional information about access to agency records. Further information about the FOIA and access to OSC records is available on the FOIA page of OSC's Web site (*https://www.osc.gov*). Information routinely provided to the public as part of a regular OSC activity—for example, forms, press releases issued by the public affairs officer, records published on the agency's Web site, or public lists

maintained at OSC headquarter offices pursuant to 5 U.S.C. 1219—may be requested and provided to the public without following this part. This part also addresses responses to demands by a court or other authority to an employee for production of official records or testimony in legal proceedings.

■ 3. Revise § 1820.2 to read as follows:

§ 1820.2 Requirements for making FOIA requests.

(a) *Submission of requests.* (1) A request for OSC records under the FOIA must be made in writing. The request must be sent by:

(i) Regular mail addressed to: FOIA Officer, U.S. Office of Special Counsel, 1730 M Street NW., Suite 218, Washington, DC 20036–4505; or

(ii) By fax sent to the FOIA Officer at 202–254–3711, the number provided on the FOIA page of OSC's Web site (*https://osc.gov/Pages/FOIA-Resources.aspx*) (*https://www.osc.gov*); or

(iii) By email to *foiarequest@osc.gov* or other electronic means as described on the FOIA page of OSC's Web site, *https://osc.gov/Pages/FOIA-Resources.aspx.*

(2) For the quickest handling, both the request letter and envelope or any fax cover sheet or email subject line should be clearly marked ''FOIA Request.'' Whether sent by mail, fax, email, or other prescribed electronic method, a FOIA request will not be considered to have been received by OSC until it reaches the FOIA office.

(b) *Description of records sought.* Requesters must describe the records sought in enough detail for them to be located with a reasonable amount of effort. When requesting records about an OSC case file, the case file number, name, and type (for example, prohibited personnel practice, Hatch Act, USERRA or other complaint; Hatch Act advisory opinion; or whistleblower disclosure) should be provided, if known. Whenever possible, requests should describe any particular record sought, such as the date, title or name, author, recipient, and subject matter.

(c) *Agreement to pay fees.* Making a FOIA request shall be considered an agreement by the requester to pay all applicable fees chargeable under § 1820.7, up to and including the amount of $25.00, unless the requester asks for a waiver of fees or specifies a willingness to pay a greater or lesser amount.

■ 4. Revise § 1820.4 to read as follows:

§ 1820.4 Timing of responses to requests.

(a) *In general.* OSC ordinarily will respond to FOIA requests according to their order of receipt. In determining which records are responsive to a request, OSC ordinarily will include only records in its possession as of the date on which it begins its search for them. If any other date is used, OSC will inform the requester of that date.

(b) *Multitrack processing.* (1) OSC may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and/or time needed to process the request.

(2) When using multitrack processing, OSC may provide requesters in its slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of the faster track(s).

(c) *Expedited processing.* (1) Requests and appeals will be taken out of order and given expedited treatment whenever OSC has established to its satisfaction that:

(i) Failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) With respect to a request made by a person primarily engaged in disseminating information, an urgency exists to inform the public about an actual or alleged federal government activity; or

(iii) The requested records relate to an appeal for which the requester faces an imminent deadline for filing with the Merit Systems Protection Board or other administrative tribunal or a court of law, seeking personal relief pursuant to a complaint filed by the requester with OSC, or referred to OSC pursuant to title 38 of the U.S. Code. Expedited status granted under this provision will apply only to the following requested records: Letters sent to the complainant by OSC; and the official complaint form submitted to OSC by the complainant or the original referred complaint if referred to OSC pursuant to title 38 of the U.S. Code. All other requested records will be processed according to the order in which OSC received the request.

(2) A request for expedited processing must be made in writing and sent to OSC's FOIA Officer. Such a request will not be considered to have been received until it reaches the FOIA Officer.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester within the category described in paragraph (c)(1)(ii) of this section, if not a full-time member of the news media, must establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation. The formality of certification may be waived as a matter of OSC's administrative discretion.

(4) OSC shall decide whether to grant a request for expedited processing and notify the requester of its decision within 10 calendar days of the FOIA Officer's receipt of the request. If the request for expedited processing is granted, the request for records shall be processed as soon as practicable. If a request for expedited processing is denied, any administrative appeal of that decision shall be acted on expeditiously.

(d) *Aggregated requests.* OSC may aggregate multiple requests by the same requester, or by a group of requesters acting in concert, if it reasonably believes that such requests constitute a single request involving unusual circumstances, as defined by the FOIA, supporting an extension of time to respond, and the requests involve clearly related matters.

■ 5. Revise § 1820.6 to read as follows:

§ 1820.6 Appeals.

(a) *Appeals of adverse determinations.* A requester may appeal an adverse determination denying a FOIA request in any respect to the Office of General Counsel, U.S. Office of Special Counsel, 1730 M Street NW., Suite 218, Washington, DC 20036–4505. The appeal must be in writing, and must be submitted either by:

(1) Regular mail sent to the address listed in this subsection, above; or

(2) By fax sent to the FOIA Officer at, (202) 254–3711, the number provided on the FOIA page of OSC's Web site *https://osc.gov/Pages/FOIA-Resources.aspx;* or

(3) By email to *foiaappeal@osc.gov,* or other electronic means as described on the FOIA page of OSC's Web site, *https://osc.gov/Pages/FOIA-Resources.aspx.*

(b) *Submission and content.* The appeal must be received by the Office of General Counsel within 45 days of the date of the letter denying the request. For the quickest possible handling, the appeal letter and envelope or any fax cover sheet should be clearly marked ''FOIA Appeal.'' The appeal letter must clearly identify the OSC determination (including the assigned FOIA request number, if known) being appealed. An appeal ordinarily will not be acted on if

the request becomes a matter of FOIA litigation.

(c) *Responses to appeals.* The agency decision on an appeal will be made in writing. A decision affirming an adverse determination in whole or in part shall inform the requester of the provisions for judicial review of that decision. If the adverse determination is reversed or modified on appeal, in whole or in part, the requester will be notified in a written decision and the request will be reprocessed in accordance with that appeal decision.

■ 6. Add a new heading for subpart A before § 1820.10 as set forth below.

■ 7. Revise § 1820.10 and add §§ 1820.11 and 1820.12 to subpart A to read as follows:

Subpart A—Touhy Regulations General Provisions

Sec.
1820.10 Scope and purpose.
1820.11 Applicability.
1820.12 Definitions.

§ 1820.10 Scope and purpose.

(a) This part establishes policy, assigns responsibilities and prescribes procedures with respect to:

(1) The production or disclosure of official information or records by current and former OSC employees, and contractors; and

(2) The testimony of current and former OSC employees, advisors, and consultants relating to official information, official duties, or the OSC's records, in connection with federal or state litigation or administrative proceedings in which the OSC is not a party.

(b) The OSC intends this part to:

(1) Conserve the time of OSC employees for conducting official business;

(2) Minimize the involvement of OSC employees in issues unrelated to OSC's mission;

(3) Maintain the impartiality of OSC employees in disputes between private litigants; and

(4) Protect sensitive, confidential information and the deliberative processes of the OSC.

(c) In providing for these requirements, the OSC does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of OSC. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

§ 1820.11 Applicability.

This part applies to demands and requests to current and former employees, and contractors, for factual or expert testimony relating to official information or official duties or for production of official records or information, in legal proceedings in which the OSC is not a named party. This part does not apply to:

(a) Demands upon or requests for current or former OSC employees or contractors to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of the OSC;

(b) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; or

(c) Congressional demands and requests for testimony, records or information.

§ 1820.12 Definitions.

The following definitions apply to this part.

Demand means an order, subpoena, or other command of a court or other competent authority for the production, disclosure, or release of records or for the appearance and testimony of an OSC employee in a legal proceeding.

General Counsel means the General Counsel of the OSC or a person to whom the General Counsel has delegated authority under this part.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

OSC means the U.S. Office of Special Counsel.

OSC employee or *employee* means:

(1)(i) Any current or former employee of the OSC; and

(ii) Any other individual hired through contractual agreement by or on behalf of the OSC or who has performed or is performing services under such an agreement for the OSC.

(2) This definition does not include persons who are no longer employed by the OSC and who agree to testify about matters available to the public.

Records or *official records and information* means all information in the custody and control of the OSC, relating to information in the custody and control of the OSC, or acquired by an OSC employee in the performance of his or her official duties or because of his or her official status, while the individual was employee by or on behalf of the OSC.

Request means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court of other competent authority.

Testimony means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

■ 8. Add subpart B to read as follows:

Subpart B—Demands or Requests for Testimony and Production of Documents

Sec.
1820.13 General prohibition.
1820.14 Factors the OSC will consider.
1820.15 Filing requirements for litigants.
1820.16 Service of requests or demands.
1820.17 Processing requests or demands.
1820.18 Final determinations.
1820.19 Restrictions that apply to testimony.
1820.20 Restrictions that apply to released records.
1820.21 Procedure when a decision is not made prior to the time a response is required.
1820.22 Procedure in the event of an adverse ruling.

§ 1820.13 General prohibition.

No employee of OSC may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior written approval of the General Counsel.

§ 1820.14 Factors the OSC will consider.

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

(a) The purposes of this part are met;

(b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(c) Allowing such testimony or production of records would assist or hinder the OSC in performing its statutory duties;

(d) Allowing such testimony or production of records would be in the best interest of the OSC or the United States;

(e) The records or testimony can be obtained from other sources;

(f) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rule of procedure governing the

case or matter in which the demand or request arose;

(g) Disclosure would violate a statute, Executive Order or regulation;

(h) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential or financial information, otherwise protected information, or information which would otherwise be inappropriate for release;

(i) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceeding, or compromise constitutional rights or national security interests;

(j) Disclosure would result in the OSC appearing to favor one litigant over another;

(k) A substantial government interest is implicated;

(l) The demand or request is within the authority of the party making it; and

(m) The demand or request is sufficiently specific to be answered.

§ 1820.15 Filing requirements for litigants seeking documents or testimony.

A litigant must comply with the following requirements when filing a request for official records and information or testimony under this part. A request should be filed before a demand is issued.

(a) The request must be in writing and must be submitted to the General Counsel.

(b) The written request must contain the following information:

(1) The caption of the legal or administrative proceeding, docket number, and name and address of the court or other administrative or regulatory authority involved;

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal or administrative proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs any need to maintain the confidentiality of the information and outweighs the burden on the OSC to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than an OSC employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require of each OSC employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The OSC reserves the right to require additional information to complete the request where appropriate.

(d) The request should be submitted at least 30 days before the date that records or testimony is required. Requests submitted in less than 30 days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with the request.

(f) The request should state that the requester will provide a copy of the OSC employee's statement free of charge and that the requester will permit the OSC to have a representative present during the employee's testimony.

§ 1820.16 Service of requests or demands.

Requests or demands for official records or information or testimony under this subpart must be served by mail or hand delivery to the Office of General Counsel, U.S. Office of Special Counsel, 1730 M St. NW., Suite 213, Washington, DC 20036; or sent by fax to 202–254–3711.

§ 1820.17 Processing requests or demands.

(a) After receiving service of a request or demand for testimony, the General Counsel will review the request and, in accordance with the provisions of this subpart, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or produce official records and information.

(b) Absent exigent circumstances, the OSC will issue a determination within 30 days from the date the request is received.

(c) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of the OSC or the United States, or for other good cause.

(d) *Certification (authentication) of copies of records.* The OSC may certify that records are true copies in order to facilitate their use as evidence. If a requester seeks certification, the requester must request certified copies from the OSC at least 30 days before the date they will be needed.

§ 1820.18 Final determination.

The General Counsel makes the final determination regarding requests to employees for production of official records and information or testimony in litigation in which the OSC is not a party. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and, when appropriate, the court or other competent authority of the final determination, the reasons for the grant or denial of the request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of an OSC employee. The General Counsel's decision exhausts administrative remedies for purposes of disclosure of the information.

§ 1820.19 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on the testimony of OSC employees including, for example:

(1) Limiting the areas of testimony;

(2) Requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal;

(3) Requiring that the transcript will be used or made available only in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) The OSC may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not;

(1) Disclose confidential or privileged information; or

(2) For a current OSC employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the OSC unless testimony is being given on behalf of the United States (see also 5 CFR 2635.805).

(d) The scheduling of an employee's testimony, including the amount of time that the employee will be made available for testimony, will be subject to the OSC's approval.

§ 1820.20 Restrictions that apply to released records.

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, the OSC may condition the release of official records and information on an amendment to the existing protective order (subject to court approval) or confidentiality agreement.

(b) If the General Counsel so determines, original OSC records may be presented for examination in response to a request, but they may not be presented as evidence or otherwise used in a manner by which they could lose their identity as official OSC records, nor may they be marked or altered. In lieu of the original records, certified copies may be presented for evidentiary purposes.

§ 1820.21 Procedure when a decision is not made prior to the time a response is required.

If a response to a demand or request is required before the General Counsel can make the determination referred to in § 1820.28, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the request is being reviewed, provide an estimate as to when a decision will be made, and seek a stay of the demand or request pending a final determination.

§ 1820.22 Procedure in the event of an adverse ruling.

If the court or other competent authority fails to stay a demand or request, the employee upon whom the demand or request is made, unless otherwise advised by the General Counsel, will appear, if necessary, at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand or request, citing *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

■ 9. Add subpart C, consisting of § 1820.23, to read as follows:

Subpart C—Schedule of Fees

§ 1820.23 Fees.

(a) *Generally.* The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to the OSC.

(b) *Fees for records.* Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowances, and benefits). Fees for duplication will be the same as those charged by the OSC in its Freedom of Information Act regulations at § 1820.7.

(c) *Witness fees.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the federal district closest to the location where the witness will appear and on 28 U.S.C. 1821, as applicable. Such fees will include cost of time spent by the witness to prepare for testimony, in travel and for attendance in the legal proceeding, plus travel costs.

(d) *Payment of fees.* A requester must pay witness fees for current OSC employees and any record certification fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the United States Department of Treasury. In the case of testimony of former OSC employees, the requester must pay applicable fees directly to the former OSC employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Waiver or reduction of fees.* The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(f) *De minimis fees.* Fees will not be assessed if the total charge would be $10.00 or less.

■ 10. Add subpart D, consisting of § 1820.24, to read as follows:

Subpart D—Penalties

§ 1820.24 Penalties.

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by the OSC, or as ordered by a federal court after the OSC has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former OSC employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current OSC employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action.

■ 11. Add subpart E, consisting of § 1820.25, to read as follows:

Subpart E—Conformity With Other Laws

§ 1820.25 Conformity with other laws.

This regulation is not intended to conflict with 5 U.S.C. 2302(b)(13).

Dated: September 21, 2016.

Lisa V. Terry,

General Counsel.

[FR Doc. 2016–23215 Filed 10–21–16; 8:45 am]

BILLING CODE 7405–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–23706; Directorate Identifier 2006–NE–03–AD; Amendment 39–18688; AD 2016–21–07]

RIN 2120–AA64

Airworthiness Directives; Honeywell International Inc. Turboprop Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding airworthiness directive (AD) 2015–12–04 for all Honeywell International Inc. (Honeywell) TPE331–1, –2, –2UA, –3U, –3UW, –5, –5A, –5AB, –5B, –6, –6A, –10, –10AV, –10GP, –10GT, –10P, –10R, –10T, –10U, –10UA, –10UF, –10UG, –10UGR, –10UR, –11U, –12JR, –12UA, –12UAR, and –12UHR turboprop engines with certain Woodward fuel control unit (FCU) assemblies, installed. AD 2015–12–04 required initial and repetitive dimensional inspections of the affected fuel control drives and insertion of certain airplane operating procedures into the applicable flight manuals. This AD corrects the compliance requirements and relaxes the inspection interval. This AD was prompted by a request to change compliance time from 50 hours to 100 hours for affected fuel controls. We are

issuing this AD to prevent failure of the fuel control drive, damage to the engine, and damage to the airplane.

DATES: This AD is effective November 28, 2016.

ADDRESSES: For service information identified in this final rule, contact Honeywell International Inc., 111 S. 34th Street, Phoenix, AZ 85034–2802; phone: 800–601–3099; Internet: *https://myaerospace.honeywell.com/wps/portal.* You may view this service information at the FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2006–23706.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*by searching for and locating Docket No. FAA–2006–23706; 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 address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; phone: 562–627–5246; fax: 562–627–5210; email: *joseph.costa@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2015–12–04, Amendment 39–18177, (80 FR 34534, June 17, 2015), (''AD 2015–12–04''). AD 2015–12–04 applied to all Honeywell TPE331–1, –2, –2UA, –3U, –3UW, –5, –5A, –5AB, –5B, –6, –6A, –10, –10AV, –10GP, –10GT, –10P, –10R, –10T, –10U, –10UA, –10UF, –10UG, –10UGR, –10UR, –11U, –12JR, –12UA, –12UAR, and –12UHR turboprop engines with certain Woodward FCU assemblies, installed. The NPRM published in the **Federal Register** on March 29, 2016 (81 FR 17412). This AD requires correcting the compliance requirements and relaxing the inspection interval. We are issuing this AD to prevent failure of the fuel control drive, damage to the engine, and damage to the airplane.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this AD as proposed.

Related Service Information

We reviewed Honeywell Operating Information Letter (OIL) OI331–12R6, dated May 26, 2009, for multi-engine airplanes; and OIL OI331–18R4, dated May 26, 2009, for single-engine airplanes, and Honeywell TPE331 maintenance manuals. That service information describes procedures for conducting fuel control drive inspections and engine shutdown.

Costs of Compliance

We estimate that this AD affects 2,250 engines installed on airplanes of U.S. registry. We also estimate that it would take about 8 hours per engine to comply with this AD. The average labor rate is $85 per hour. We estimate that 10% of affected engines will require FCU assembly stub shaft replacement and fuel pump or fuel control repair. We also estimate that repairs will cost about $10,000 per engine. Based on these figures, we estimate the cost of this AD on U.S. operators to be $525,587 per year.

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2015–12–04, Amendment 39–18177, (80 FR 34534, June 17, 2015), and adding the following new AD:

2016–21–07 Honeywell International Inc.: Amendment 39–18688; Docket No. FAA–2006–23706; Directorate Identifier 2006–NE–03–AD.

(a) Effective Date

This AD is effective November 28, 2016.

(b) Affected ADs

This AD replaces AD 2015–12–04, Amendment 39–18177, (80 FR 34534, June 17, 2015).

(c) Applicability

This AD applies to all Honeywell International Inc. (Honeywell) TPE331–1, –2, –2UA, –3U, –3UW, –5, –5A, –5AB, –5B, –6, –6A, –10, –10AV, –10GP, –10GT, –10P, –10R, –10T, –10U, –10UA, –10UF, –10UG,

–10UGR, –10UR, –11U, –12JR, –12UA, –12UAR, and –12UHR turboprop engines with Woodward fuel control unit (FCU) assemblies with Honeywell part numbers (P/Ns) as listed in Table 1 to paragraph (c) of this AD, installed.

TABLE 1 TO PARAGRAPH (c)—AFFECTED FCU ASSEMBLY P/NS

Group #	Engine	FCU Assembly P/Ns
1	TPE331–1, –2, and –2UA	P/N 869199–13, –20, –21, –22, –23, –24, –25, –26, –27, –28, –29, –31, –32, –33, –34, and –35.
2	TPE331–1, –2, and –2UA	P/N 869199–9, –10, –11, –12, –14, –16, –17, and –18.
3	TPE331–3U, –3UW, –5, –5A, –5AB, –5B, –6, –6A, –10AV, –10GP, –10GT, –10P, and –10T.	P/N 893561–7, –8, –9, –10, –11, –14, –15, –16, –20, –26, –27, –29; and P/N 897770–1, –3, –7, –9, –10, –11, –12, –14, –15, –16, –25, –26, and –28.
4	TPE331–3U, –3UW, –5, –5B, –6, –6A, and –10T.	P/N 893561–4, –5, –12, –13; and P/N 897770–5, –8, and –13.
5	TPE331–10, –10R, –10U, –10UA, –10UF, –10UG, –10UGR, –10UR, –11U, –12JR, –12UA, –12UAR, and –12UHR.	P/N 897375–2, –3, –4, –5, –8, –9, –10, –11, –12, –13, –14, –15, –16, –17, –19, –21, –24, –25, –26, –27; and P/N 897780–1, –2, –3, –4, –5, –6, –7, –8, –9, –10, –11, –14, –15, –16, –17, –18, –19, –20, –21, –22, –23, –24, –25, –26, –27, –30, –32, –34, –36, –37, –38; and P/N 893561–17, –18, and –19.

(d) Unsafe Condition

This AD was prompted by reports of loss of the fuel control drive, leading to engine overspeed and engine failure. We are issuing this AD to prevent failure of the fuel control drive, damage to the engine, and damage to the airplane.

(e) Compliance

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

(1) Inspection of Engines With FCU Assembly P/Ns in Groups 2 or 4

For FCU assembly P/Ns in Groups 2 or 4 listed in Table 1 to paragraph (c) of this AD:

(i) At the next scheduled inspection of the fuel control drive, or within 500 hours-in-service (HIS) after the effective date of this AD, whichever occurs first, inspect the fuel control drive for wear.

(ii) Thereafter, reinspect the fuel control drive within every 1,000 HIS since-last-inspection (SLI).

(2) Inspection of Engines With FCU Assembly P/Ns in Groups 1, 3, or 5

For FCU assembly P/Ns in Groups 1, 3, or 5 listed in Table 1 to paragraph (c) of this AD:

(i) If, on the effective date of this AD, the FCU assembly has 900 or more HIS SLI, inspect the fuel control drive for wear within 100 HIS after the effective date of this AD.

(ii) If, on the effective date of this AD, the FCU assembly has fewer than 900 HIS SLI, inspect the fuel control drive for wear within 1,000 HIS.

(iii) Thereafter, reinspect the fuel control drive for wear within every 1,000 HIS SLI.

(3) Airplane Operating Procedures

Within 60 days after the effective date of this AD, insert the information in Figure 1 to paragraph (e) of this AD, into the Emergency Procedures Section of the applicable Airplane Flight Manual (AFM), Pilot Operating Handbook (POH), or the Manufacturer's Operating Manual (MOM).

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Figure 1 to Paragraph (e) – Airplane Operating Procedures

NOTE

Procedures in dotted line boxes are immediate action items to be performed by the pilot / flight crew.

RAPID, UNCOMMANDED ACCELERATION DURING ENGINE START (Propeller ON Start Locks)

- Engine Start – Abort Immediately – Shut Down Affected Engine in accordance with Emergency Procedures.

WARNING

Do not attempt to re-start engine. Report to maintenance.

ON GROUND or IN FLIGHT:

RAPID, UNCOMMANDED INCREASE IN RPM, TORQUE, FUEL FLOW AND/OR TURBINE TEMPERATURE (Propeller OFF Start Locks)

- Identify Malfunctioning Engine (multi-engine airplanes) – Cross check for high torque, RPM, fuel flow, and turbine temperatures.
- Shut Down Affected Engine in accordance with Emergency Procedures.

WARNING

Never retard the power levers aft of flight idle in flight or on the ground.

WARNING

Do not attempt an engine re-start. Report to maintenance.

BILLING CODE 4910–13–C

(f) Optional Terminating Action

Replacing the affected FCU assembly with an FAA-approved FCU assembly not listed in this AD by P/N is terminating action for the initial and repetitive inspections required by this AD, and for inserting the information in Figure 1 to paragraph (e) of this AD into the AFM, POH, and MOM.

(g) Definitions

For the purposes of this AD:

(1) The ''fuel control drive'' is a series of mating splines located between the fuel pump and fuel control governor.

(2) The fuel control drive consists of four drive splines: The fuel pump internal spline, the fuel control external ''quill shaft'' spline, and the stub shaft internal and external splines.

(h) Alternative Methods of Compliance (AMOCs)

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

(i) Related Information

(1) For more information about this AD, contact Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; phone: 562–627–5246; fax: 562–627–5210; email: *joseph.costa@faa.gov.*

(2) Information pertaining to operating recommendations for affected engines after a fuel control drive failure is contained in Honeywell Operating Information Letter (OIL) OI331–12R6, dated May 26, 2009, for multi-engine airplanes; and OIL OI331–18R4, dated May 26, 2009, for single-engine airplanes. Information on fuel control drive inspection can be found in Section 72–00–00 of the applicable TPE331 maintenance manuals. These Honeywell OILs and the TPE331 maintenance manuals can be obtained from Honeywell using the contact information in paragraph (i)(3) of this AD.

(3) For service information identified in this AD, contact Honeywell International Inc., 111 S. 34th Street, Phoenix, AZ 85034–2802; phone: 800–601–3099; Internet: *https://myaerospace.honeywell.com/wps/portal.*

(4) You may view this service information at FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on October 14, 2016.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2016–25268 Filed 10–21–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Institutes of Standards and Technology

15 CFR Part 17

[Docket No.: 160311228–6788–02]

RIN 0693–AB62

Technology Innovation—Personnel Exchanges

AGENCY: National Institute of Standards and Technology (NIST), United States Department of Commerce.

ACTION: Final rule.

SUMMARY: This final rule clarifies the appropriate use of Cooperative Research and Development Agreement (CRADA) authority by a Federal laboratory for personnel exchanges where the Federal laboratory has an existing relationship with the potential partner through another legal mechanism, as well as in the context of joint research projects or the development of existing laboratory technology, and through use of the General Services Administration's Presidential Innovation Fellows program for Federal laboratory Entrepreneur-In-Residence programs. Another objective of this rulemaking is to remove outdated regulations addressing the licensing of inventions owned by the Department of Commerce.

DATES: *Effective Date:* This rule is effective November 23, 2016.

FOR FURTHER INFORMATION CONTACT: Courtney Silverthorn, via email: *courtney.silverthorn@nist.gov,* or by telephone: 301–975–4189.

SUPPLEMENTARY INFORMATION:

The Stevenson-Wydler Technology Innovation Act of 1980, Public Law 96–480, as amended (codified at title 15 of the United States Code (U.S.C.), Section 3701 *et seq.*) (the Stevenson-Wydler Act), sets forth a national policy to promote cooperation among academia, Federal laboratories, labor, and industry in order to facilitate the transfer of innovative federal technologies to United States and world markets. In furtherance of that policy, the Administration's *Lab to Market* initiative seeks to ''significantly accelerate and improve technology transfer by streamlining administrative processes, facilitating partnerships with industry, evaluating impact, and opening federal research and development (R&D) assets as a platform for innovation and economic growth.'' (*Lab to Market: Cross Agency Priority Goal Quarterly Progress Update, Fiscal Year 2015 Quarter 4*). One proven method to ensure that federal innovations are made available to industry and the public is to encourage frequent interactions among Federal laboratories, academic institutions, and industry, including small businesses.

The final rule clarifies the appropriate use of CRADA authority under 15 U.S.C. 3710a for personnel exchanges where a Federal laboratory has an existing relationship with the potential partner through another legal mechanism, such as a grant or cooperative agreement. The final rule also promotes the use of existing authorities to implement personnel exchange programs at Federal Laboratories: (1) By utilizing the existing CRADA authority to transfer personnel to and from a Federal laboratory for joint research projects or the development of existing laboratory technology; and (2) by utilizing the General Services Administration (GSA)'s Presidential Innovation Fellows program to offer Federal laboratories additional options for implementing Entrepreneur-In-Residence programs.

The final rule also provides for the deletion of all existing provisions in part 17 of title 15 of the Code of Federal Regulations (CFR), ''Licensing of Government-Owned Inventions in the Custody of the Department of Commerce,'' which are outdated. Outdated subpart A implemented for the Department of Commerce licensing rules found at 41 CFR part 101–4, which were themselves removed at 50 FR 28402, July 12, 1985. Outdated subpart B was reserved. Outdated subpart C set forth appeal procedures addressed to the outdated licensing rules of subpart A. All subparts are obsolete, and the rules governing the licensing of government-owned inventions are today found in 37 CFR part 404. The heading of part 17 will be revised to read ''Personnel Exchanges Between Federal Laboratories and Non-Federal Entities,'' and five new sections are added.

Section 17.1, Scope, sets forth the scope of revised part 17, which is to implement 15 U.S.C. 3712 and clarifies the appropriate use of personnel exchanges in relation to Federal laboratory CRADAs under the authority of 15 U.S.C. 3710a(a)(1), including CRADAs involving as parties recipients of Federal funding under grants (including cooperative agreements) and contracts, which could include National Network for Manufacturing Innovation awardees.

Section 17.2, Definitions, provides definitions for certain terms used in this part.

Section 17.3, Exchange of Federal Laboratory Personnel with Recipients of Federal Funding, provides in paragraph (a) that the existence of a funding agreement (as defined in 35 U.S.C. 201(b)) between a Federal laboratory and a contractor shall not preclude a CRADA with that contractor, where the Federal laboratory director makes a determination that the technical subject matter of the funding agreement is sufficiently distinct from that of the CRADA. Paragraph (a) also provides that a contractor which is a collaborating party shall in no event transfer funds to a Federal laboratory under a CRADA using funds awarded to the contractor by that laboratory.

Paragraph (b) of § 17.3 provides that a Federal laboratory may exchange personnel with a contractor under a CRADA where the determination required under paragraph (a) cannot be made, provided that the CRADA includes at least one collaborating party in addition to the Federal laboratory and that contractor. In that circumstance, the Federal laboratory shall not provide services, property, or other resources to that contractor under the CRADA, and if any individual terms of that contractor's funding agreement conflict with the terms of the multi-party CRADA, then the funding agreement terms will control as applied to that contractor and the Federal laboratory only.

Paragraph (c) of § 17.3 sets forth a number of factors which may be taken into account in making the ''sufficiently distinct'' determination required under paragraph (a), including whether the conduct of specified research or development efforts under the CRADA would require the contractor to perform tasks identical to those required under the funding agreement; whether existing intellectual property to be provided by the Federal laboratory or the contractor under the CRADA is the same as that provided under, or referenced in, the funding agreement; whether the contractor's employees performing the specified research or development efforts under the CRADA are the same employees performing the tasks required under the funding agreement; and whether services, property or other resources contemplated by the Federal Laboratory to be provided to the contractor for the specified research or development efforts under the CRADA would materially benefit the contractor in the performance of tasks required under the funding agreement.

Section 17.4, Personnel Exchanges from a Federal Laboratory, provides in paragraph (a)(1) that a Federal laboratory may exchange its personnel with a collaborating party under a CRADA where no invention currently exists. Under paragraph (a)(2), a Federal laboratory may exchange personnel with

a non-Federal collaborating party for the purposes of developing or commercializing an invention in which the Federal government has an ownership interest, including an invention made by an employee or former employee while in the employment or service of the Federal government, and such personnel exchanged may include such employee who is an inventor. Paragraph (a)(2) also provides that funding may be provided by the non-federal collaborating party to the Federal laboratory for the participation of the Federal employee in developing or commercializing an invention, including costs for salary and other expenses, such as benefits and travel. Consistent with guidance in the Office of Legal Counsel's Memorandum for Gary Davis, Acting Director, Office of Government Ethics, September 7, 2000, ''Application of 18 U.S.C. 209 to Employee-Inventors Who Receive Outside Royalty Payments,'' [1] paragraph (a)(2) also sets forth that royalties from inventions received through a license agreement negotiated with the Federal laboratory and paid by the laboratory to an inventor who is a Federal employee are considered Federal compensation. Paragraph (a)(3) provides that where an employee leaves Federal service in order to receive salary or other compensation from a non-Federal organization, a Federal laboratory may use reinstatement authority in accordance with 5 CFR 315.401, or other applicable authorities, to rehire the former Federal employee at the conclusion of the exchange.

In exchanging personnel with a collaborating party under a CRADA, as in any other exercise of the CRADA authority, a Federal Laboratory should take into account the provisions of 15 U.S.C. 3710a(c)(3) regarding standards of conduct for its employees for resolving potential conflicts of interest.

Section 17.5, Personnel Exchanges to a Federal laboratory, provides that a Federal laboratory may provide funds for non-federal personnel exchanged in order to bring into a Federal laboratory outside personnel with expertise in scientific commercialization through the Presidential Innovation Fellows program, and that a laboratory will engage with the General Services Administration (GSA) to transfer funding for exchanged personnel and to select and place Entrepreneurs-In-Residence at the laboratory for the purposes of evaluating the laboratory's technologies, and providing technical consulting to facilitate readying a technology for commercialization by an outside entity.

Response to Comments

During the proposed rule comment period, NIST received one written comment that noted that the changes likely posed no additional burden to universities, but requested additional time to provide comments due to the academic schedule of university staff.

Discussion: NIST appreciates the interest of the academic community in the rule. It is anticipated that these clarifications will strengthen the ability of Federal laboratories and partners through other agreements to work together with a third party, often a university, to support economic development and commercialization in the United States. NIST conducted extensive outreach to multiple groups that support universities to note the availability of the proposed rulemaking, and provided a link to the proposed rulemaking to the National Academies of Science Government-University-Industry Research Roundtable, which was distributed to their mailing list. We believe, as noted within the comment, that these changes are clarifications and that the lack of substantive comments from academia, as well as industry, is indicative of a lack of specific concerns rather than a lack of time and therefore do not believe an extended comment period is warranted.

Changes From the Proposed Rule

The final rule contains no substantive changes from the proposed rule.

Classification

NIST has determined that the final rule is consistent with the Stevenson-Wydler Act of 1980 and its amendments and other applicable law.

Executive Order 12866

This final rule was determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132

This final rule does not contain policies with Federalism implications as defined in Executive Order 13132.

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

Paperwork Reduction Act

This final rule contains no new collection of information subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

This rule will not significantly affect the quality of the human environment. Therefore, an environmental assessment or Environmental Impact Statement is not required to be prepared under the National Environmental Policy Act of 1969.

List of Subjects in 15 CFR Part 17

Federal employees, Inventions and patents, Laboratories, Research and development, Science and technology, Technology transfer.

Kent Rochford,

Associate Director for Laboratory Programs, National Institute of Standards and Technology.

For the reasons stated in the preamble, the National Institute of Standards and Technology revises 15 CFR part 17 as follows:

PART 17—PERSONNEL EXCHANGES BETWEEN FEDERAL LABORATORIES AND NON-FEDERAL ENTITIES

Sec.

17.1 Scope.
17.2 Definitions.
17.3 Exchange of Federal laboratory personnel with recipients of Federal funding.
17.4 Personnel exchanges from a Federal laboratory.
17.5 Personnel exchanges to a Federal laboratory.

Authority: 15 U.S.C. 3712.

§ 17.1 Scope.

(a) The Stevenson-Wydler Technology Innovation Act of 1980, Public Law 96–480, as amended (codified at title 15 of the United States Code (U.S.C.), section 3701 *et seq.*) (the Stevenson-Wydler Act), sets forth a national policy to renew, expand, and strengthen cooperation among academia, Federal laboratories, labor, and industry, in forms including personnel exchanges (15 U.S.C. 3701(3)). One proven method to ensure that Federal innovations are passed to industry and the public is to encourage frequent interactions among Federal laboratories, academic institutions, and industry, including both large and small businesses. In

[1] *https://www.oge.gov/web/oge.nsf/Legal%20Interpretation/604EE82C4CA3404A85257EF200502488/$FILE/op-olc-v024-p0170_0.pdf?open.*

accordance with applicable ethics regulations and Agency policies, exchanges of personnel between Federal laboratories and outside collaborators should be encouraged (15 U.S.C. 3702(5)). Models that include Federal funding, as well as those that are executed without Federal funding, are encouraged.

(b) This part implements 15 U.S.C. 3712 and provides clarification regarding the appropriate use of personnel exchanges in relation to Federal laboratory Cooperative Research and Development Agreements (CRADAs) under the authority of 15 U.S.C. 3710a.

(c) This part is applicable to exchanges of personnel between Federal laboratories and parties to a CRADA under 15 U.S.C. 3710a(a)(1).

§ 17.2 Definitions.

(a) The term *funding agreement* shall have the meaning according to it under 35 U.S.C. 201(b).

(b) The term *contractor* shall have the meaning according to it under 35 U.S.C. 201(c).

(c) The term *Federal laboratory* shall have the meaning according to it under 15 U.S.C. 3703(4).

§ 17.3 Exchange of Federal laboratory personnel with recipients of Federal funding.

(a) In accordance with 15 U.S.C. 3710a(b)(3)(A) and 3710a(d)(1), a Federal laboratory may provide personnel, services, property, and other resources to a collaborating party, with or without reimbursement (but not funds to non-Federal parties) for the conduct of specified research or development efforts under a CRADA which are consistent with the missions of the Federal laboratory. The existence of a funding agreement between a Federal laboratory and a contractor shall not preclude the Federal laboratory from using its authority under 15 U.S.C. 3710a to enter into a CRADA with the contractor as a collaborating party for the conduct of specified research or development efforts, where the director of the Federal laboratory determines that the technical subject matter of the funding agreement is sufficiently distinct from that of the CRADA. In no event shall a contractor which is a collaborating party transfer funds to a Federal laboratory under a CRADA using funds awarded to the contractor by that laboratory.

(b) (1) A Federal laboratory may enter into a CRADA with a contractor as a collaborating party for the purpose of exchange of personnel for the conduct of specified research or development efforts where the determination required under paragraph (a) of this section could not be made, provided that:

(i) The CRADA includes at least one collaborating party in addition to the Federal laboratory and that contractor; and

(ii) The Federal laboratory shall not provide services, property or other resources to that contractor under the CRADA.

(2) Where a Federal laboratory enters into a CRADA with a contractor under this paragraph (b), the terms of that contractor's funding agreement shall normally supersede the terms of the CRADA, to the extent that any individual terms conflict, as applied to that contractor and the Federal laboratory only.

(c) In making the determination required under paragraph (a) of this section, the director of a Federal laboratory may consider factors including the following:

(1) Whether the conduct of specified research or development efforts under the CRADA would require the contractor to perform tasks identical to those required under the funding agreement;

(2) Whether existing intellectual property to be provided by the Federal laboratory or the contractor under the CRADA is the same as that provided under, or referenced in, the funding agreement;

(3) Whether the contractor's employees performing the specified research or development efforts under the CRADA are the same employees performing the tasks required under the funding agreement; and

(4) Whether services, property or other resources contemplated by the Federal laboratory to be provided to the contractor for the specified research or development efforts under the CRADA would materially benefit the contractor in the performance of tasks required under the funding agreement.

§ 17.4 Personnel exchanges from a Federal laboratory.

(a) For personnel exchanges in which a Federal laboratory maintains funding for Federal personnel provided to a collaborating party—

(1) in accordance with 15 U.S.C. 3710a(b)(3)(A), a Federal laboratory may exchange personnel with a collaborating party for the purposes of specified scientific or technical research towards a mutual goal consistent with the mission of the Agency, where no invention currently exists, or

(2) in accordance with 15 U.S.C. 3710a(b)(3)(C), a Federal laboratory may exchange personnel with a non-Federal collaborating party for the purposes of developing or commercializing an invention in which the Federal government has an ownership interest, including an invention made by an employee or former employee while in the employment or service of the Federal government, and such personnel exchanged may include such employee who is an inventor.

(i) Funding may be provided under a CRADA by the non-Federal collaborating party to the Federal laboratory for the participation of the Federal employee in developing or commercializing an invention, including costs for salary and other expenses, such as benefits and travel.

(ii) Royalties from inventions received through a license agreement negotiated with the Federal laboratory and paid by the Federal laboratory to an inventor who is a Federal employee are considered Federal compensation.

(3) Where an employee leaves Federal service in order to receive salary or other compensation from a non-Federal organization, a Federal laboratory may use reinstatement authority in accordance with 5 CFR 315.401, or other applicable authorities, to rehire the former Federal employee at the conclusion of the exchange.

§ 17.5 Personnel exchanges to a Federal laboratory.

For exchanges in which a Federal laboratory provides funds for the non-federal personnel—

(a) Outside personnel with expertise in scientific commercialization may be brought in to a Federal laboratory through the Presidential Innovation Fellows program or related programs (see 5 CFR 213.3102(r)) for Entrepreneur-In-Residence programs or similar, related programs run by the General Services Administration (GSA) or other Federal Agencies.

(b) A laboratory may engage with the GSA or other relevant Agency to transfer funding for exchanged personnel, and may work with such agency to select and place Entrepreneurs-In-Residence at the laboratory for the purposes of evaluating the laboratory's technologies, and providing technical consulting to facilitate readying a technology for commercialization by an outside entity.

Phillip Singerman,

Associate Director for Innovations and Industry Services.

[FR Doc. 2016–25355 Filed 10–21–16; 8:45 am]

BILLING CODE 3510–13–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2016–0014]

RIN 0960–AH94

Extension of the Expiration Date for State Disability Examiner Authority To Make Fully Favorable Quick Disability Determinations and Compassionate Allowance Determinations

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: We are extending, until December 28, 2018, the expiration date of our disability examiner authority (DEA) rule, which authorizes State agency disability examiners to make fully favorable determinations without the approval of a State agency medical or psychological consultant in claims that we consider under our quick disability determination (QDD) and compassionate allowance (CAL) processes. This is our last extension of this rule because we will phase out the use of DEA during the extension period under section 832 of the Bipartisan Budget Act of 2015 (BBA). This extension provides us the time necessary to take all of the administrative actions we need to take in order to reinstate uniform use of medical and psychological consultants. The current rule will expire on November 11, 2016. In this final rule, we are changing the November 11, 2016 expiration or ''sunset'' date to December 28, 2018, extending the authority for 2 years and 1 month. This is the final extension of our DEA rule. On December 28, 2018, at the conclusion of this extension, the authority for this test will terminate. We are making no other changes.

DATES: This final rule is effective October 24, 2016.

FOR FURTHER INFORMATION CONTACT: Kenneth Williams, Office of Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–0608, for information about this notice. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Background of the QDD and CAL Disability Examiner Authority

On October 13, 2010, we published a final rule that temporarily authorized State agency disability examiners to make fully favorable determinations without the approval of a State agency medical or psychological consultant in claims that we consider under our QDD and CAL processes. 75 FR 62676.

We included in 20 CFR 404.1615(c)(3) and 416.1015(c)(3) a sunset date, under which the DEA would expire on November 12, 2013, unless we decided to terminate it earlier or extend it by publication of a final rule in the **Federal Register**. Since that time, we have extended the DEA rule three times for one year each. 78 FR 66638; 79 FR 51241; 80 FR 63092. The last extension we published continues the DEA until November 11, 2016. 80 FR 63092.

Explanation of Provision

This final rule extends the expiration date of the DEA rule until December 28, 2018. Extending the DEA rule provides us with the time necessary for an orderly phase out of the DEA rule, and will allow us to discontinue the use of the DEA under section 832 of the Bipartisan Budget Act of 2015 (BBA).[1] At the conclusion of this extension, by December 28, 2018, the authority for this test will terminate.

Regulatory Procedures

Justification for Issuing a Final Rule Without Notice and Comment

We follow the Administrative Procedure Act (APA) rulemaking procedures specified in 5 U.S.C. 553 when developing regulations. Section 702(a)(5) of the Social Security Act, 42 U.S.C. 902(a)(5). Generally, the APA requires that an agency provide prior notice and opportunity for public comment before issuing a final rule. However, the APA provides exceptions to its notice and public comment procedures when an agency finds there is good cause for dispensing with such procedures because they are impracticable, unnecessary, or contrary to the public interest.

We have determined that good cause exists for dispensing with the notice and public comment procedures for this final rule. 5 U.S.C. 553(b)(B). Good cause exists because this final rule only extends the expiration date of the existing provisions. It makes no substantive changes to the current rule. The current regulations expressly provide that we may extend or terminate the current rule. Therefore, we have determined that opportunity for prior comment is unnecessary, and we are issuing this rule as a final rule.

In addition, for the reasons cited above, we find good cause for dispensing with the 30-day delay in the effective date of this final rule. 5 U.S.C. 553(d)(3). We are not making any substantive changes in our current rule, but are only extending the expiration date of the rule. For these reasons, we find it unnecessary to delay the effective date of our rule.

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this final rule does not meet the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, OMB did not review it.

We also determined that this final rule meets the plain language requirement of Executive Order 12866.

Regulatory Flexibility Act

We certify that this final rule will not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Paperwork Reduction Act

The final rule does not create any new or affect any existing collections and, therefore, does not require Office of Management and Budget approval under the Paperwork Reduction Act.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; 96.006, Supplemental Security Income.)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Blind, Disability benefits; Old-age, Survivors and Disability Insurance; Reporting and recordkeeping requirements; Social security.

20 CFR Part 416

Administrative practice and procedure; Reporting and recordkeeping requirements; Supplemental Security Income (SSI).

Carolyn W. Colvin,

Acting Commissioner of Social Security.

For the reasons stated in the preamble, we are amending subpart Q of part 404 and subpart J of part 416 of title 20 of the Code of Federal Regulations as set forth below:

[1] Pub. L. 114–74, section 832, 129 Stat. 584, 613. Section 832 of the BBA amends section 221(h) of the Social Security Act, 42 U.S.C. 421(h).

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950—)

Subpart Q—[Amended]

■ 1. The authority citation for subpart Q of part 404 continues to read as follows:

Authority: Secs. 205(a), 221, and 702(a)(5) of the Social Security Act (42 U.S.C. 405(a), 421, and 902(a)(5)).

■ 2. Amend § 404.1615 by revising paragraph (c)(3) to read as follows:

§ 404.1615 Making disability determinations.

* * * * *

(c) * * *

(3) A State agency disability examiner alone if the claim is adjudicated under the quick disability determination process (see § 404.1619) or the compassionate allowance process (see § 404.1602), and the initial or reconsidered determination is fully favorable to you. This paragraph (c)(3) will no longer be effective on December 28, 2018 unless we terminate it earlier by publication of a final rule in the **Federal Register**; or

* * * * *

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart J—[Amended]

■ 3. The authority citation for subpart J of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1614, 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1382c, 1383, and 1383b).

■ 4. Amend § 416.1015 by revising paragraph (c)(3) to read as follows:

§ 416.1015 Making disability determinations.

* * * * *

(c) * * *

(3) A State agency disability examiner alone if you are not a child (a person who has not attained age 18), and the claim is adjudicated under the quick disability determination process (see § 416.1019) or the compassionate allowance process (see § 416.1002), and the initial or reconsidered determination is fully favorable to you. This paragraph (c)(3) will no longer be effective on December 28, 2018 unless we terminate it earlier by publication of a final rule in the **Federal Register**; or

* * * * *

[FR Doc. 2016–25565 Filed 10–21–16; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 874

[Docket No. FDA–2016–N–3287]

Medical Devices; Ear, Nose, and Throat Devices; Classification of the Eustachian Tube Balloon Dilation System

AGENCY: Food and Drug Administration, HHS.

ACTION: Final order.

SUMMARY: The Food and Drug Administration (FDA) is classifying the Eustachian tube balloon dilation system into class II (special controls). The special controls that will apply to the device are identified in this order and will be part of the codified language for the Eustachian tube balloon dilation system's classification. The Agency is classifying the device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device.

DATES: This order is effective October 24, 2016. The classification was applicable on September 16, 2016.

FOR FURTHER INFORMATION CONTACT: Joyce Lin, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2462, Silver Spring, MD, 20993–0002, 301–796–5544, *Joyce.Lin@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

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

Section 513(f)(2) of the FD&C Act, as amended by section 607 of the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144), provides two procedures by which a person may request FDA to classify a device under the criteria set forth in section 513(a)(1). Under the first procedure, the person submits a premarket notification under section 510(k) of the FD&C Act for a device that has not previously been classified and, within 30 days of receiving an order classifying the device into class III under section 513(f)(1) of the FD&C Act, the person requests a classification under section 513(f)(2). Under the second procedure, rather than first submitting a premarket notification under section 510(k) of the FD&C Act and then a request for classification under the first procedure, the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence and requests a classification under section 513(f)(2) of the FD&C Act. If the person submits a request to classify the device under this second procedure, FDA may decline to undertake the classification request if FDA identifies a legally marketed device that could provide a reasonable basis for review of substantial equivalence with the device or if FDA determines that the device submitted is not of ''low-moderate risk'' or that general controls would be inadequate to control the risks and special controls to mitigate the risks cannot be developed.

In response to a request to classify a device under either procedure provided by section 513(f)(2) of the FD&C Act, FDA shall classify the device by written order within 120 days. This classification will be the initial classification of the device.

On December 17, 2015, Acclarent, Inc. submitted a request for classification of the ACCLARENT AERA™ Eustachian Tube Balloon Dilation System under section 513(f)(2) of the FD&C Act.

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

believes these special controls, in addition to general controls, will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on September 16, 2016, FDA issued an order to the requestor classifying the device into class II. FDA is codifying the classification of the device by adding 21 CFR 874.4180.

Following the effective date of this final classification order, any firm submitting a premarket notification (510(k)) for a Eustachian tube balloon dilation system will need to comply with the special controls named in this final administrative order.

The device is assigned the generic name Eustachian tube balloon dilation system, and it is identified as a prescription device that includes a flexible catheter attached to an inflatable balloon. The system is intended for use in dilating the cartilaginous portion of the Eustachian tube for treating persistent Eustachian tube dysfunction.

FDA has identified the following risks to health associated specifically with this type of device and the measures required to mitigate these risks in table 1:

TABLE 1—EUSTACHIAN TUBE BALLOON DILATION SYSTEM RISKS AND MITIGATION MEASURES

Identified risk	Mitigation measure
Introduction of false passages and rupture or damage to carotid artery	Non-clinical performance testing. Simulated use testing. Training. Labeling.
Injury to mucosal tissue: • due to misuse of device on patulous Eustachian tube or following skull base surgery • due to catheter mechanical failure • due to balloon rupture • due to mishandling of device with respect to excessive force and/or incorrect positioning	Non-clinical performance testing. Simulated use testing. Shelf life validation. Training. Labeling.
Adverse tissue reaction	Biocompatibility evaluation.
Infection	Sterilization validation. Shelf life validation. Labeling.

FDA believes that the special controls, in combination with the general controls, address these risks to health and provide reasonable assurance of safety and effectiveness.

Eustachian tube balloon dilation system devices are not safe for use except under the supervision of a practitioner licensed by law to direct the use of the device. As such, the device is a prescription device and must satisfy prescription labeling requirements (see 21 CFR 801.109, *Prescription devices*).

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k), if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the device. Therefore, this device type is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the Eustachian tube balloon dilation system they intend to market.

II. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

III. Paperwork Reduction Act of 1995

This final administrative order establishes special controls that refer to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in part 807, subpart E, regarding premarket notification submissions, have been approved under OMB control number 0910–0120, and the collections of information in 21 CFR part 801, regarding labeling, have been approved under OMB control number 0910–0485.

List of Subjects in 21 CFR Part 874

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 874 is amended as follows:

PART 874—EAR, NOSE, AND THROAT DEVICES

■ 1. The authority citation for part 874 continues to read as follows:

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

■ 2. Add § 874.4180 to subpart E to read as follows:

§ 874.4180 Eustachian tube balloon dilation system.

(a) *Identification.* A Eustachian tube balloon dilation system is a prescription device that includes a flexible catheter attached to an inflatable balloon. The system is intended for use in dilating the cartilaginous portion of the Eustachian tube for treating persistent Eustachian tube dysfunction.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) Non-clinical performance testing must demonstrate that the device performs as intended under anticipated conditions of use. The following performance characteristics must be evaluated:

(i) Mechanical testing, including tensile and flexural testing of catheter joints and materials.

(ii) Durability testing, including fatigue and burst pressure testing of the balloon materials and components.

(iii) Inflation and deflation characterization testing, including time and pressure measurements, and leak testing of the balloon.

(iv) Verification testing of safety features built into the device must be performed, including the characterization of catheter geometries

and distal tip insertion limitation mechanisms.

(2) Simulated use testing in a clinically relevant model must demonstrate the reliability of the device to remain mechanically functional throughout the anticipated conditions of use, and validate that the design features limit access to only the cartilaginous portion of the Eustachian tube.

(3) The patient-contacting components of the device must be demonstrated to be biocompatible.

(4) Performance data must demonstrate the sterility of the device.

(5) Performance data must support shelf life by demonstrating continued sterility of the device, package integrity, and device functionality over the identified shelf life.

(6) Training must include simulated use on cadavers to ensure users can follow the instructions for use to allow safe use of the device.

(7) Labeling must include:

(i) Detailed instructions for use.

(ii) A detailed summary of the device technical parameters, including maximum allowed inflation pressure, allowable catheter geometries, and available balloon sizes.

(iii) A shelf life.

Dated: October 18, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–25602 Filed 10–21–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Subtitle A and Chapters II, IV, V, VIII, IX, and XX

[Docket No. FR–5976–N–01]

Housing Opportunity Through Modernization Act of 2016: Initial Guidance

AGENCY: Office of General Counsel, HUD.

ACTION: Initial implementation guidance.

SUMMARY: On July 29, 2016, President Obama signed into law the Housing Opportunity Through Modernization Act of 2016 (HOTMA). This new statute provides updates and improvements to statutes that authorize and prescribe requirements for multiple HUD programs and the Department of Agriculture's single-family housing guaranteed loan program. The purpose of this document is to advise HUD program participants and interested members of the public of those statutory provisions that are effective immediately and those provisions that will require further action by HUD to become effective or to be used by HUD program participants.

DATES: *Effective Date:* This document is effective October 24, 2016.

FOR FURTHER INFORMATION CONTACT: If you have any questions, please contact the following people (none of the phone numbers are toll-free):

Public Housing, Housing Choice Voucher (including project-based vouchers), and moderate rehabilitation programs: email *HOTMAquestions@hud.gov.*

Multifamily Housing programs: Danielle Garcia, Branch Chief, Assistant Housing Oversight Division, Office of Housing, 202–402–2768.

HOME Investment Partnerships program: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, 202–708–2684.

Self-Help Homeownership Opportunity Program (SHOP) program: Jackie Williams, Director, Office of Rural Housing and Economic Development, Office of Community Planning and Development, (202) 708–2290.

Housing Opportunities for Persons With AIDS (HOPWA) program: Rita Flegel, Director, Office of HIV/AIDS Housing, Office of Community Planning and Development, 202–402–5374.

Homeless programs: Norm Suchar, Director, Office of Special Needs Assistance, Office of Community Planning and Development, 202–708–4300.

The address for all offices is the Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410. Persons with hearing or speech impairments may access these numbers through TTY by calling the Federal Relay Service, toll-free, at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Introduction

On July 29, 2016, President Obama signed HOTMA into law (Pub. L. 114–201, 130 Stat. 782). HOTMA amends the United States Housing Act of 1937 (1937 Act) and other housing laws to modify multiple HUD programs, along with the Department of Agriculture's Single Family Housing Guaranteed Loan Program. Significant amendments include setting a maximum income level for continued occupancy in public housing, expanding the availability of Family Unification Program vouchers for children aging out of foster care, changes to the housing quality standards for Section 8 Voucher units, multiple changes to the Project-Based Voucher program, modifying requirements for mortgage insurance for condominiums under the Federal Housing Administration, creating a Special Assistant for Veterans Affairs in HUD, and changing the allocation formula for the Housing Opportunities for Persons With AIDS (HOPWA) program.

II. Implementation, Generally

HOTMA makes several of its provisions effective upon enactment (July 29, 2016). Other statutory changes made by HOTMA become effective only after the issuance of a notice or regulations by HUD, or at the start of the calendar year following the publication of a notice or regulation. Some provisions require rulemaking to implement, while some are strictly changes in terminology or conforming changes.

This document is intended to:

(1) Advise the public of statutory provisions that are effective immediately and advise of actions that may or should be taken now to comply with the changes (Section III of the document).

(2) Identify those provisions of HOTMA that are not effective until HUD subsequently issues a notice or regulation (Section IV of the document).

This document does not provide a section-by-section analysis of HOTMA, nor does it provide guidance on all sections. However, the guidance in this document, read together with the statutory language,[1] is intended to aid HUD program participants and the public generally in understanding (1) the prompt action HUD recommends be taken now or in the very near future, and (2) the reasons for any deferred action with respect to certain statutory provisions. HUD is committed to working closely with its program participants to see that the changes made by HOTMA are successfully implemented and that these programs are significantly improved to provide assistance to the families HUD serves.

III. Provisions of HOTMA Effective Upon Enactment or Otherwise Already in Effect—No HUD Action Required To Implement

This section outlines provisions of HOTMA that are effective upon enactment of HOTMA (July 29, 2016) and can be implemented immediately.

[1] The text of HOTMA, along with a summary prepared by the Congressional Research Service, can be found at *https://www.congress.gov/bill/114th-congress/house-bill/3700.*

HUD notes that in many cases the statutory provisions listed in this section may require conforming rulemaking at a later date to update HUD's regulations to reflect these statutory changes. HUD may also issue other types of guidance to further explain these provisions. Below is the list of HOTMA sections that are effective immediately.

Section 102(d). Reasonable Accommodation Payment Standards

Section 102(d) of HOTMA amends section 8(o) of the 1937 Act to allow PHAs to establish a payment standard of up to 120 percent of the FMR as a reasonable accommodation for a person with a disability, without HUD approval.

Implementation action: The final rule on ''Streamlining Administrative Regulations for Public Housing, Housing Choice Voucher, Multifamily Housing, and Community Planning and Development Programs,'' published on March 8, 2016, at 81 FR 12354, previously provided PHAs with the flexibility establish a payment standard up to 120 percent of the FMR as a reasonable accommodation for a person with a disability, effective April 7, 2016. As a result, no further action is needed to implement this section.

It is noted the PHA may also establish an exception payment standard of more than 120 percent of the published FMR if required as a reasonable accommodation in accordance with 24 CFR part 8 for a family that includes a person with a disability, but in such cases must request approval from HUD.

Section 107. Establishment of Fair Market Rent

This section changes how HUD publishes Fair Market Rents (FMRs), and the procedure to allow PHAs and other interested parties to comment on the FMRs and request HUD to reevaluate the FMRs in a jurisdiction before those rents become effective. Section 107 also amends section 8(o)(1)(B) of the 1937 Act to provide that in the Housing Choice Voucher (HCV) Program no PHA is required, as a result of a reduction in the FMR, to reduce the payment standard applied to a family continuing to reside in a unit under a HAP contract at the time the FMR was reduced. Currently, if a reduction in the FMR causes the PHA's payment standard to exceed the basic range (110 percent of the FMR), the PHA is required to reduce the payment standard so that the payment standard would be within the basic range of the new FMR. The program regulations at 24 CFR 982.505(c)(3) further provide that for families under a housing assistance payment (HAP) contract at the time of the decrease in the payment standard, the new decreased payment standard would be applied to the family's subsidy calculation at the family's second regular re-examination following the decrease in the payment standard amount. As a result of the change in the law, the PHA may choose to continue to use the higher payment standard for the family's subsidy calculation for as long as the family continues to receive voucher assistance in that unit. If a PHA chooses to continue to use the higher payment standard for the subsidy calculation for the family, then the PHA must adopt policies in its administrative plan that further explain this provision.

Implementation action: This provision was effective upon enactment of HOTMA. HUD's FMRs for Fiscal Year 2017, published in the **Federal Register** on August 26, 2016, reflect the new procedures for calculation of FMRs. Effective July 29, 2016, PHAs may choose, but are no longer required, to reduce the payment standard for a family who remains under HAP contract at the family's second annual reexamination. HUD will issue additional guidance on this change in the future. PHAs with questions in the interim may contact the local HUD Field Office.

Section 110. Family Unification Program for Children Aging Out of Foster Care

This section of HOTMA makes changes to the Family Unification Program (FUP) for children aging out of foster care. The law revises the length of the term that a FUP-eligible youth may receive FUP assistance from 18 months to 36 months. Please note that this change applies to youth currently receiving FUP assistance as well as any new participants. In addition, the law revises the eligibility requirements for FUP-eligible youth. Previously, FUP-eligible youth must be at least 18 years old and not more than 21 and have left foster care at age 16 or older. Under the new law, FUP-eligible youth must: Be at least 18 years old and not more than 24; have left foster care at age 16 or older or will leave foster care within 90 days, in accordance with a transition plan described in section 475(5)(H) of the Social Security Act; and be homeless or at risk of being homeless. PHAs should refer to the definition of ''at risk of homelessness'' at 24 CFR 576.2. HOTMA also requires HUD to issue guidance, after consultation with other appropriate Federal agencies, on how to improve coordination between PHAs and public child welfare agencies to carry out the FUP program.

Implementation action: The changes to the FUP program were effective upon enactment of HOTMA. PIH issued a letter on August 29, 2016, to FUP PHA Executive Directors to ensure that such PHAs are aware that this provision was effective upon enactment. In addition, HUD plans to issue the guidance on improving coordination between PHAs and public child welfare agencies by the statutory deadline of January 25, 2017.

Section 113. Preference for United States Citizens or Nationals

This section only applies to Guam and establishes a preference or priority in receiving financial assistance (*e.g.,* admission to public housing, the HCV program, etc.) for any citizen or national of the United States over aliens covered by section 141 of the Compacts of Free Association between the United States and the Marshall Islands, the Federated States of Micronesia, and Palau.

Implementation action: This provision was effective upon enactment of HOTMA. No regulatory action is needed for this section of HOTMA to be implemented.

Section 114. Exception to Public Housing Agency Resident Board Member Requirement

This section provides for an exception for certain jurisdictions (Housing Authority of the County of Los Angeles or any PHA in the States of Alaska, Iowa, and Mississippi) from the resident board member requirements under section 2(b) of the 1937 Act.

Implementation action: This provision was effective upon enactment of HOTMA, and the exception has been in effect for a number of years through the appropriations acts. As a result, no further action is needed to implement this section. This statutory provision does not alter the regulatory provision at 24 CFR 964.405(b).

Section 402. Inclusion of Public Housing Agencies and Local Development Authorities in Emergency Solutions Grants

Section 402 of HOTMA amended section 414(c) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11373(c)) to authorize local governments that receive Emergency Solutions Grants (ESG) funds to subaward all or a portion of those funds to public housing agencies, as defined under section 3(b)(6) of the 1937 Act (42 U.S.C. 1437a(b)(6)), and local redevelopment authorities, as defined under State law. *Implementation action:* This provision was effective upon

enactment of HOTMA. No regulatory action is needed to authorize local governments to subaward ESG funds to public housing agencies and local redevelopment authorities. However, HUD intends to issue guidance explaining the conditions and requirements that apply to subawarding ESG funds to PHAs and local redevelopment authorities.

Section 501. Inclusion of Disaster Housing Assistance Program in Certain Fraud and Abuse Prevention Measures

This section provides that the Disaster Housing Assistance Program shall be considered a program of HUD under section 904 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 for the purpose of income verifications.

Implementation action: This provision was effective upon enactment of HOTMA, and it has previously been in effect through HUD appropriations acts for a number of years, and therefore no additional action is needed for implementation.

Section 502. Energy Efficiency Requirements Under Self-Help Homeownership Opportunity Program

This provision prohibits HUD from requiring units developed under the Self-Help Homeownership Opportunity Program (SHOP) to meet energy efficiency standards other than those in section 109 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12709).

Implementation action: This provision was effective upon enactment of HOTMA. The changes will be reflected in the future SHOP Notice of Funding Availability, and HUD will provide current grantees with additional information on how this provision affects their prior year funding.

Section 701. Formula and Terms for Allocations To Prevent Homelessness for Individuals Living With HIV or AIDS

This provision makes several changes to the Housing Opportunities for Persons with AIDS (HOPWA) program. These changes include: Alterations to the allocation formula; continued eligibility of Fiscal Year 2016 grantees; authorization to award funds to alternative grantees as requested by the original grantee in accordance with specified criteria; and amended definitions.

Implementation action: These changes apply to the formula for Fiscal Year 2017 funds. HUD's Office of Community Planning and Development (CPD) is preparing more detailed guidance to explain how these changes will affect Fiscal Year 2017 funding. This section requires HUD to issue regulations in order to exercise discretion regarding reallocations of funds distributed by formula, and HUD is developing those regulations.

IV. Provisions That Require Rulemaking or Guidance by HUD

There are several provisions in HOTMA that amend HUD statutes but, under their own terms, are not effective until HUD issues a notice or regulation. Other provisions make changes to HUD statutes that, while effective upon enactment of HOTMA, require HUD rulemaking or the issuance of detailed guidance for implementation. This section addresses both types of HOTMA provisions requiring further HUD action. For these provisions, PHAs, multifamily owners, or grantees may not use the provisions of HOTMA until HUD issues a rule or notice.

Section 101(a)(1). Initial Inspections in Section 8 Voucher Units

Section 101(a)(1) amends section 8(o) of the 1937 Act to authorize assistance payments for up to 30 days if an initial inspection reveals non-life-threatening defects and to authorize occupancy of units before an inspection by the PHA if the property has met the requirements of an alternative inspection in the previous 24 months.

Implementation action: HUD has the ability to implement these changes by notice or by regulation, and the statutory amendments are not effective until the notice or regulation is issued. HUD is considering the appropriate method for implementation.

Sections 101(a)(2) and (3). Enforcement of Housing Quality Standards for Section 8 Voucher Units

Section 101(a)(3) amends section 8(o) of the 1937 Act to require timeframes for correcting deficiencies discovered by inspections. The statute requires life-threatening deficiencies to be corrected within 24 hours and sets the time for correcting other deficiencies at 30 days unless the PHA determines otherwise. The section also provides families with 90 days to relocate to a new unit if an owner fails to correct the defaults and allows PHAs to use up to two months of any assistance amounts withheld or abated for costs directly associated with relocation of these families. Section 101(a)(2) is a technical amendment to make room for the new subparagraph (G) added by section 101(a)(3).

Implementation action: For section 101(a)(3), HUD is in the process of developing regulations, and section 101(a)(2) requires only a conforming rule by HUD. The statutory amendments made by sections 101(a)(2) and (3) will only go into effect when the regulations are issued to implement the new subparagraph added by section 101(a)(3).

Sections 102(a), (c), and (e). Income Reviews

Section 102(a) of HOTMA amends section 3(a) of the 1937 Act to revise the frequency of family income reviews and the calculation of income. Specifically, this section requires that reviews of family income must be conducted upon admission and annually thereafter, depending on certain decreases or increases in annual adjusted income. This section also requires HUD, in consultation with other appropriate Federal agencies, to develop electronic procedures enabling PHAs to access income determinations for other Federal means-tested programs.

Section 102(c) of HOTMA amends section 3(b) of the 1937 Act to change the definitions for the public housing and Section 8 programs of income and adjusted income for each member of the household who is 18 years or older and unearned income for each dependent who is less than 18. The changes in definitions require rulemaking to implement, and the statutory amendments are not effective until the rulemaking is complete.

Section 102(e) changes the definition of ''income'' to ''annual adjusted income'' for the Enhanced Voucher Program.

Implementation action: HUD has the ability to implement these changes by notice or by regulation, and the statutory amendments are not effective until the beginning of the calendar year after the notice or regulation is issued. HUD is considering the appropriate method for implementation.

Section 102(f). Income Review for Project-Based Housing

This section amends strikes the last sentence of paragraph (3) of section 8(c) of the 1937 Act (42 U.S.C. 1437f(c)(3). This eliminates the requirement that reviews of family income shall be made no less frequently than annually.

Implementation action: HUD has the ability to implement these changes by notice or by regulation, and the statutory amendments are not effective until the beginning of the calendar year after the notice or regulation is issued. HUD is considering the appropriate method for implementation.

Section 103. Limitation on Public Housing Tenancy for Over-Income Families

The statute sets the maximum amount of annual adjusted income for continued occupancy in public housing at 120 percent area median income (AMI), which the Secretary may adjust based on certain statutory factors. The statute also requires that a family is only subject to this limitation if their annual adjusted income meets or exceeds the maximum amount for two consecutive years. In addition, for a family meeting this threshold for two consecutive years, the PHA has the option to terminate the family's tenancy or to allow them to remain in the unit at a higher rent amount.

Implementation action: The statutory language recognizes that it is necessary in some areas to deviate from the income cap of 120 percent AMI. In order to allow HUD to exercise its discretion in a fair and effective manner, HUD will issue additional information in the future. In addition, the new section 16(a)(5)(A)(i)(II) of the 1937 Act requires regulations to determine the amount of subsidy allocated to a specific unit in order to determine family rent in the event a family chooses to remain in the unit.

Section 104. Limitation on Eligibility for Assistance Based on Assets

Section 104 sets limits on the assets that families residing in assisted housing may have. Section 104 also directs HUD, beginning October 1, 2017, to direct PHAs to require all applicants and recipients under the 1937 Act to authorize the PHA to obtain financial information needed in connection with a determination with respect to eligibility.

Implementation action: This requirement must be put in place by rulemaking.

Section 105. Units Owned by Public Housing Agencies

This section provides that the term 'owned by a public housing agency' means, with respect to a dwelling unit, that the dwelling unit is in a project that is owned by a PHA, by an entity wholly controlled by a PHA, or by a limited liability company or limited partnership in which a PHA (or an entity wholly controlled by a PHA) holds a controlling interest in the managing member or general partner. This section also provides that a dwelling unit is not deemed to be owned by a PHA where the PHA holds a fee interest as ground lessor in the property on which the unit is situated, holds a security interest under a mortgage or deed of trust on the unit, or holds a non-controlling interest in an entity which owns the unit or in the managing member or general partner of an entity which owns the unit.

Implementation action: PHAs should continue their current practices until HUD can issue additional information on how affected PHAs can comply with any new requirements.

Section 106. PHA Project-Based Assistance

This section makes several statutory changes to the Project-Based Voucher (PBV) Program in section 8(o)(13) of the 1937 Act. The amendments include (1) changing the portfolio limitation on PBV vouchers from a funding to a unit calculation and allowing for additional project-basing of vouchers for homeless families, families with veterans, supportive housing for persons with disabilities or elderly persons, or in areas where vouchers are difficult to use; (2) changing the cap on the number of PBV units in a project to be the greater of 25 units in a project or 25 percent of the units in a project; (3) allowing PHAs to provide for an initial PBV contract of up to 20 years; (4) providing owners and PHAs the ability to adjust rents based on an operating cost adjustment factor; (5) permitting owners to use site-based waiting lists; (6) allowing PHAs to attach assistance to structures in which the PHA has an ownership interest or control without following a competitive process; and (7) allowing PHAs to use project-based HUD–VASH and FUP vouchers under the same policies and procedures applicable to general purpose vouchers.

Implementation action: HUD has the ability to implement these changes by notice or regulation, and the statutory amendments are not effective until the notice or regulation is issued. Some sections require regulations to add onto baselines set by the statute. HUD is considering the appropriate method for implementation.

Section 109. Public Housing Capital and Operating Funds

Section 109 revises section 9 of the 1937 Act regarding (1) PHAs establishing a Capital Fund Replacement Reserve, for which HUD may allow a PHA to transfer more than 20 percent of its operating fund to establish the reserve; (2) a 20 percent operating funds cap for capital improvements; and (3) PHA accounting and reporting on replacement reserves funds.

Implementation action: These statutory changes are effective upon the enactment of HOTMA. However, in order for PHAs to implement the changes, additional guidance or rulemaking is required.

Section 112. Use of Vouchers for Manufactured Housing

Section 112(b) of HOTMA extends the definition of ''rent'' for vouchers to include monthly payments for purchasing a manufactured home, tenant-paid utilities, and monthly rent for real property.

Implementation action: These statutory changes are only effective upon issuance by HUD of an implementing notice. The statutory amendments are not effective until HUD issues that implementation notice.

Section 301. Modification of FHA Requirements for Mortgage Insurance for Condominiums

Section 301 mandates several changes to FHA's mortgage insurance for condominiums, including changes to requirements on project recertification, exceptions to the percentage of floor space that may be used for nonresidential or commercial purposes, private transfer fee covenants, and the minimum required percentage of units that must be owner occupied.

Implementation action: Some of these changes must be done by regulations, while the revision to the owner occupancy percentage may be done by rulemaking or an administrative document. HUD issued a proposed rule to implement provisions on all these subjects other than transfer fees, and including general parameters on owner occupancy, on September 28, 2016, at 81 FR 66565. In the near future, HUD will be issuing a Mortgagee Letter to establish the specific owner occupancy percentage. For other provisions of section 301, HUD is considering the appropriate implementation action.

Section 401. Definition of Geographic Area for Continuum of Care Program

Section 401 requires HUD to issue a notice by October 27, 2016 defining ''geographic area'' for the Continuum of Care (CoC) program.

Implementation action: HUD is currently developing the notice.

Section 701. HOPWA Allocations

Section 701 of HOTMA adds four paragraphs to section 854(c) of the AIDS Housing Opportunity Act (42 U.S.C. 12903(c)). The new paragraph (1)(C) allows the Secretary to change the allocation formula set in paragraph (1)(A) to account for differences in housing costs and poverty rates. The new paragraph (4) allows the Secretary to set criteria by which the Secretary

determines a grantee is unable to properly administer its allocation.

Implementation action: Both of these provisions require HUD to issue regulations to exercise the Secretary's discretion, and HUD is developing those regulations.

Dated: October 12, 2016.

Ariel Pereira,

Associate General Counsel for Legislation and Regulations.

[FR Doc. 2016–25147 Filed 10–21–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2016–0859]

Special Local Regulations; Savannah Harbor Boat Parade of Lights and Fireworks, Savannah River

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Savannah Harbor Boat Parade of Lights and Fireworks Special Local Regulation from 5 p.m. through 10 p.m. on November 26, 2016. This action is necessary to ensure safety of life on navigable waters of the United States during the Savannah Harbor Boat Parade of Lights and Fireworks displays. During the enforcement period, and in accordance with previously issued special local regulations, no person or vessel may enter, transit through, anchor in, or remain within the designated area unless authorized by the Captain of the Port Savannah or a designated representative.

DATES: The regulation in 33 CFR 100.701, Table to § 100.71, Item (f)4 will be enforced from 5 p.m. until 10 p.m. on November 26, 2016.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email MST1 Cliffton Hendry, Marine Safety Unit Savannah Office of Waterways Management, Coast Guard; telephone 912–652–4353, extension 243, or email *Cliffton.R.Hendry@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulation for the Savannah Habor Parade of Lights and Fireworks in 33 CFR 100.701, Table to § 100.71, Item (f)4 from 5 p.m. until 10 p.m. on November 26, 2016.

Under the provisions of 33 CFR 100.701, all persons and vessels are prohibited from entering the regulated area unless they receive permission to do so from the Captain of the Port Savannah, or designated representatives. This action is to provide enforcement action of regulated area that will encompass the entire Savannah River in Savannah, GA beginning at the Talmadge Bridge near River Street, coordinates 32°05′20″ N., 081°05′56.3″ W., and proceeding down river to a line drawn at 146 degrees true from day board 62, approximate coordinates are: 32°04′48.7″ N., 081° 04′47.9″ W.

Spectator vessels may safely transit outside the regulated area, but may not anchor, block, loiter in, impede the transit of festival participants or official patrol vessels or enter the regulated area without approval from the Captain of the Port Savannah or a designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This notice of enforcement is issued under authority of 33 CFR 100.701 and 5 U.S.C. 552 (a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide notice of the regulated area by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

Dated: September 14, 2016.

A.M. Beach,

Commander, U.S. Coast Guard, Captain of the Port, Savannah.

[FR Doc. 2016–25600 Filed 10–21–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2016–0745]

Special Local Regulation; Back River, Poquoson, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a special local regulation to keep vessels from entering the Poquoson Seafood Festival Workboat Races route near the vicinity of Messick Point, in Back River, Poquoson, VA on October 23, 2016. This action is necessary to ensure safety of life on navigable waters during this event. Our regulation for Recurring Marine Events within the Fifth Coast Guard District identifies the regulated area for this event. During the enforcement period, no person or vessel may enter, transit through, anchor in, or remain within the regulated area without approval from the Captain of the Port or a designated representative.

DATES: The regulations in 33 CFR 100.501 will be enforced for the location listed in item (c.)8 of the Table to § 100.501, from 1 p.m. through 4 p.m. on October 23, 2016.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email ENS Chandra Saunders, U.S. Coast Guard Sector Hampton Roads (WWM); telephone 757–668–5582, email *Chandra.M.Saunders@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulation in the table to 33 CFR 100.501, item (c.)8, from 1 p.m. until 4 p.m. on October 23, 2016, for the 2016 Poquoson Seafood Festival Workboat Races on Back River. This action is being taken to provide for the safety of life on navigable waterways during this event. Our regulation for Recurring Marine Events within the Fifth Coast Guard District, § 100.501, specifies the location of the special regulated area bounded on the north by a line drawn along latitude 37°06′30″ N., bounded on the south by a line drawn along latitude 37°06′15″ N., bounded on the east by a line drawn along longitude 076°18′52″ W. and bounded on the west by a line drawn along longitude 076°19′30″ W. located in the vicinity of Messick Point, in Back River, Poquoson, VA. As specified in § 100.501(c), during the enforcement period, no vessel may not enter, remain in, or transit through the special local regulation without approval from the Captain of the Hampton Roads (COTP) or a COTP designated representative. The Coast Guard may be assisted by other Federal, state or local law enforcement agencies in enforcing this regulation.

This notice of enforcement is issued under authority of 33 CFR 100.501 and 5 U.S.C. 552(a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of this enforcement period via the Local Notice to Mariners and marine information broadcasts.

Dated: October 14, 2016.

Richard J. Wester,

Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads, VA.

[FR Doc. 2016–25679 Filed 10–21–16; 8:45 am]

BILLING CODE 9110–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 13–236; FCC 16–116]

National Television Multiple Ownership Rule

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document eliminates the UHF discount from the calculation of the national television audience reach cap because it is no longer justified due to the transition to digital television. The discount attributes television stations broadcasting in the UHF spectrum with only 50 percent of the television households in their Designated Market Areas (DMAs). To avoid imposing undue harm on existing broadcast television station groups that exceed the national audience reach cap without the benefit of the UHF discount, this *Report and Order* grandfathers combinations: In existence on September 26, 2013 (Grandfather Date), the release date of the Notice of Proposed Rulemaking (*NPRM)* in this proceeding; created by a transaction that had received Commission approval on or before the Grandfather Date; and proposed in applications pending before the Commission on the Grandfather Date.

DATES: Effective November 23, 2016.

FOR FURTHER INFORMATION CONTACT: Brendan Holland, Industry Analysis Division, Media Bureau, *Brendan.Holland@fcc.gov,* (202) 418–2757.

SUPPLEMENTARY INFORMATION: This *Report and Order* in MB Docket No. 13–236 was adopted August 24, 2016, and released September 7, 2016. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554, or online at *https://www.fcc.gov/ecfs/filing/0907563506002/document/090756350600263ba.* To request this document in accessible formats for people with disabilities (*e.g.* braille, large print, electronic files, audio format, etc.) or to request reasonable accommodations (*e.g.* accessible format documents, sign language interpreters, CART, etc.), send an email to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis of the Report and Order

1. *Background.* Three decades ago in 1985, to protect localism, diversity, and competition, the Commission amended its national television multiple ownership rule to include a national audience reach cap that prohibited a single entity from owning television stations that collectively reached more than 25 percent of the total television households in the nation. At that time, the Commission recognized the inherent physical limitations of the UHF television band, finding that the strength of UHF television signals decreased more rapidly with distance in comparison to the signals of stations broadcasting in the VHF band, resulting in significantly smaller coverage areas and audience reach. This finding was significant because, at the time, the vast majority of viewers received programming from broadcast television stations via over-the-air signals. Thus, a smaller over-the-air signal made it harder for UHF stations to compete with incumbent VHF stations, which maintained greater coverage areas. To account for this coverage disparity, the Commission determined that licensees of UHF stations should be attributed with only 50 percent of the television households in their DMAs for purposes of calculating the national audience reach cap. This rule is termed the UHF discount.

2. As early as 1992, the Commission anticipated the possibility that the transition to digital television would obviate the need for the UHF discount, and sought comment on whether any distinction between UHF and VHF stations would be appropriate in light of the transition. A few years later, in the Telecommunications Act of 1996 (1996 Act), Congress directed the Commission to modify its ownership rules to increase the national audience reach cap from 25 percent to 35 percent of the total nationwide audience. In the *1996 Act Implementation Order* (11 FCC Rcd 12374), the Commission noted that it was reviewing the UHF discount in the context of its television broadcast ownership rules, and explicitly cautioned that any entity that acquired stations during this interim period and complied with the 35 percent audience reach cap only by virtue of the UHF discount would be subject to the outcome of the pending rule making proceeding. In the *1998 Biennial Review Order* (15 FCC Rcd 11058), the Commission retained the UHF discount, but stated that it would likely be unnecessary after the digital television transition and that the Commission would initiate a proceeding in the future to phase out the discount. In the *2002 Biennial Review Order* (18 FCC Rcd 13620), the Commission raised the national audience reach cap to 45 percent and again concluded that, ''the digital [television] transition [would] largely eliminate the technical basis for the UHF discount because UHF and VHF signals [would] be substantially equalized.'' Therefore, the *2002 Biennial Review Order* adopted rules to phase out the UHF discount for broadcast stations owned by the Big Four networks (ABC, CBS, NBC, and Fox) on a market-by-market basis at the time the markets transitioned to DTV. The Commission indicated further that, for networks and station groups other than those stations owned and operated by the Big Four networks, it would decide in a subsequent biennial ownership review whether to extend the sunset to all other networks and station group owners. The rules at that time contemplated a gradual, market-by-market transition to DTV, but this approach was later replaced by a hard deadline—June 12, 2009.

3. Following adoption of the *2002 Biennial Review Order,* Congress subsequently rolled back the 45 percent national audience reach cap by including a provision in the 2004 Consolidated Appropriations Act (CAA) directing the Commission to set the cap at 39 percent of national television households. The CAA further amended section 202(h) of the 1996 Act to require a quadrennial review of the Commission's broadcast ownership rules rather than the previously mandated biennial review. In doing so, Congress removed the requirement to review any rules relating to the 39 percent national audience reach cap from the quadrennial review requirement. The CAA did not mention the UHF discount, nor did it address the potential impact of the DTV transition on the calculation of the national audience reach cap.

4. Prior to the enactment of the CAA, several parties had appealed the Commission's *2002 Biennial Review Order* to the U.S. Court of Appeals for the Third Circuit (Third Circuit). In June 2004, the Third Circuit found, among other things, that the CAA rendered moot the challenges to the Commission's decision to retain the UHF discount (373 F.3d 372). The court further found that the CAA insulated the national audience reach cap, including the UHF discount, from the Commission's quadrennial review of its media ownership rules. At the same time, however, the court stated that its decision did not foreclose the Commission's consideration of the UHF

discount in a rulemaking separate from the required quadrennial review of its ownership rules. The court concluded that, barring congressional intervention, the Commission could decide the scope of its authority to modify or eliminate the UHF discount outside the context of section 202(h). Prior to the court's decision, in February 2004, the Media Bureau issued a *Public Notice* specifically seeking comment on the Commission's authority to modify or eliminate the UHF discount in light of the CAA. In particular, the Media Bureau sought comment on whether the passage of the 39 percent cap signified congressional approval, adoption, or ratification of the 50 percent UHF discount. The comments and replies were filed in the docket for the *2002 Biennial Review Order.*

5. In July 2006, the Commission issued a *Further Notice of Proposed Rulemaking* (FNPRM) as part of its 2006 quadrennial review of the media ownership rules (21 FCC Rcd 8834). Among other things, the *FNPRM* sought comment on the UHF discount rule in light of the Third Circuit's holding and queried whether the Commission should retain, modify, or eliminate the UHF discount. Comments filed in response to the *FNPRM* also refreshed the Commission's record on its authority to alter the UHF discount. In February 2008, the Commission concluded in the *2006 Quadrennial Review Order* (23 FCC Rcd 2010) that the UHF discount was insulated from review under section 202(h) as a result of the CAA, and thus beyond the parameters of the quadrennial review. But the Commission noted that the Third Circuit's 2004 decision had left it to the Commission to decide the scope of its authority to modify or eliminate the UHF discount outside the context of section 202(h). Accordingly, the Commission indicated that it would address the petitions, comments, and replies filed with respect to the alteration, retention, or elimination of the UHF discount in a separate proceeding, which would be commenced at a future date.

6. Since June 13, 2009, all full-power television stations have broadcast their over-the-air signals exclusively in digital form. The DTV transition has enabled broadcasters to provide multiple programming choices, higher quality video, and enhanced capabilities to consumers. Yet the transition has posed more challenges for VHF channels than UHF channels because VHF spectrum has proven to have characteristics that make it less desirable for providing digital television service. For instance, nearby electrical devices tend to emit noise that can cause interference to DTV signals within the VHF band, creating reception difficulties in urban areas even a short distance from the TV transmitter. The reception of VHF signals also requires physically larger antennas compared to UHF signals. For these reasons, among others, television broadcasters generally have faced greater challenges providing consistent reception on VHF signals than UHF signals in the digital environment, and some station owners have therefore opted to migrate their signals from VHF to UHF. Therefore, on September 26, 2013, the Commission issued the NPRM in this proceeding proposing to eliminate the UHF discount and grandfather certain existing television station combinations that would exceed the 39 percent national audience reach cap in the absence of the discount, and seeking comment on whether a VHF discount should be adopted (28 FCC Rcd 14324).

7. *Authority to Modify the UHF Discount.* We conclude that the Commission has the authority to modify the national audience reach cap, including the authority to revise or eliminate the UHF discount. We find that no statute bars the Commission from revisiting the cap or the UHF discount in a rulemaking proceeding so long as such a review is conducted separately from a quadrennial review of the broadcast ownership rules pursuant to section 202(h) of the 1996 Act. The CAA removed the requirement to review the national ownership cap from the Commission's quadrennial review requirement, but did not impose a statutory national audience reach cap or prohibit the Commission from evaluating the elements of this rule. While the CAA also provides that the Commission may not apply its forbearance authority under Section 10 of the Communications Act to any person or entity exceeding the 39 percent national audience reach cap, there is nothing in the CAA that suggests Congress intended to prevent the Commission from tightening the cap, repealing the UHF discount, or otherwise changing its rules at a later date. Thus, the Commission retains authority under the Communications Act to review any aspect of the national audience reach cap; it simply is not required to do so as part of the quadrennial review.

8. Specifically, the Communications Act gives the Commission the statutory authority to revisit its own rules and revise or eliminate them when it concludes such action is appropriate. The Act authorizes the agency to ''perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.'' Similarly, section 303(r) provides that the Commission may ''[m]ake such rules and regulations . . . not inconsistent with this law, as may be necessary to carry out the provisions of this Act . . . .'' Indeed, courts have held that the Commission has an affirmative obligation to reexamine its rules over time. In *Bechtel* v. *FCC* (957 F.2d 873), the court observed that ''changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so. In the rulemaking context, an agency also may be obligated to reexamine its approach if a significant factual predicate of a prior decision has been removed.'' As we explain further below, this is precisely the case in this instance.

9. With respect to the UHF discount, even those advocating retention of the discount based on the CAA acknowledge that the CAA does not even mention the UHF discount. We disagree with commenters' suggestion that the CAA's legislative history somehow supports a conclusion that Congress fully considered either the UHF discount or the effect of the—then future—DTV transition. The history of this immense, omnibus bill does not reflect any consideration of the UHF discount or its potential elimination. There is no basis for the assumption that Congress, in overruling the Commission's decision to raise the national audience reach cap to 45 percent and mandating it be moved back down to 39 percent, did so with the expectation that the Commission would indefinitely maintain the UHF discount, especially given that post-DTV transition there is no technological basis for the discount. We note further that, when Congress chose to supersede the Commission's action and revise the national audience reach cap down to 39 percent, it was on notice of the Commission's intent to phase out the discount, which the Commission had expressed in 1998 and again in 2002. Congress was also aware, of course, of the Commission's broad authority—indeed, its obligation—to reevaluate its rules periodically and revise any that no longer serve the public interest. It could have foreclosed the Commission from ever revising the national audience reach cap or the UHF discount by making the national cap and the UHF discount a statutory restriction or by otherwise withdrawing Commission authority to modify the cap or the UHF

discount. It did not do so, opting instead for the limited measure that reduced the cap from 45 percent to 39 percent and relieved the Commission of the obligation to reevaluate the national audience reach cap in the mandated quadrennial ownership review.

10. We agree with commenters who assert that these actions suggest Congress's intent was to prevent excessive consolidation in the broadcast market. In fact, as discussed below, operation of the analog-era discount after the DTV transition effectively allows some broadcasters with UHF stations to reach far more than the 45 percent of the national audience that Congress thought too high.

11. Our interpretation of the CAA is consistent with the conclusion of the Third Circuit. As the court explained, although Congress excluded the national audience reach cap from the quadrennial review requirement under section 202(h), it did not foreclose Commission action to review or modify the UHF discount in a separate context.

12. *Elimination of the UHF Discount.* As in the *NPRM,* we conclude that television broadcasting in the UHF band is no longer technically inferior to operations in the VHF band. UHF stations no longer suffer from weaker signals and smaller audience reach, are less dependent today on over-the-air coverage, are more desirable than VHF stations for digital broadcasting, and therefore UHF station owners no longer need the UHF discount to remain viable and competitive. Commenters in this proceeding have not presented evidence of any existing technical limitations that render digital UHF stations inferior to digital VHF stations.

13. Therefore, we find that the DTV transition has rendered the UHF discount technically obsolete, and we eliminate it from the calculation of the national audience reach cap. As a result of the DTV transition, the national cap is effectively 78 percent for a station group that includes only UHF stations, and for any station group that includes a UHF station, the effective national cap now exceeds the 39 percent level that Congress directed the Commission to establish. Rather than offsetting an actual service limitation or reflecting a disparity in signal coverage, the UHF discount serves only to confer a factually unwarranted benefit on owners of UHF television stations that undermines the purpose of the national audience reach cap. Furthermore, the Commission's ongoing experience reviewing media transactions after the DTV transition date indicates that failure to correct the distortion that the UHF discount causes in the calculation of national audience reach as a result of the DTV transition creates an ongoing potential that additional transactions could undermine the national audience reach cap.

14. At the time the UHF discount was established, analog UHF television stations were demonstrably inferior to VHF stations, with weaker signals and a smaller audience reach. Thirty years after its adoption, however, it is clear that the UHF discount cannot be justified in the digital world. While the discount was needed in the mid-1980s, the Commission soon found that the disparity between analog UHF and VHF stations was unlikely to exist in perpetuity. Further, three decades ago roughly 60 percent of U.S. television households received programming exclusively over-the air, while according to the most recent Nielsen data, approximately 11.5 percent, or about 13.3 million television households, are broadcast-only.

15. As early as 1988, the Commission noted that the disparities between UHF and VHF services had begun to decrease. Further, as the disparity between the two services eroded during the 1980s and 1990s, the Commission repealed a number of rules and policies that had previously treated UHF stations differently, and occasionally more favorably, than their VHF counterparts. In 1988 the Commission eliminated the UHF Impact Policy, which limited approval of new or modifications to existing VHF stations if the approval would harm existing or potential UHF stations (3 FCC Rcd 638). In 1995, the Commission repealed both the Prime Time Access Rule, which prohibited network-affiliated television stations in the top 50 markets from broadcasting more than three hours of network programs during prime time (11 FCC Rcd 546), and the Secondary Affiliation Rule, which required a third network seeking an affiliate in a market to offer its programming first to the independent station, often a UHF station (10 FCC Rcd 4538). By the mid-1990s, the Commission went so far as to note that the disparities between UHF and VHF stations had been largely ameliorated and the ability of UHF stations to compete against VHF stations had greatly improved (11 FCC Rcd 19949).

16. The most important change, however, occurred with the DTV transition, which the Commission had long recognized would likely eliminate the inferiority of UHF channels. In the *1998 Biennial Review Order,* even though the Commission ultimately decided to retain the discount because the digital television transition was not yet complete, it indicated that the discount's days were numbered. The Commission discussed at length its expectation that the transition to digital broadcasting would potentially ''rectify the UHF/VHF disparity'' and that ''the eventual modification or elimination of the discount for DTV [would] be appropriate.'' In the subsequent *2002 Biennial Review Order,* the Commission determined that the issue was ripe and that the forthcoming DTV transition would substantially equalize UHF and VHF signals. The DTV transition has borne out the Commission's expectation.

17. UHF spectrum is now highly desirable in light of its superior propagation characteristics for digital television. Since the 2009 DTV transition, 74 percent of the nation's television stations are now operating on UHF channels, and 80 percent of the aggregate television viewing population is served by UHF stations. As a result of the DTV transition, the number of UHF stations increased by 221 stations and the number of VHF stations decreased by 204 stations, indicating that over 200 stations, or approximately 15 percent of the total number of commercial television stations, switched spectrum bands in favor of UHF. In April 2010, Broadcasting & Cable noted that following the June 2009 DTV transition, the majority of U.S. TV stations had moved to UHF channels, which are better suited to broadcasting digital television at lower power level. Notably, the DTV transition preserved station coverage, and in many cases, allowed stations to improve coverage by upgrading their facilities, maximizing power, and capitalizing on improved propagation of digital television signals. Therefore, stations have enhanced their coverage and audience reach as a result of the DTV transition, both because of the technical superiority of digital broadcasts on UHF channels and as a result of the chance to maximize their signal coverage during the transition. The evidence clearly establishes that digital UHF operations do not suffer from the same technical limitations as analog UHF operations. This finding is consistent with past Commission decisions scrutinizing the necessity of the UHF discount and recognizing the increased economic viability and success of the UHF band.

18. Simply put, the UHF discount does not appropriately reflect the technical and economic reality of UHF facilities today. In fact, the discount impedes the objectives of the national audience reach cap by effectively expanding the 39 percent cap beyond even the level that Congress determined

was too high when it enacted the CCA. Continued application of the UHF discount seven years after the DTV transition has the absurd result of stretching the national audience reach cap to allow a station group broadcasting exclusively on UHF channels to actually reach up to 78 percent of television households, dramatically raising the number of viewers that a station group can reach and thwarting the intent of the cap.

19. While the discount was intended to make the calculation of an owner's audience reach better reflect the reality of the audience the stations actually reached, in current circumstances, applying the discount creates a loophole that allows owners to fail to count audience that the stations actually do reach. Continued application of the antiquated UHF discount now has the unintended consequence of significantly discounting a station's actual audience reach for purposes of the rule when in reality the station's audience reach is not diminished at all by the use of UHF technology, but rather improved.

20. Additionally, during the DTV transition, many stations that were broadcasting on VHF channels at the time the 39 percent cap was instituted shifted to UHF channels. Even after the transition, a number of stations that initially elected to operate on a VHF channel sought to relocate to a UHF channel to resolve technical difficulties encountered in broadcasting digitally on a VHF channel. Despite having signal coverage that was equal to, or even better than, its previous VHF channel, the former VHF station now received—for the first time—the benefit of the UHF discount, *i.e.,* a 50 percent reduction in the audience reach attributed to the station, all based on a discount intended to offset the inferiority of *analog* UHF signals. For instance, a licensee that traded an analog VHF station for a digital UHF station would now appear to have room to acquire additional stations under the 39 percent cap simply by virtue of having changed spectrum, even though the number of stations owned by the licensee and the audience reached by those stations remained the same. Such a result serves as an unwarranted windfall for stations that migrated from VHF to UHF in the DTV transition, in light of the general technical superiority of the digital UHF channels.

21. For example, in 2009, just prior to the DTV transition, Fox owned 27 stations with a total national audience reach of 37.22 percent before application of the UHF discount and 31.20 percent after application of the UHF discount. In 2010, immediately after the DTV transition, Fox continued to own 27 stations with a total national audience reach of 37.10 percent before application of the UHF discount. However, because five of Fox's stations switched from analog VHF channels to digital UHF channels in the transition, Fox's national audience reach calculation suddenly decreased with the benefit of the UHF discount, which allowed the station group to calculate its audience reach as only 24.75 percent—despite the fact that Fox still owned the same number of stations in the same markets reaching the same audiences. Although only five of Fox's stations switched from analog VHF to digital UHF channels in the DTV transition, these stations were all located in the top 10 DMAs, which account for a significant percentage of the television households in the nation. As a result, reducing the national audience reach by 50 percent for just a handful of stations in these larger markets had the effect of greatly reducing Fox's national audience reach calculation and potentially allowing significant additional consolidation, although it had no effect on its actual national audience reach. This example demonstrates the absurd results created by the continued existence of the discount.

22. We do not agree with commenters arguing that, apart from technical considerations, the discount remains necessary to promote competition, localism, and diversity, help non-network broadcast groups compete with stations owned and operated by the major broadcast networks, and foster the creation of new networks. Further, contrary to claims of some commenters, the Commission's decision in the *2002 Biennial Review Order* to continue the UHF discount for stations not owned and operated by the Big Four networks was not based on a finding that such stations continued suffering from economic handicaps. The Commission clearly articulated that the UHF discount was predicated on the competitive disparity arising from the technical differences between the two types of channels, and merely deferred a decision on eliminating the discount. Any competitive disparity between UHF and VHF flowed from the technological disparity.

23. As we have detailed above, following the transition to DTV, stations broadcasting on UHF spectrum are no longer competitively disadvantaged as compared to stations broadcasting on VHF spectrum. The record does not reflect evidence of any existing competitive disparity resulting from the continued deficiency of UHF signals. For example, no party has proffered evidence that advertisers routinely discount the prices paid for advertising on UHF stations versus VHF stations, as commenters alleged in the 2002 biennial review proceeding. Thus, we find no evidence that UHF stations today face a competitive disparity vis-à-vis VHF stations. In fact, as we note above, a number of former analog VHF stations chose to switch to UHF channels, further belying the suggestion that a competitive disparity persists between the two types of channels. We note further that the Commission has eliminated previously the historic steep discount in annual regulatory fees assessed for UHF stations, combining UHF and VHF stations into a single fee category beginning in Fiscal Year 2014, thereby eliminating a distinction based on the historical disadvantages of UHF.

24. Of course, this is not to say that all *stations* are now competitive equals. Disparities continue to exist between stations in terms of viewership, advertising revenue, retransmission consent fees, and programming, to name a few. But these competitive disparities are not the result of any current technical differences between UHF and VHF stations. Because UHF stations are no longer technologically disadvantaged, they can now compete effectively in a market with VHF stations. Disparities between stations today are the result of market competition, programming choices, network affiliation, and capitalization. We do not believe that retention of the UHF discount would resolve any of these competitive differences. Finally, we disagree with any claim that removing the discount would frustrate the original purpose of the national cap; instead, removing the discount will prevent networks from expanding their reach, and our grandfathering regime, discussed below, will ensure that broadcasters that otherwise would exceed the cap after the discount is eliminated—none of which are the Big Four networks—will be grandfathered.

25. Further, when the Commission stated in the *2002 Biennial Review Order* that the UHF discount continues to be necessary to promote entry and competition among broadcast networks, the DTV transition was still a number of years in the future. Contrary to the Commission's observations nearly a decade and a half ago, we do not see that the UHF discount is leading to the creation of new broadcast networks today. The record contains no evidence that new broadcast networks are being built today by assembling a national station group of UHF broadcast stations. Similarly, our most recent annual report on the state of competition among video

providers does not reflect a trend of emerging UHF broadcast networks. Instead, it appears that new programming networks are emerging as cable networks, online video programmers, and multi-cast digital networks—methods that do not rely on the UHF discount. Therefore, the record in this proceeding does not support a conclusion that perpetuation of the UHF discount would foster the creation of new broadcast networks.

26. We do not agree with commenters claiming that eliminating the UHF discount also requires an examination of the national audience reach cap. Reexamining the cap is not within the scope of the *NPRM,* and we decline to initiate a further rulemaking proceeding at this time for that purpose. No party has presented persuasive reasons for revisiting the national cap at this time, and doing so would be far more complex than the decision to eliminate the UHF discount, which we conclude clearly lacks any remaining justification. Initiating a new rulemaking proceeding to undertake a complex review of the public interest basis for the national cap, which is the media ownership limit that Congress examined most recently, would only delay the correction of audience reach calculations necessitated by the DTV transition. Delay would unnecessarily complicate efforts to bring the cap back into alignment with its stated level as broadcasters continue to increase their reach. Continued application of the discount absent its technical justification simply distorts the operation of the national audience reach cap by exempting the portions of the audience that are receiving a signal from being counted and allowing licensees that operate on UHF channels to reach more than 39 percent of viewers nationwide. Removal of the analog-era discount thus maintains the efficacy of the national cap. Although we do not foreclose the possibility of examining the national audience reach cap in the future, we find that action now to address the effects of the DTV transition by eliminating the UHF discount is appropriate.

27. In this regard, our elimination of the UHF discount is unlike our adoption of the attribution rule for television joint sales agreements (TV JSAs), which the Third Circuit, in its recent ruling in connection with our quadrennial review of the multiple ownership rules, held was contrary to our periodic review obligation under section 202(h) (824 F.3d 33). (''[T]he Commission cannot expand its attribution policies for an ownership rule to which § 202(h) applies unless it has, within the previous four years, fulfilled its obligation to review that rule and determine whether it is in the public interest.'') The Local TV ownership rule clearly is subject to periodic review under section 202(h), whereas the national television ownership cap is not subject to that obligation. In addition, unlike our initial action on TV JSAs, we are grandfathering station groups that will exceed the national cap after we eliminate the UHF discount, so elimination of the UHF discount will not require divestitures by station owners. Finally, as discussed above, retention of the UHF discount is indefensible, regardless of the level of the cap, because it is irrational in light of the digital transition. Therefore, we reject the recent contentions of the National Association of Broadcasters and Fox that the Third Circuit's recent decision supports a conclusion that we cannot eliminate the UHF discount separately from a review of the national audience reach cap.

28. *Grandfathering Existing Broadcast Station Combinations.* We adopt the proposal for grandfathering reflected in the *NPRM.* Specifically, we grandfather broadcast station ownership groups that would exceed the 39 percent national audience reach cap as a result of the elimination of the UHF discount as of September 26, 2013, the date of the *NPRM.* As further proposed, we also grandfather proposed station combinations for which an assignment or transfer application was pending with the Commission or that were part of a transaction that had received Commission approval as of that date if such station groups would otherwise exceed the cap. We require any grandfathered ownership combination subsequently assigned or transferred to comply with the national audience reach cap in existence at the time of the transfer of control or assignment of license. We find that these provisions provide an appropriate balance between the valid expectations of broadcast station ownership groups who exceed the cap solely as a result of the elimination of the UHF discount and the goals and purposes of the 39 percent national audience reach cap. For this reason, we refuse to adopt a more limited grandfathering regimen or no grandfathering provision whatsoever, as urged by some commenters.

29. No broadcasters will exceed the national cap following the elimination of the UHF discount with a combination that will not be fully grandfathered by this decision. No broadcast transactions since the release of the *NPRM* have resulted in an entity exceeding the national ownership cap. Thus, as a practical matter, there is no actual difference in grandfathering as of the date of the *NPRM* or the date of this *Report and Order.* Despite one commenter's claims, the Commission has continued to evaluate and approve broadcast transaction applications during the pendency of this proceeding. The grandfathering proposal adopted today protects the existing ownership structure as of the release of this *Report and Order* for all broadcast television station groups that will exceed the national audience reach cap upon the elimination of the UHF discount. Given the long history of notice that the UHF discount would be eliminated following the DTV transition and the potential for significant distortion of the national audience reach cap—indeed, the potential to double the national cap—the decision to use the date of the *NPRM* as the grandfathering date is fully supported and best serves the public interest.

30. Grandfathering as of the date of the *NPRM* is consistent with previous Commission decisions. For example, the grandfathering of interests in connection with the Commission's equity/debt plus rule and the attribution of Local Marketing Agreements (LMAs) each used the date of the notice in those proceedings as the cut-off date (14 FCC Rcd 12559 and 14 FCC Rcd 12903). Therefore, the Commission is not persuaded to designate the adoption date of this *Report and Order* as the grandfathering date for the UHF discount as some commenters request. Proposing such a grandfathering date would have provided an incentive to broadcasters to rush to engage in new transactions that could have diluted the effectiveness of the Commission's action to preserve the national audience reach cap by eliminating the outdated and technically unsupported UHF discount, perpetuating the distortive effect of this anachronistic regulation.

31. Further, this grandfathering date does not disrupt expectations because the industry has been on notice for at least 20 years that the UHF discount would likely be eliminated following the transition to DTV. The Commission further stated in the *1998 Biennial Review Order* that it expected to eliminate the UHF discount after completion of the DTV transition. The Commission, in fact, had previously decided to phase out the UHF discount, although that phase-out was rendered moot by congressional action. The grandfathering proposal adopted today ensures that, going forward, the national audience reach of broadcast station groups is reflected accurately in the broadcast television market while not penalizing those station groups which

exceed the national audience reach cap solely as a result of eliminating the UHF discount.

32. The grandfathering mechanism adopted here does not make the decision to eliminate the UHF discount retroactive. This action does not alter the past lawfulness of station combinations, does not impose any liability for having assembled station groups that would be prohibited going forward, and does not introduce any retrospective obligations for past conduct. As noted above, by grandfathering existing station groups that would exceed the national audience reach cap without the continued benefit of the UHF discount as of the date of the *NPRM,* we protect all existing broadcast television station ownership combinations that would otherwise exceed the cap from the future effect of this change, even though application of the revised rule to them would not be considered retroactive.

33. While some commenters urge adoption of permanent grandfathering of station groups that resulted in the creation of a new broadcast network, the Commission concludes that its decision not to allow the transferability of grandfathering is fully consistent with prior Commission practice regarding grandfathering; for example, the 1999 *Local TV Ownership Order* (14 FCC Rcd 12903) and the 2014 *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions Order* (29 FCC Rcd 6567). This approach strikes the appropriate balance between avoiding imposition of the hardship of divestiture on owners of existing station combinations who have long owned the combination in reliance on the rules, and moving the industry toward compliance with current rules when owners voluntarily decide to sell their stations. The grandfathering rule adopted preserves several existing combinations that resulted in new broadcast networks. Networks continue to exist with owned and operated station groups that comply with the national audience reach cap, or which are far below the nearly 65 percent nationwide coverage reached by one grandfathered station group. In addition, even if the Commission permitted a grandfathered station group to be transferred intact, there would be no obligation for the new buyer to maintain the stations' current network affiliation or the programming aired by the current licensee. Thus, we conclude that the public interest would not be served by allowing grandfathered combinations to be freely transferable in perpetuity where a combination does not comply with the national audience reach cap at the time of transfer or assignment simply because the combination once resulted in a new network.

34. Finally, we find that the record does not support one commenters' request that the Commission fashion a specific waiver standard for violations of the national audience reach cap that result from elimination of the UHF discount. Parties may always petition the Commission for a waiver under our existing rules if they believe unique circumstances warrant a waiver in a particular case. However, we expect such circumstances to be rare and isolated given that only a few existing broadcast television station ownership groups will exceed the cap after elimination of the discount. Ultimately, there are many different ways to structure an assignment or transfer of control that may present varying levels of concern regarding the potential impact of a proposed transaction. Given the fact-specific nature of our review of such transactions, a specific waiver standard is not appropriate. Instead, we conclude that a case-by-case approach will best serve the public interest by allowing the Commission to consider the unique circumstances of any proposed transaction involving grandfathered combinations and its potential impact on competition.

35. *VHF Discount.* We disagree with commenters claiming that eliminating the UHF discount also requires the concurrent adoption of a VHF discount. As noted above, the DTV transition has made UHF spectrum generally more desirable than VHF spectrum for purposes of digital television broadcasting. Yet, despite the challenges to the digital VHF band, the current record does not demonstrate that digital television operations in the VHF band are universally technically inferior to operations in the UHF band in a manner or to a degree that would warrant a discount. The record does not provide clear evidence that digital VHF stations consistently suffer from significant technical disadvantages in audience coverage sufficient to justify adoption of a discount. Further, the record lacks evidence that the economic viability of VHF stations would be threatened without a discount. Moreover, the Commission has already taken steps to assist individual VHF stations in addressing technical concerns. Accordingly, we decline to adopt a VHF discount at this time.

36. *Procedural Matters.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this *Report and Order* in MB Docket No. 13–236, which is summarized below.

37. This *Report and Order* does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.

38. *Final Regulatory Flexibility Analysis.* The Regulatory Flexibility Act (RFA) directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted in the *Report and Order.* The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

39. *Television Broadcasting.* The SBA designates television broadcasting stations with $38.5 million or less in annual receipts as small businesses. Television broadcasting includes establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The Commission estimates that there are 1,387 licensed commercial television stations in the United States. In addition, according to Commission staff review of the BIA/Kelsey Media Access Pro Television Database as of March 25, 2016, 1,264 (or about 91 percent) of the estimated 1,387 commercial television stations have revenues of $38.5 million or less and, thus, qualify as small entities under the SBA definition. We therefore estimate that the majority of commercial television broadcasters are small entities. The Commission has also estimated the number of licensed noncommercial educational (NCE) television stations to be 390. These

stations are non-profit, and therefore considered to be small entities.

40. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of small business is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

41. The *Report and Order* modifies the calculations underlying the national television multiple ownership rule as set forth above, which would affect reporting, recordkeeping, or other compliance requirements. The conclusion modifies several FCC forms and their instructions: (1) FCC Form 301, Application for Construction Permit for Commercial Broadcast Station; (2) FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License; and (3) FCC Form 315, Application for Consent to Transfer Control of Corporation Holding Broadcast Station Construction Permit or License. The Commission may have to modify other forms that include in their instructions the media ownership rules or citations to media ownership proceedings, including Form 303–S and Form 323. The impact of these changes will be the same on all entities, and we do not anticipate that compliance will require the expenditure of any additional resources as the proposed modification to the calculations underlying the national television multiple ownership rule will not place any additional obligations on small businesses.

42. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. The *NPRM* invited comment on issues that had the potential to have significant impact on some small entities.

43. The rule change adopted in this *Report and Order,* as set forth above, is intended to achieve our public interest goal of competition. By recognizing the technical advancements of the UHF band after the DTV transition, this *Report and Order* seeks to create a regulatory landscape that reflects the current value of UHF spectrum in order to better assess national television ownership figures. Further, this *Report and Order* complies with the President's directive for independent agencies to review their existing regulations to determine whether such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. By eliminating an outdated rule, we seek to reduce the costs and burdens of compliance on firms generally, including small business entities. And we find that the benefits of our decision to eliminate the UHF discount outweigh any costs or other burdens that may result from our action. In addition, the grandfathering proposal the Commission adopts in the *Report and Order* aims to create a more effective regulatory landscape by addressing current market realities. Overall, this *Report and Order* seeks to expand broadcast ownership opportunities for station owners, which includes small entities, by accurately reflecting broadcast television ownership in the digital age. Given that the technical justification for the UHF discount no longer exists, continued application of the discount stifles competition by encouraging consolidation instead of promoting new entrants in local broadcast television markets. Therefore, the Commission believes the rule change adopted in this *Report and Order* will benefit small entities, not burden them.

44. *Ordering Clauses.* Accordingly, *it is ordered* that, pursuant to the authority contained in Sections 1, 2(a), 4(i), 303(r), 307, 309, and 310 of the Communications Act of 1934, as amended, this *Report and Order is adopted.* The rule modification below shall be effective November 23, 2016.

It is further ordered that the commission shall send a copy of this *Report and Order* to Congress and to the Government Accountability Office pursuant to the Congressional Review Act.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer. Office of the Secretary.

List of Subjects in 47 CFR Part 73

Television, Radio.

For the reasons discussed in the preamble, The Federal Communication Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

■ 2. Amend § 73.3555 by revising paragraphs (e)(1) and (e)(2)(i) to read as follows:

§ 73.3555 Multiple ownership.

* * * * *

(e) * * *

(1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.

(2) * * *

(i) National audience reach means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license.

* * * * *

[FR Doc. 2016–25569 Filed 10–21–16; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 81, No. 205
Monday, October 24, 2016

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9190; Directorate Identifier 2016–NM–087–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2014–23–06, for certain Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. AD 2014–23–06 currently requires modifying the main landing gear (MLG) by installing a new bracket on the left and right lower aft-wing planks. Since we issued AD 2014–23–06, we have determined that it is necessary to require a different modification of the MLG. This proposed AD would require modification of the MLG with an improved design. We are proposing this AD to prevent incorrect installation of the brake hydraulic lines, which could cause the brakes and the anti-skid system to operate incorrectly, and result in catastrophic failure of the airplane during a high-speed rejected takeoff.

DATES: We must receive comments on this proposed AD by December 8, 2016.

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

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

For service information identified in this NPRM, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; Widebody Customer Response Center North America toll-free telephone 1–866–538–1247 or direct-dial telephone 1–514–855–2999; fax 514–855–7401; email *ac.yul@aero.bombardier.com*; Internet *http://www.bombardier.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9190; 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 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: Fabio Buttitta, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7303; fax 516–794–5531.

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–2016–9190; Directorate Identifier 2016–NM–087–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 November 5, 2014, we issued AD 2014–23–06, Amendment 39–18022 (79 FR 69037, November 20, 2014) (''AD 2014–23–06''). AD 2014–23–06 requires actions intended to correct an unsafe condition for certain Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes.

Since we issued AD 2014–23–06, we have determined that the modification required by AD 2014–23–06 is inadequate, and that it is necessary to require an improved modification of the MLG.

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2014–10R1, dated May 4, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. The MCAI states:

> Cases of inboard and outboard hydraulic brake lines connected to the incorrect port of the swivel assembly on the main landing gear were found in service. Cross-connected brake hydraulic lines can cause the brakes and/or the anti-skid system to operate incorrectly. During a high speed rejected take-off, inability for the brakes to operate correctly could be catastrophic. The original issue of this [Canadian] AD mandated the modification to prevent inadvertent cross-connection of the inboard and outboard hydraulic brake lines.
>
> Following the initial release of this [Canadian] AD, operators reported that the modifications required by Bombardier Service Bulletin (SB) 601R–32–110 Rev. NC., dated 19 December 2013, still have a potential for incorrect connection. Subsequently, the SB has been revised to introduce a modified design and this [Canadian] AD revision is issued to mandate the incorporation of the modified design.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for

and locating Docket No. FAA–2016–9190.

Related Service Information Under 1 CFR Part 51

Bombardier, Inc. has issued Bombardier Service Bulletin 601R–32–110, Revision C, dated May 4, 2016. The service information describes modifying the MLG by installing a block on the left and right lower aft-wing planks. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

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

Costs of Compliance

We estimate that this proposed AD affects 526 airplanes 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 $190 per product. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be $502,330, or $955 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

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) 2014–23–06, Amendment 39–18022 (79 FR 69037, November 20, 2014), and adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2016–9190; Directorate Identifier 2016–NM–087–AD.

(a) Comments Due Date

We must receive comments by December 8, 2016.

(b) Affected ADs

This AD replaces AD 2014–23–06, Amendment 39–18022 (79 FR 69037, November 20, 2014) (''AD 2014–23–06'').

(c) Applicability

This AD applies to Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, serial numbers 7003 and subsequent.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing gear.

(e) Reason

This AD was prompted by a report indicating that inboard and outboard hydraulic lines of the brakes were found connected to the incorrect ports on the swivel assembly of the main landing gear (MLG). We are issuing this AD to prevent incorrect installation of the brake hydraulic lines, which could cause the brakes and the anti-skid system to operate incorrectly, and result in catastrophic failure of the airplane during a high-speed rejected takeoff.

(f) Compliance

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

(g) Modification of the MLG

(1) For airplanes on which Bombardier Service Bulletin 601R–32–110, dated December 19, 2013, has been incorporated: Within 6,600 flight hours or 37 months after the effective date of this AD, whichever occurs first, modify the MLG, in accordance with Part B of the Accomplishment Instructions of Bombardier Service Bulletin 601R–32–110, Revision C, dated May 4, 2016.

(2) For airplanes on which Bombardier Service Bulletin 601R–32–110, dated December 19, 2013, has not been incorporated: Within 4,400 flight hours or 24 months after the effective date of this AD, whichever occurs first, modify the MLG, in accordance with Part A of the Accomplishment Instructions of Bombardier Service Bulletin 601R–32–110, Revision C, dated May 4, 2016.

(h) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraph (g)(1) of this AD, if those actions were performed before the effective date of this AD using Part B of Bombardier Service Bulletin 601R–32–110, Revision A, dated October 29, 2015; or Revision B, dated January 26, 2016.

(2) This paragraph provides credit for actions required by paragraph (g)(2) of this AD, if those actions were performed before the effective date of this AD using Part A of Bombardier Service Bulletin 601R–32–110, Revision A, dated October 29, 2015; or Revision B, dated January 26, 2016.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, 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 New York ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax

516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* As of the effective date of this AD, for any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO, ANE–170, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Airworthiness Directive CF–2014–10R1, dated May 4, 2016, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9190.

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; Widebody Customer Response Center North America toll-free telephone 1–866–538–1247 or direct-dial telephone 1–514–855–2999; fax 514–855–7401; email *ac.yul@aero.bombardier.com*; Internet *http://www.bombardier.com*. You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on October 12, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–25351 Filed 10–21–16; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 27, 73, and 76

[GN Docket No. 12–268, MB Docket No. 16–306; DA 16–1095]

Incentive Auction Task Force and Media Bureau Seek Comment on Post-Incentive Auction Transition Scheduling Plan

AGENCY: Federal Communications Commission.

ACTION: Proposed rule, request for comment.

SUMMARY: This document seeks comment on the proposal set forth by the Media Bureau, in consultation with the Incentive Auction Task Force, the Wireless Telecommunications Bureau, and the Office of Engineering and Technology, for developing a post-incentive auction transition scheduling plan. In preparing their submissions commenters should be mindful of the Commission's prohibited communications rule, which prohibits broadcasters and forward auction applicants from communicating any incentive auction applicant's bids or bidding strategies to other parties covered by the relevant rules.

DATES: Comments due on or before October 31, 2016 and reply comments due on or before November 15, 2016.

FOR FURTHER INFORMATION CONTACT: Evan Morris, Video Division, Media Bureau, Federal Communications Commission, (202) 418–1656 or Erin Griffith, Incentive Auction Task Force, Federal Communications Commission, (202) 418–2957.

ADDRESSES: You may submit comments, identified by GN Docket No. 12–268 and MB Docket No. 16–306, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web site: https://www.fcc.gov/*. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: *https://www.fcc.gov/ecfs/*.
- *Paper Filers:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *fcc504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, DA 16–1095, in GN Docket No. 12–268 and MB Docket No. 16–306; released on September 30, 2016. The full text of this document, as well as all omitted Illustrations, Figures and Tables are available on the Internet at the Commission's Web site at: *http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1003/DA–16–1095A1.pdf; https://www.fcc.gov/wireless/auction-1001* and selecting the ''Documents'' tab; or by using the search function for GN Docket No. 12–268, MB Docket No. 16–306 on the Commission's Electronic Comment Filing System (ECFS) Web page at *http://www.fcc.gov/cgb/ecfs/*. The full text is also available for public inspection and copying from 8:00 a.m. to 4:30 p.m. Eastern Time (ET) Monday through Thursday or from 8:00 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554 (telephone: 202–418–0270, TTY: 202–418–2555).

Synopsis

In the *Incentive Auction Report and Order* (*IA R&O*), 79 FR 48441, August 15, 2014, the Federal Communications Commission (Commission or FCC) delegated authority to the Media Bureau (the Bureau) to establish construction deadlines within the 39-month post-auction transition period for television stations that are assigned to new channels in the incentive auction repacking process. In delegating authority to the Bureau to establish construction deadlines within the transition period, the FCC directed the Bureau to tailor the deadlines to stations' individual circumstances. The Commission also determined that a phased construction schedule would facilitate efficient use of the resources necessary to complete the transition. In the *IA R&O* the FCC also directed the Bureau to account for ''the needs of forward auction winners and their construction plans.''

Based on the record to date and on staff analysis and computer modeling, the Bureau is developing a plan to create a phased transition schedule for broadcasters that are reassigned to a new channel in the repacking. Under this phased approach, stations will be assigned to one of 10 ''transition phases'' with sequential testing periods and deadlines, or ''phase completion dates.'' The phase completion date will be the date listed in each station's construction permit as its construction deadline and will be the last day that a station may operate on its pre-auction channel. A station ''must cease

operating on [its] pre-auction channel once [that] station begins operating on its post-auction channel or by the deadline specified in its construction permit for its post-auction channel, whichever occurs earlier.'' 47 CFR 73.3700(b)(4)(iii). We interpret ''begin operating'' to mean when the station begins providing a broadcast television service to the public on its post-auction channel, not simply testing equipment on that channel. We believe a phased approach will smooth the way for station coordination, promote efficient allocation of limited resources, limit the impact of the transition on consumers, and facilitate FCC monitoring to determine whether schedule adjustments are necessary during the course of the transition process. The proposed approach is also designed to provide information to stations, vendors, and other industry participants in a way that will allow them to plan for and respect the obligations and resource requirements of stations that are assigned to earlier phases. This approach will take into account our international obligations and the agreement to undertake in a joint repacking with Canada.

We seek comment on the proposed approach and the methodology described in Appendix A of the Public Notice for establishing a transition schedule, as well as the alternative constraints we present therein. Based on the development of the record and staff analysis, the Bureau will adopt a post-auction transition scheduling plan that will be used to create a phased transition and assign stations individual construction permit deadlines.

Post-Auction Transition Scheduling Process. The initial steps of the post-auction transition scheduling process will occur before the incentive auction closes. Once the final stage rule has been satisfied, no additional stages of the auction will be required. Therefore, as soon as the final stage rule is satisfied, the final television channel assignment plan will be determined. The Bureau will use the final channel assignments to establish a phased transition schedule for relocated stations and stations that voluntarily moved to a different band as part of the auction. We propose that the schedule be established using the methodology described in this Public Notice and Appendix A. We anticipate that the Bureau will be able to determine the final channel assignment plan and the phase assignments prior to the conclusion of the forward auction. Therefore, because we recognize the importance of providing broadcasters with as much time as possible to prepare for the transition, we intend to send each eligible station that will remain on the air after the auction a confidential letter identifying the station's post-auction channel assignment, technical parameters, and assigned transition phase. If a station is not reassigned to a new post-auction channel, its confidential letter will list the station's pre-auction channel and technical parameters.

Once the forward auction concludes, we will release the *Auction Closing and Channel Reassignment PN* (*Closing and Reassignment PN*), which will announce that the reverse and forward auctions have ended and specify the effective date of the post-auction repacking. The information provided in the confidential letter will be subject to change in the Closing and Reassignment PN, we do not anticipate significant changes. Among other things, the *Closing and Reassignment PN* will announce the post-auction channel assignment and technical parameters of every station eligible for protection in the repacking process that will remain on the air after the incentive auction. The *Closing and Reassignment PN* will also announce the transition phase, phase completion date, and testing period for each reassigned station. Stations reassigned to new channels will have three months from *the Closing and Reassignment PN* release date to file construction permit applications proposing modified facilities to operate on their post-auction channel facility specified in the *Closing and Reassignment PN. See* 47 CFR 73.3700(b)(1)(i)–(iii), (vi), (iv)(A). The Bureau will then issue each station a construction permit. The construction permit deadline will be the phase completion date for that station. Stations will be required to abide by the deadlines and requirements of the transition scheduling plan. A station that does not comply with the requirements of the plan may be subject to sanction or other action, as permitted under the Commission's rules. *See, e.g.,* 47 CFR 1.80; 47 CFR 73.3598(e).

As illustrated below, the transition phases will all begin at the same time but will have sequential phase completion dates. Each phase will have a defined ''testing period'' that ends on the phase completion date. While stations may engage in planning and construction activities at any time prior to their phase completion date, equipment testing on post-auction channels will be confined to the specified testing periods in order to minimize interference and facilitate coordination. Other than for the first phase, the testing period will begin on the day after the phase completion date for the prior phase. The proposed plan is premised on the likelihood that winning go off-air bidders have ceased operations on their pre-auction channels prior to the first transition phase testing period, either because they have relinquished their license and gone off air, or because they have implemented a channel sharing arrangement and are now operating on the shared channel.

Whether a station needs to coordinate with other stations during the testing period will depend on whether it is part of a ''linked-station set,'' that is, a set of two or more stations assigned to the same phase with interference relationships or ''dependencies.'' Section II of Appendix A describes dependencies in detail. Stations that are not part of a linked-station set may operate on their pre-auction channels and test on their post-auction channels during the testing period without the need for coordination. Conversely, stations that are part of a linked-station set must coordinate testing with other stations in the set so as to avoid undue interference and must transition to their post-auction channels simultaneously. In order to facilitate coordination, linked-station sets will be identified in the *Closing and Reassignment PN.* The graph below illustrates a hypothetical phased transition schedule under the Bureau's proposed approach. The relatively longer test period for stations in phase 2 is a result of the fact that this is the first phase in which ''complicated'' stations can be assigned. Thus, it is likely that there will always be a longer test period for stations.
[Illustration Omitted]

Phase Assignment and Scheduling Tools. The Bureau proposes to use two computer-based tools to establish a phased transition schedule. Consistent with the Commission's direction, we believe that these two tools will allow the Bureau to establish a transition schedule that takes into account the complexity of stations' individual circumstances, allocates resources fairly, and balances forward auction winners' needs with those of transitioning broadcasters. The first tool is the Phase Assignment Tool, which will assign television stations to transition phases. The Phase Assignment Tool is intended to group stations together in a way that will support an orderly, managed transition process based on a set of enumerated constraints and objectives. The second tool is the Phase Scheduling Tool, which will estimate the time required for stations in each phase to complete the tasks required to transition in light of resource availability. The Bureau will

use the Phase Scheduling Tool to guide it in establishing phase completion dates for each phase. [Illustration Omitted].

We propose to use mathematical optimization techniques in the Phase Assignment Tool to assign stations to transition phases based on a defined set of constraints and objectives. We propose specific constraints and objectives, including the priority of the objectives, in Appendix A. We believe that the constraints and objectives proposed will result in a solution that minimizes dependencies created by interference issues, ensures that the 600 MHz Band is cleared as expeditiously as possible, clusters groups of stations into the same phase to help manage scarce transition resources, and minimizes the impact of the transition on consumers.

After stations are assigned to phases, the Bureau proposes to use the Phase Scheduling Tool to help determine the phase completion date for each phase. By modeling the tasks required to complete the transition, and accounting for limited resources, this Tool estimates the total time necessary for stations within a phase to complete the transition process.

The Phase Scheduling Tool accounts for limited resources by constraining the amount of such resources available to stations within a phase at any given time. If a required resource is unavailable, the stations will obtain access to the required resource according to their ''simulation order,'' and the Tool will estimate the time required for all stations to complete the transition phase based on that order. The Bureau proposes to run the Phase Scheduling Tool with different simulation orders to produce a range of estimated times for each transition phase. By generating results for multiple simulation orders, the Tool produces a range of estimated completion times for each phase. The Bureau will use the resulting range of estimated times to guide its determination of a phase completion date for each transition phase.

Appendix A details the specific tasks or processes that we propose to model in the Phase Scheduling Tool for each stage of the transition process, as well as the estimated time and resource availability for each task. The proposed estimates are based on information from the Widelity Report, submissions from stakeholders, and informational discussions with tower crew companies, antenna and transmitter manufacturers, and broadcasters. We believe that the proposed estimates are conservative and reasonable.

Other Issues. Before transitioning to their post-auction channels, stations ideally should be able to test equipment on their new channels. During the transition, however, many stations would likely cause undue interference to one another if they test or operate on their post-auction channels without first coordinating with large numbers of other stations to avoid causing such interference. Appendix A sets forth in detail the results of the staff's analysis and modeling of transition-related interference relationships between stations.

The Commission has in the past allowed temporary increases in interference to broadcasters in order to facilitate transitions to new services. For example, the Commission permitted new wireless licensees in the 700 MHz Band to cause temporary increases of up to 1.5 percent interference to broadcasters. *Qualcomm Order* 21 FCC Rcd 11683 (2006). In doing so, the Commission balanced ''the public interest benefits of an accelerated deployment in the 700 MHz Band against the importance of sustaining a minimally disruptive transition to DTV for consumers'' and emphasized that it has a ''forward-looking preference toward those services that are the end-points'' of the transition. *Qualcomm Order* 21 FCC Rcd at 11697, para. 31. In addition, the Commission permitted three-way band clearing agreements that could result in up to two percent temporary interference to the population served of stations that were not parties to the agreement. *See* Upper 700 MHz Band 3rd R&O, 66 FR 10204, February 14, 2001; *Upper 700 MHz Band Recon Order,* 66 FR 51594, October 10, 2001. The Commission rejected broadcasters' arguments that the two percent standard was inappropriate because the interference permitted would be for the benefit of new wireless licensees and not broadcasters' efforts to transition to DTV, explaining that clearing the 700 MHz band was an integral part of the DTV transition.

The staff's analysis indicates that allowing temporary pairwise interference increases above the 0.5 percent authorized by the rules governing permanent interference, 47 CFR 73.616(e), is likely to significantly reduce inter-dependencies between stations, thereby reducing the amount of coordination needed to allow testing of a station's post-auction facility. During the post-auction transition the percentage of increased pairwise interference is relative to a station's pre-auction baseline interference-free population. We propose during the transition to allow temporary pairwise interference increases of up to two percent, which we believe will produce substantial benefits without undue disruption to television service during this limited period. Pairwise interference increases beyond the 0.5 percent permitted by the Commission's rules will not be permitted past conclusion of the post-auction transition period. Temporary pairwise interference increases of up to 2 percent could occur at any time during the transition on either a station's pre-auction and post-auction channels. It could affect both reassigned stations and those that will remain on their pre-auction channels.

Another means of reducing the size or number of linked-station sets, and facilitating a station's ability to operate on its pre-auction channel while testing on its post-auction channel, would be to assign some stations to temporary channels during the transition. A station assigned to a temporary channel would have to transition twice: Once to its temporary channel and then to its post-auction channel during a later transition phase. We do not propose to assign temporary channels as part of the phased transition scheduling plan. We tentatively conclude that the benefits of using temporary channels are not great enough to warrant their use in light of the potential burdens. For example, using temporary channels would require stations to move twice, which may confuse viewers. Stations would also need to acquire additional equipment, which would place additional demands on resources and increase overall transition costs. Nevertheless, we invite comment on using temporary channel assignments and on issues that would be raised if we were to do so. Whether we ultimately decide to use temporary channels as part of the phased transition scheduling plan depends on how the record develops and whether we adopt other, effective means of reducing the number and size of linked-station sets.

Should we decide to use temporary channel assignments, we tentatively conclude that temporary channels may be assigned to full power or Class A stations and may be located anywhere in the post-auction VHF or UHF television bands, as well as in the new 600 MHz wireless band. Temporary channel assignments would replicate pre-auction coverage area and population served and would be listed in the *Closing and Reassignment PN* along with ultimate post-auction channel assignments. A station would only be assigned a temporary channel within its post-auction band. We propose to limit such assignments to stations in complex ''cycles'' of inter-

dependency, which are discussed in detail in Appendix A. We also propose to limit such assignments to channels that are close to a stations' ultimate channel assignments, and to relatively low power stations (*e.g.,* Class A stations or other stations similar in power), in order to limit the associated burdens and costs. Because we anticipate that stations would need to commence operations on temporary facilities early in the transition, we propose to require that stations assigned to temporary channels apply for special temporary authority (STA) within 90-days of the release of the *Closing and Reassignment PN.* A licensee that is assigned a temporary channel must comply with all filing and notification requirements, construction schedules, and all other post-auction deadlines that would apply to construction of the station's ultimate post-auction facility. We do not believe that requiring broadcasters to license their temporary channel facilities is appropriate in light of the temporary nature of the operations.

If we decide to use temporary channel assignments, we tentatively conclude that stations will have must-carry rights on their temporary channels. We believe the statute may reasonably be interpreted to extend such rights. Section 614 of the Communications Act of 1934, as amended, defines an eligible full-power television station entitled to must-carry as one that is ''licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.'' Consistent with the broad definition of ''license'' in section 153 of the Act, we believe the term ''licensed'' in this context may be interpreted to include an STA. We also believe that the term ''channel regularly assigned to [the station's] community by the Commission'' in this context may be interpreted to encompass a temporary channel assignment. While this language could be read to refer to a channel allotted to a particular community in the DTV Table of Allotments (DTV Table), the FCC has explained that it ''will not use a codified Table of Allotments or rulemaking procedures to implement post-auction channel changes.'' *IA R&O* 79 FR at 48491. During the post-auction transition period, therefore, temporary or permanent channels will be ''regularly assigned'' to communities on a case-by-case basis in response to applications rather than by amending the DTV Table. Further, as a practical matter, channels assigned on a temporary basis would enable stations to serve the same coverage area and population as they did on their pre-auction channels, meaning that the stations will continue to serve the same communities of license set forth in the Table as they did before the auction.

We do not believe that MVPDs would be unduly burdened by extending must-carry rights to stations on temporary channels. MVPDs are eligible for reimbursement when they ''reasonably incur costs in order to continue to carry broadcast stations that are reassigned as a result of the auction.'' *IA R&O* 79 FR at 48497. Such costs include the reasonable costs to set up delivery of a signal that the MVPD is required to carry under the Commission's must-carry rules or under retransmission consent contracts. Under this standard, MVPDs likewise would be eligible for reimbursement of all eligible costs in order to continue to carry a reassigned station operating on a temporary channel. Finally, we believe that extending must-carry rights to a station's temporary facility will further the important interests Congress sought to advance through the must-carry provisions, specifically ''preserving the benefits of free, over-the-air local broadcast television and promoting the widespread dissemination of information from a multiplicity of sources.'' *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules,* 70 FR 14412, 14418, para. 35, March 22, 2005.

If we decide to use temporary channel assignments, we propose that any temporary channel assignments in the 600 MHz Band would be subject to the inter-service interference (ISIX) protections adopted in the *ISIX Third Report and Order,* 80 FR 71731, 71736–37, November 17, 2015, as well as the other interference protections provided for in our rules and any temporary pairwise interference adopted for the post-auction transition. Although STA operations are not protected against interference under our normal rules, we believe that the public interest would be served by extending the same protections to temporary channels that would apply to any licensed facility during the post-auction transition. In addition, a full power or Class A station operating on a temporary channel could displace a low power television (LPTV) station. Consistent with the Commission's previous interpretation, section 336(f)(7)(B) of the Act would not apply to temporary channel assignments for Class A stations for purposes of the post-auction transition because these temporary channels will be assigned by the Commission, not proposed by Class A licensees. *See IA R&O* 79 FR at 48463; 47 U.S.C. 336(f)(7)(B). We propose that an operating LPTV station displaced by a temporary channel assignment could file for a new channel during the post-auction LPTV displacement window. Alternatively, displaced LPTV stations could go silent or seek temporary authorization to operate its facility at variance from its authorized parameters in order to prevent interference. Depending on the station's proximity to Mexico or Canada, coordination approval may be required from that particular country.

The Commission anticipated the possibility of using temporary channels to facilitate the transition and stated that the reasonably incurred costs of equipment needed to move to temporary channels are eligible for reimbursement. *IA R&O* 79 FR at 48501. Thus, such costs would be eligible for reimbursement in the same manner as costs related to construction of permanent post-auction channel facilities. As discussed above, MVPDs likewise should be eligible for reimbursement of all eligible costs in order to continue to carry a reassigned station operating on a temporary channel.

As explained above, the *Closing and Reassignment PN* will announce the transition phase, phase completion date, and testing period for each reassigned station. We recognize that individual stations may wish to raise concerns regarding their particular phase assignments, phase completion dates, and/or testing periods once the *Closing and Reassignment PN* is released. In considering any such concerns, we must be mindful of the potential impact of requests for changes or adjustments on other stations and on the overall phased transition schedule. While we tentatively conclude that we will rely on existing rules and procedures to address any such concerns, we also seek comment on whether to establish an alternative process. If we take the former approach and allow stations to challenge the PN as it impacts them, should we waive any rules or procedures in order to facilitate the transition?

We recognize that some stations may seek to construct an expanded facility or alternate channel that differs from the technical parameters assigned in the *Closing and Reassignment PN.* Further, during the transition period some stations may request extensions of their construction deadlines and may seek authority to continue operating on their pre-auction channel after their phase completion date. While a station may

request an extension of its construction permit deadline as set forth in 47 CFR 73.3700(b)(5), grant of such a request only permits the station additional time to complete its construction on its final channel and does not permit a station to continue operating on its pre-auction channel. In order to do so a licensee must request special temporary authority (STA). In evaluating any such requests, we propose to examine the impact that grant of the request would have on the phased transition schedule; for example, by evaluating whether such modification may create new or affect existing dependencies (*i.e.,* daisy chains or cycles). Any requests for expanded facilities or alternate channels by stations in the border regions with Mexico or Canada will require coordination approval from the country in question. The Bureau will view favorably requests that are otherwise compliant with our rules and have little or no impact on the phase assignments or transition schedule. If an application for an alternate channel or expanded facilities is granted, the initial deadline listed in the construction permit for the alternate channel or expanded facilities will be the same as the deadline in the station's initial construction permit. Thus, any station requesting an expanded facility or alternate channel will be required to abide by the construction deadline and other transition schedule requirements applicable to the phase to which the station is assigned unless otherwise modified by the Bureau. Any request that the staff determines would be likely to delay or disrupt the transition, such as by causing pairwise interference above two percent to another station, creating additional linked-station sets, necessitating another station move to a different transition phase, or that is likely to cause a drain on limited transition resources required by other stations, will be viewed unfavorably. The Bureau will view requests that have such adverse effects on the transition schedule more favorably if the requesting station demonstrates that it has the approval of all the stations that would be affected if the request were granted, or it agrees to take steps during the transition period to mitigate the impact of the proposed request—such as by accepting additional levels of temporarily increased interference or operating at variance from its pre-auction licensed parameters (*i.e.,* operating with reduced facilities). After evaluation, the Bureau may choose to modify transition phase assignments and construction deadlines to enable grant of a request. If the Bureau determines that granting a particular request would not cause adverse effects on the transition schedule, or that granting a request would be beneficial to the transition plan, the Bureau may adjust the phase assignment of the requesting station, or if necessary, other stations as well. However, we propose that no station will be assigned to an earlier transition phase than it was originally assigned to without its consent. To the extent that the Bureau denies a request for a station to continue operating on its pre-auction channel past its phase completion date, the Bureau will work with the impacted licensee to remain on-air while construction of its post-auction facility is completed. Each circumstance will be evaluated on a case-by case basis.

Commenters should be mindful that Commission rules prohibit broadcasters and forward auction applicants from communicating any incentive auction applicant's bids or bidding strategies to other parties covered by the relevant rules. *See* 47 CFR 1.2205(b)(1), (c)(1), (c)(6)(ii). The relevant prohibitions will apply prior to, during, and after the period for comment. The prohibition covers related parties, as well as covered broadcast licensees and forward auction applicants. 47 CFR 1.2205(a)(1) and 1.2105(c)(5)(i).

We previously have cautioned that statements to the public may create a risk of prohibited communications when the public statement should be expected to result in a communication that violates the rule. Accordingly, comments submitted to the Commission may violate one of the prohibitions even though not made directly to another party covered by the rule. Moreover, a communication that does not explicitly state a bid or bidding strategy but conveys information that leaves little doubt about an incentive auction applicant's bids and bidding strategies may violate the rule regardless of the communicating party's intent.

A covered party may also violate the prohibition any time it conveys information that might communicate known past or future bids or bidding strategies of any other covered party. Information regarding past, as well as future, bids and bidding strategies is covered by the prohibitions. Furthermore, the prohibitions apply to more than a party's desired auction outcome and steps the party has taken or will take to achieve it. The fact that a party is not communicating its own bids or bidding strategies, or is communicating only the irrevocable results of another's bids or bidding strategies, will not preclude the statements from violating the prohibition. For example, a broadcaster that is not participating in the auction may not communicate that a prospective channel sharing partner no longer will need to share with it because it has exited the auction. Similarly, a forward auction applicant whose initial eligibility has decreased may not communicate that it has foregone prior plans to pursue particular markets due to reduced eligibility.

These prohibitions should not, however, preclude any party from addressing relevant issues regarding the post-auction transition. Until the final stage rule is met, all broadcasters reasonably might be expected to plan for a potential relocation to a new channel in their pre-auction band, regardless of participation in the reverse auction or current bidding status. Statements of general applicability, not related to a particular broadcaster's circumstances or a forward auction applicant's plans, generally should not disclose any incentive auction applicant's bids or bidding strategies. Furthermore, given that public statements regarding whether or not a broadcaster applied to participate in the incentive auction are not deemed to violate the rule, a broadcaster that has disclosed that it did not apply to participate will not disclose bids or bidding strategies by discussing the details of its own transition. For reasons already discussed, such a broadcaster that may share its post-auction channel with an auction participant must, however, exercise caution to avoid disclosing the bids or bidding strategies of its prospective channel partner. This is true with respect to statements regarding the technical interdependencies to be considered by the Phase Assignment Tool or the resource constraints relevant to the Phase Scheduling Tool, even if the statements might be applicable to the station's individual transition as well. A party's statements of general applicability will not violate the prohibition solely because they are consistent with its bids or bidding strategy. Rather, to be prohibited, statements must communicate bids or bidding strategies, either directly or by leaving little doubt regarding what they are, regardless of the lack of a direct statement.

Administrative Matters. The proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's ex parte rules. *See* 47 CFR 1.1200 *et seq.* Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different

deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with section 1.1206(b) of the rules. In proceedings governed by section 1.49(f) of the rules or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable.pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 through 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, Title II, 110 Stat. 857 (1996). The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). Written public comments are requested on the IFRA, and must be filed in accordance with the same filing deadlines as comments on the Public Notice, with a distinct heading designating them as responses to the IRFA. With respect to the Public Notice, an Initial Regulatory Flexibility Analysis (IRFA) under the Regulatory Flexibility Act is contained in Appendix B of the document.

Appendix A—Phase Assignment and Scheduling Tools

Appendix A sets forth a proposed methodology for assigning construction deadlines to stations based on the staff's analysis and the record developed to date. Potential ''dependencies,'' or interference relationships, between certain television stations on pre-auction and post-auction channels will impact the transition process. As the Commission recognized, stations with dependencies must coordinate in order to test equipment or begin operating on their new channels without causing interference. Coordination may involve stations agreeing to operate at lower power or accept increased interference for short periods of time while the stations involved are performing tests. Dependencies can involve numerous and/or distant stations, however, making successful coordination extremely challenging. The FCC staff has analyzed these dependencies to develop a means of breaking them in order to reduce the need for coordination and to make remaining coordination more manageable. These possible solutions that were considered include assigning stations to separate ''transition phases,'' allowing temporary interference increases, and assigning stations to temporary channels.

Under this proposal, stations would be assigned to a limited number of transition phases. The phases will begin at the same time, but have sequential end dates. Equipment testing on post-auction channels will be confined to set ''testing periods.'' With the exception of the first phase, the testing period for subsequent phases will begin on the day after the end of the preceding phase. Every station must cease operating on its pre-auction channel at the end of its assigned phase, also known as the ''phase completion date.''

The proposed methodology would utilize two computer-based tools to assign stations to phases and establish phase completion dates for each phase. First, stations would be assigned to phases using the Phase Assignment Tool, which applies optimization techniques to identify, among solutions that satisfy a set of defined rules or constraints, a solution that best meets a separate set of defined objectives. After stations are assigned to phases, the Phase Scheduling Tool would be used to help determine the phase completion date for each phase.

With the information provided in this Appendix, interested parties will have sufficient information to replicate the methodology proposed for determining the overall transition schedule. The Phase Assignment Tool implements the objectives and constraints described in this Appendix using commercially-available optimization software. The Phase Scheduling Tool leverages an open source discrete event simulation software package using inputs described in detail in this Appendix. The data presented in this Appendix is the output of applying this methodology to representative final television channel assignment plans for 114 MHz and 84 MHz spectrum clearing scenario and also making certain assumptions regarding Canada and Mexico based on ongoing coordination with those countries. As used herein, ''representative'' means consistent with the plans generated by the Commission's Final Television Channel Assignment Plan determination procedure based on numerous auction simulations conducted by the staff. The clearing target for Stage 2 of the auction has now been set at 114 MHz. We therefore are using 84 MHz and 114 MHz as representative examples. We note that we do not anticipate publicly releasing these plans or the underlying simulations, consistent with our practice in this proceeding of releasing such information as appropriate in the interest of transparency and in consideration of the ongoing, internal deliberations regarding it, as well as broadcasters' confidentiality interests in reverse auction participation. Interested parties can create their own television channel assignment plans for any spectrum clearing scenario by applying the Assignment Plan determination procedure to auction simulations based on their own assumptions of likely outcomes.

Section II: Dependencies and Means of Breaking Them. Before transitioning to their post-auction channels, stations ideally should be able to test equipment on their new channels. During the transition, however, there is a potential for undue interference between stations that are still operating on their pre-auction channels and stations testing or operating on their post-auction channels. The Commission's rules governing interference between stations before and after the post-auction transition will prevent undue interference between stations operating on their pre-auction channels and between stations operating on their post-auction channels, respectively. In developing a proposed transition plan, the staff has sought to avoid undue interference while providing as much flexibility as possible for stations to test equipment prior to commencing operations on their new channels. The staff's ''Precedence Daisy-Chain Graph'' explicitly captures any interference that may occur between stations operating on their pre-auction and post-auction channels.

The Graph is constructed as follows: Nodes are stations and a directed arc connects two nodes (say s and s') when station s cannot transition until station s' has transitioned to its post-auction channel because the current channel of station s' interferes with the future channel of station s. This relationship is called a dependency.

Example 1: Dependency. [Illustration Omitted]. Suppose Station A and Station B have co- and adjacent-channel interference restrictions on all channels. Station A is reassigned from channel 25 to channel 18. Station B is reassigned from channel 45 to channel 26. Station A must vacate channel 25 before Station B can move to channel 26 so that neither station will experience undue interference. Therefore, the graph includes a directed arc from Station A to Station B since Station A must transition before Station B (Station B is dependent on Station A in order to transition).

Example 2: Daisy-Chain. [Illustration Omitted]. Multiple dependencies can be connected, forming a daisy-chain. Example 2 illustrates a daisy chain of 4 stations. Station A must transition before Station B. Station B must transition before Station C. And Station C must transition before Station D. Thus, Stations A, B, and C all must transition before Station D can transition.

Daisy-chains can involve numerous stations and multiple transition dependencies. Figure 1 below illustrates a single daisy-chain involving 29 stations in the Northeast in a simulated outcome where the Commission repurposes 84 MHz of broadcast spectrum through the incentive auction. [Figure 1 Omitted]

Successful coordination to avoid undue interference among the stations illustrated in Figure 1 is likely to be extremely challenging, given the number of stations involved and their distance from one another. In order to reduce or eliminate the need for coordination, the chain could be broken by assigning stations to transition during different time periods or phases. At least 29 separate transition phases would be needed to break the chain completely so that every station in the chain could transition without the need for coordination. A large number of transition phases may undercut other potential transition goals, however, such as transitioning stations within the same region at the same time and avoiding the need for multiple channel rescans by viewers. In order to balance these goals, a certain number of stations within a daisy chain may be assigned to the same transition phase, thereby ''collapsing'' the daisy chain into a more manageable size. For example, the first five or ten stations in the 29-station daisy chain illustrated above could be assigned to the first transition phase. Each station in this collapsed daisy chain would have to coordinate with one or more of the other stations in the chain in order to test their equipment without undue interference. Moreover, as illustrated by Example 3 below, the staff's analysis indicates that certain dependencies, known as ''cycles,'' cannot be broken by assigning stations to different transition phases.

Example 3: Cycle. [Illustration Omitted]. Example 3 shows a cycle consisting of three stations. Station A needs to transition from channel 20 to channel 17; while Station B needs to transition from channel 28 to channel 20; while Station C needs to transition from channel 17 to channel 28. Because all three stations cannot operate on either channel 17, channel 20, or channel 28 simultaneously, they must transition from their pre-auction to their post-auction channels simultaneously in order to commence operation on their post-auction channel. They must also coordinate in order to test equipment on their post-auction channels without causing increased interference to one another. In such circumstances, the dependencies between stations cannot be broken by assigning stations to different transition phases. On the other hand, assigning the stations to the same transition phase may facilitate their ability to coordinate with one another.

Cycles of much greater complexity than Example 3 are likely to occur during the post-auction transition process. Figure 2 below shows another simulated outcome in which the auction repurposes 84 MHz of broadcast spectrum. The cycle consists of 196 stations and reaches from the Southeast region of the United States through the Northeast and into Canada. [Figure 2 Omitted].

The problem becomes more complicated when all dependencies are considered. Daisy-chains can intersect and overlap, creating a larger and more complicated daisy-chain. A cycle can also be part of a daisy-chain. Thus, hundreds of stations may be inter-dependent and one station may require tens (or even hundreds) of stations to transition first in order to be able to begin operating on its post-auction channel. Figure 3 below shows another simulated 84 MHz outcome with a set of 796 inter-dependent stations. [Figure 3 Omitted].

As indicated above, transition phases are a potentially useful tool to address dependencies between stations. Stations may be assigned to different phases in order to break daisy chains, or to the same phase in order to facilitate coordination by stations involved in a cycle, or to achieve other goals. We refer to inter-dependent stations assigned to the same phase as a ''linked-station set'' and the individual stations in the linked-station set as ''linked-stations.''

Another means of breaking dependencies is to allow temporary, limited increases in station-to-station (pairwise) interference that exceed the 0.5 percent allowed under the Commission's rules governing pre-auction and post-transition interference relationships. As discussed in the Public Notice, the Commission has previously allowed such temporary increases in pairwise interference above the 0.5 percent threshold in order to facilitate spectrum transitions. As shown below, the staff's analysis indicates that allowing temporary, limited increases in pairwise interference would significantly reduce the number of dependencies between stations and in turn reduce the size, number, and complexity of daisy chains and cycles. Additionally, the staff's analysis indicates that allowing temporary, limited increases in pairwise interference would not result in significant aggregate interference increases.

Another means of breaking dependencies would be to assign stations in complicated daisy chains or cycles to operate on temporary channels prior to transitioning to their post-auction channels. Stations assigned to temporary channels would have to ''move'' twice, first to their temporary channels and then to their ultimate post-auction channels. Below we illustrate how temporary channel assignments could be used to break large cycles.

Example 4: Temporary Channels. [Illustration Omitted]. In Example 4, nine stations are part of a complicated cycle and must coordinate their testing because no station can broadcast on its post-auction channel without causing undue interference with at least one other station in the set. However, if two of these stations are assigned to temporary channels (Station C and Station G), then the cycle is transformed into a collection of daisy chains in which stations at the same level of a daisy chain need not coordinate with one another in order to test equipment or operate on their post-auction channels. Since the longest chain in this example has five levels, stations could be assigned to five phases based on how far they are (in the dependence graph) from the stations placed on temporary channels.

Section III—The Phase Assignment Tool. Under the proposed methodology, stations would be assigned to a limited number of transition phases. Every station in a phase must cease operating on its pre-auction channel at the end of the phase, *i.e.,* the phase completion date. Stations would be assigned to phases using the Phase Assignment Tool. This Section discusses the Phase Assignment Tool as well as the proposed constraints (*i.e.,* rules by which all assignments generated by the proposed tool must abide) and objectives (*i.e.,* goals when creating the assignments). We begin by proposing specific constraints and objectives, followed by a discussion of the results of staff analysis illustrating the rationale underlying the proposal and the tradeoffs involved in choosing among different constraints and objectives. Proposed Constraints and Objectives. Based on the staff's analysis and the record developed to date, we propose the following constraints and objectives in assigning stations to phases.

Constraints: (1) A station cannot cause more than two percent new interference to another station during the transition. As discussed above, we believe that it is important both to avoid undue interference during the transition and to provide stations with as much flexibility as possible to test equipment on their post-auction channels before transitioning. Although stations may be able to achieve these goals through coordination, coordination may not be feasible in situations involving large-scale and complex dependencies among stations. As discussed in more detail in the next section, the staff's analysis indicates that allowing temporary, limited increases in pairwise interference would reduce the number and complexity of dependencies without resulting in significant aggregate interference increases. Doing so is also likely to promote other potential goals, such as prioritizing the clearing of the 600 MHz Band

and reducing the number of channel rescans. Although allowing higher levels of temporary interference—up to five percent—would further reduce dependencies, our proposal to allow no more than two percent represents a compromise between avoiding what the Bureau believes would cause undue interference and limiting dependencies. This proposal assumes that all winning bidders affecting the first phase of the transition who have agreed to go off-air completely, or that become a channel sharee of another station with a post-auction channel assignment, will have gone dark before the stations in the first transition phase begin testing of their equipment (*e.g.,* two months before the end of the first transition phase). This assumption is reasonable given the expected timeline for paying winning stations and the estimated time for the first phase to complete.

(2) No stations in Canada will be assigned to transition before the third transition phase and no Canadian stations will be assigned to a temporary channel. Due to dependencies between domestic and Canadian stations, a joint transition plan with Canada is necessary and is being developed by FCC and ISED. In keeping with our informal discussions with ISED Canada to date, stations in Canada have generally been assigned to later transition phases for this proposal. This constraint will promote efficient use of cross-border resources and respect the minimum notification periods to Canadian TV stations established in ISED's 600 MHz decision.

(3) There will be no more than 10 transition phases. While increasing the number of phases could decrease the number of linked-station sets in each phase, a large number of phases may undercut other transition goals, such as transitioning stations within the same region at the same time and avoiding the need for multiple channel rescans by viewers. We also believe that limiting the number of phases will facilitate monitoring of the transition process. We believe that limiting the number of transition phases to 10 strikes a reasonable balance between these goals. Canadian stations not impeding the transition of U.S. stations may be permitted to continue to operate beyond the 10th phase based on rules to be established in Canada.

(4) No U.S. stations will be assigned to temporary channels. Although we do not propose to assign stations to temporary channels, the attached PN invites comment on whether we should use temporary channels. In the event that temporary channels are used to reduce dependencies we propose to potentially apply one or more of the following additional constraints: (a) Only assign temporary channels to stations in complex dependencies. (b) Only assign temporary channels to stations that are in close proximity to the stations' ultimate post-auction channel assignments. As stated above, temporary channel assignments would requires stations to move twice. Requiring that the temporary channel be ''close'' to the ultimate channel may reduce the burden and expense associated with double moves. If such an approach is considered, we seek comment on what the definition of ''close'' should be. (c) Only assign temporary channels to stations with relatively low power (*e.g.,* Class A stations). This constraint could limit the cost of the purchase of broadband antennas that would be necessary for stations that must move twice. If such an approach is considered, we seek comment on what the definition of a ''relatively low power'' should be with regard to a Class A or full power station.

(5) All stations within a DMA will be assigned to no more than two different transition phases. While some parties have suggested that the Bureau could divide the country into specific regions for the transition, it is not possible to create a wholly regionalized plan that will respect interference constraints because the interference constraints create dependencies that may overlap geographic areas. The proposed DMA constraint provides similar benefits to those that would come from a purely regional approach. For example, taking a station's DMA into account clusters stations in a particular geographic area into the same transition phase. Doing this will make resource allocation more efficient—for instance, tower crews would be able to focus on multiple stations in a specific area during a single phase. Additionally, the constraint will benefit consumers by limiting the number of rescans the consumer will have to complete because of the transition. While this constraint potentially increases the number and/or size of linked-station sets within a transition phase, on balance we believe that the benefits to consumers and stations outweighs the burden caused by this constraint. Limiting each DMA to a single transition phase results in approximately two-thirds of all stations having to transition in the same phase, removing the benefits of a phased transition approach.

(6) The difference in the number of stations in the largest transition phase and the smallest transition phase will be no more than 30 stations. If it is not feasible to assign stations in such a way that the difference in the number of stations in the largest transition phase and the smallest transition phase is less than or equal to 30 stations, then an optimization will be performed minimizing the difference between the largest transition phase and smallest transition phase, and subsequent optimizations will be limited to no more than 1.1 times the number found in this optimization. This constraint will attempt to make the number of assigned stations in each of the phases somewhat equal, which in turn will help manage limited resources by ensuring that they can be spread more evenly across the transition phases.

(7) Every transitioning station will be assigned to one transition phase.

(8) No phase can have more than 125 linked-stations. The dependencies created by the interference constraints can affect a large number of stations across large geographic areas. This constraint will limit the effect of those dependencies and, to the extent that coordination is needed, facilitate a manageable transition process for broadcasters. Based on staff analysis, we believe the proposed 125-station limit strikes a balance between minimizing dependencies and other goals. If it is not possible to limit the number of linked-stations in a phase to 125, then we propose to apply an objective of minimizing the maximum number of linked-stations in any phase, and constrain all phases to no more than 1.2 times that maximum number.

(9) No station falling into the ''complicated'' category for purposes of the Phase Scheduling Tool can be assigned to Phase 1. The goal of this constraint is to allow adequate time to transition the most challenging stations and to prevent an early phase completion date to be delayed due to the most time consuming transitions.

Objectives: In order to identify a solution that best satisfies the Commission's transition goals, we propose to apply the following objectives to assignments or ''solutions'' identified by the Phase Assignment Tool that satisfy the constraints proposed above. The Phase Assignment Tool would prioritize the proposed objectives in the sequence listed below. Subsequent objectives would be constrained by prior objectives.

(1) Assign U.S. stations whose pre-auction channels are in the 600 MHz Band to earlier phases in order to clear the 600 MHz Band as quickly as possible, while simultaneously assigning all Canadian stations and U.S. stations whose pre-auction channel is in the remaining television bands (U.S. TV-band stations) to later phases, where possible. This objective would promote a number of goals. It would help to clear the 600 MHz Band first in order to open it up to wireless licensees to offer new innovative services. It would also prevent Canadian and U.S. stations from competing for limited resources and provide Canada with the time needed for its transition. The Phase Assignment Tool therefore gives weights to assignments where there are stations transitioning from the 600 MHz Band after transition Phase 8. Similarly, the Phase Assignment Tool gives weights to assignments where Canadian stations as well as U.S. TV-band stations are assigned to any transition phase earlier than Phase 9. The weights for stations not transitioning out of the 600 MHz Band before Phase 9 is significantly higher than the weights for U.S. TV-band stations or Canadian stations transitioning early. We propose the following weights to assignments: U.S. stations in the 600 MHz Band assigned to phase 9 would add a weight of 20; US stations in the 600 MHz Band assigned to phase 10 would add a weight of 200; US TV-band stations and Canadian stations assigned before phase 9 would add a weight of 1. The Phase Assignment Tool minimizes the sum of all weights incurred by the phase assignments.

(2) Minimize the sum, over all DMAs, of the number of times a DMA must rescan. This objective benefits consumers by minimizing the number of rescans necessary by viewers in a market and creates regionalized clusters that will make resource allocation more efficient. As in constraint #5 proposed above, the use of DMAs attempts to provide similar benefits to those that would flow from a purely regional approach.

(3) Minimize the total number of linked-stations. This proposed objective is different than constraint #8 proposed above, in that it would minimize the total number of linked-stations throughout all phases of the transition. This objective seeks to provide as

many stations as possible with the ability to test their equipment on their post-auction channel while simultaneously broadcasting on their pre-auction channel without the need to coordinate.

(4) Minimizing the difference between the number of stations in the largest transition phase and the smallest transition phase. Like constraint #6 proposed above, by minimizing this maximum difference, this objective attempts to reduce below 30 the maximum difference between the number of stations in different phases. We believe that evening out the number of stations assigned to each transition phase will help manage limited resources by ensuring that they can be spread more evenly across the transition phases.

We seek comment on these proposed constraints and objectives. Although the Phase Assignment Tool can enforce any of these constraints and objectives, some conflict with others and cannot be imposed simultaneously and others will have no impact on the solution if placed after a preceding objective.

The Phase Assignment Tool could also be used during the transition to modify phase assignments. We recognize that unforeseen events may occur during the transition that may warrant adjustments in order to ensure that the transition proceeds in a timely fashion. If we decide to use the Phase Assignment Tool during the transition to modify phase assignments, we propose to restrict reassignments to later transition phases in order to provide certainty to stations that any adjustments will not require them to transition earlier than their originally scheduled phase completion date.

Preliminary Results of Staff Analysis-Baseline Results. This section presents results from running the Phase Assignment Tool using representative final channel assignment plans, for both a 114 MHz and an 84 MHz spectrum clearing scenario. In each scenario, all of the constraints proposed above are satisfied and the proposed objectives were applied. We assumed that Canadian stations will be jointly transitioning with U.S. stations. All Canadian stations are included in the studies. Those stations that will remain on their channel but be required to convert to digital are not reflected at this time. However, the final joint transition plan and schedule will include all analog and digital Canadian stations. We also assumed that Mexican stations will have already completed their transition to their new channels below channel 37 prior to the end of the first phase.

Figures 4 and 5 below present histograms for the 114 MHz and 84 MHz cases, respectively, showing the total number of stations that transition in each phase and within each phase how many are (a) Canadian stations, (b) U.S. stations whose pre-auction channel is in the 600 MHz Band and (c) other U.S. stations. The figures show that the 600 MHz band is mostly clear of U.S.-based impairments by the end of Phase 8. Also, very few Canadian stations are assigned to early transition phases. Those Canadian stations that are assigned to early transition phases must transition earlier in order to allow U.S. stations or other Canadian stations to transition. Table 1 illustrates the number of stations that are part of linked-station sets in each of the two scenarios. [Figure 4, Figure 5, and Table 1 Omitted].

Preliminary Results with Modified Constraints. To illustrate the reasons underlying the constraints and objectives proposed above, this section presents comparable results under an 84 MHz clearing target scenario using alternative constraints. We chose to use the 84 MHz clearing target to illustrate these tradeoffs because the results are generally similar to those obtained using higher clearing targets. In this 84 MHz scenario the following constraints were applied instead of the proposed constraints above: (a) Instead of not allowing any temporary channel assignments, a small number of temporary channel assignments were allowed; (b) instead of allowing temporary pairwise interference increases of up to 2 percent, pairwise interference increases were limited to 0.5 percent and, conversely, allowed to go up to 5 percent; and (c) instead of requiring that all stations in a DMA be assigned to no more than two different transition phases, the restriction was tightened to assign all stations within a DMA to the same transition phase and, conversely, loosened to require that all stations in a DMA be assigned to no more than three different transition phases. The results of applying these alternative constraints are shown in the figures and tables below. We invite comment on whether any of these alternative constraints should be adopted.

Temporary Channel Assignments. Figure 6 below shows the impact of allowing 50 temporary channel assignments on the phase size distribution. Table 2 shows how allowing a small number of temporary channel moves can reduce the size of linked-station sets. The results in this table indicate that allowing up to 50 temporary channel assignments is likely to significantly reduce the size of the largest linked-station set, reduce the number of U.S. stations remaining in the 600 MHz Band in Phase 9, and reduce the number of DMAs requiring more than one rescan. [Figure 6 and Table 2 Omitted]

Pairwise Interference. Figures 7 and 8 and Table 3 below show the results if (a) only 0.5 pairwise interference increases are allowed on a temporary basis during the transition and (b) pairwise interference increases up to 5 percent are allowed. Figures 7 and 8 and Table 3 reflect that, as the amount of temporary pairwise interference allowed is increased, more U.S. TV-Band and Canadian stations transition in the final two phases, and fewer DMAs require more than one rescan. As compared to the 0.5 percent results, the higher interference levels substantially reduced the maximum number of linked-station sets. [Figure 7, Figure 8, and Table 3 Omitted]

Staff analysis also indicates that, when pairwise temporary interference is allowed to increase, aggregate interference levels (calculated consistent with the methodology presented in the Aggregate Interference PN) do not exceed the pairwise limits except for a few cases. In those few cases, the aggregate interference for any one station is never more than double the pairwise limit. Table 4 shows the results of the staff's analysis. [Table 4 Omitted].

DMA Restrictions. Requiring that all stations within a DMA be assigned to the same transition phase resulted in approximately two thirds of all stations being assigned to the same phase. Figure 9 illustrates this result under an 84 MHz scenario. [Figure 9 Omitted]. On the other hand, as shown in Figure 10 and Table 5 below, when stations in the same DMA are allowed to transition in up to three different phases, the number of DMAs requiring more than one rescan actually decreases compared to the baseline run. This is because allowing a few DMAs to be subject to three rescans gives the optimization software more flexibility to improve the percentage of DMAs that only require one rescan. Loosening this constraint also results in more stations moving out of the 600 MHz Band sooner. [Figure 10 and Table 5 Omitted].

Section IV: The Phase Scheduling Tool. After stations are assigned to phases by applying the Phase Assignment Tool described above, we propose to use the Phase Scheduling Tool to help determine the phase completion date for each phase. The Phase Scheduling Tool estimates the total time necessary for stations within a phase to perform the tasks required to complete the transition process. In this section, we discuss the Phase Scheduling Tool and the proposed inputs which include the specific tasks required for stations to transition and the estimated time required to complete each task.

The Phase Scheduling Tool models the various processes involved in a station transitioning to its post-auction channel. It divides these processes into two sequential stages: The ''Pre-Construction Stage'' and the ''Construction Stage.'' While separate processes within a stage may occur concurrently, such as equipment procurement and zoning applications, all processes within the Pre-Construction Stage must be complete before the station is ready to move to the Construction Stage. For example, in the model, the process of installing a new primary antenna cannot occur until after the new antenna is manufactured and delivered. A transition phase cannot end until all stations in the model assigned to that phase have completed both stages and are ready to operate on their post-auction channels.

Some processes require specialized resources that may be in limited supply. The Phase Scheduling Tool models these limited resources by constraining the amount available at any given time. If a station needs a constrained resource to complete a process, and the resource is unavailable because other stations are using it, the station is placed in a queue until the required resource is available. As described in more detail below, the processes within each phase are not designed to be a comprehensive listing of every task; we have instead separated those processes which need resources that are most limited in supply and therefore likely will have the biggest impact on scheduling.

In each Stage, the Phase Scheduling Tool uses two inputs: (1) The time it would take for a station to complete the tasks of that stage if all resources are available when needed; and (2) the estimated availability of

constrained resources. The Phase Scheduling Tool uses these inputs to calculate how long it will take each station within a transition phase to complete all work associated with both Stages. The output of the Tool is the estimated number of weeks from the start of the transition required for all stations assigned to a phase to complete all of the necessary transition tasks, test equipment on their post-auction channels, and be ready to operate on their post-auction channels.

Since it is not possible to know the exact order stations will begin each process, the Phase Scheduling Tool uses discrete event simulation to model this uncertainty. The Phase Scheduling Tool does assume, however, that a station assigned to an earlier phase will begin its Pre-Construction Stage processes requiring a constrained resource (*e.g.,* ordering an antenna) before a station assigned to a later phase. By assigning the station order within a transition phase randomly, called the ''simulation order,'' and simulating the transition processes, the Phase Scheduling Tool provides a single estimate of the time to complete each transition phase. By repeating this simulation multiple times with stations in the same phase entering the system in a new random simulation order, the Phase Scheduling Tool produces a range of completion times for each phase. The Bureau intends to use this range in determining appropriate phase deadlines given the composition of the individual stations in each phase.

The Phase Scheduling Tool also enables the staff to analyze the sensitivity of transition phase time estimates based on changes in input data. During the transition, as new information becomes available, the Tool can be rerun to assess the potential impact of unforeseen developments on the overall schedule.

The following subsections detail the specific processes or tasks that we propose to model for each stage, as well as the estimated time and resource availability for each process. The proposed estimates are based on data contained in the Widelity Report, submissions from stakeholders, and informational discussions with tower crew companies, other antenna and transmitter manufacturers, and broadcasters. We believe that the proposed estimates are conservative and that they reasonably capture each aspect of the transition. We invite comment on these proposed inputs. The final subsection shows sample outputs of the Phase Scheduling Tool for the two baseline Phase Assignment Tool runs set forth in the prior section.

Modeling the Transition Stages. As stated earlier, the individual tasks required for a station to complete its transition have been grouped into two stages: The Pre-Construction Stage and the Construction Stage. In the Pre-Construction Stage, a station completes two tasks: Ordering and delivery of the main and auxiliary antennas; and administration and planning work, which includes zoning, administration, legal, possible structural tower improvements, equipment modifications, and other activities. In the Construction Stage, a station completes two additional tasks: Construction-related work and tower crew work. This process is shown in Figure 11 below. [Figure 11 Omitted].

The Phase Scheduling Tool groups together all tasks within a stage that can be done regardless of how many other stations are performing similar tasks. However, since there are two constrained resources that are dependent on the actions of others (antenna deliveries and tower crew availability), these tasks are separated out and the model considers how resource availability impacts the total completion time for any station in either stage. We note that there are many other resources that are not specifically identified but are essential to completion of the transition process. Based on the staff's analysis and the record developed to date, resources such as auxiliary antenna manufacturing, transmitter manufacturing, transmission line manufacturing and RF component installers will not affect the time required for a station to complete its transition. The availability and manufacturing capacity of these resources have been identified as being sufficient to fulfill the expected demand during the transition (*i.e.,* these resources have been designated as being ''unconstrained'') and therefore are not broken out separately in the Phase Scheduling Tool. Instead, as illustrated in Figure 11, the tasks related to these unconstrained resources have been grouped into the general tasks of Administration/Planning, which is within the Pre-Construction Stage, and Construction-related Work, which is within the Construction Stage. The Phase Scheduling Tool uses conservative estimates for the time requirements in order to safely over-estimate the individual needs of each station.

Pre-Construction Stage Inputs. There are two components to the Pre-Construction Stage: (1) The time required for antenna equipment to be ordered, manufactured and delivered (a significant constraint); and (2) the time required for all other planning and administration activities necessary to prepare for construction (called ''Administration/Planning''). The Administration/Planning component includes zoning, administration, legal work, and pre-construction alterations to tower and transmitter equipment. Since administration and planning activities take place in parallel and the activities of one station are unlikely to impact the ability of others to perform the same activities, the model simply estimates the total time needed to complete all of these activities.

The proposed Phase Scheduling Tool categorizes stations based on the difficulty of completing these activities. The Commission used a similar ''bucketing'' approach for categorizing stations as was used when determining the Final Channel Assignment. Proposed time estimates were derived by taking estimates from Widelity and, where appropriate, adding ''slack'' time so that the overall estimate of the time required would be a conservative one. The proposed time estimates are shown in Table 6 below. [Table 6 Omitted].

The Administration/Planning time estimate sets the minimum amount of time required for a station to complete the Pre-Construction Stage. While Administration/Planning work is occurring, stations likely will place orders for their main antennas. The proposed time estimates for this component of the Pre-Construction Stage include manufacturing time once the antenna manufacturers receives orders from stations, as well as delivery time. If no station had to wait for its main antenna to be manufactured and delivered, then the maximum amount of time it would take any station to complete the Pre-Construction Stage would be the 72 weeks allotted for the complicated stations to complete their planning activities. However, the ability of manufactures to produce enough antennas may impact the overall schedule. Therefore, the Phase Scheduling Tool includes antenna manufacturing and delivery as a specific resource constraint. Each station within a Transition Phase must receive its antenna delivery in order for it to complete the Pre-Construction Stage.

Stations are divided into two categories, based on the assumption that manufacture and delivery of directional antennas for full power stations will require more time than for non-directional and Class A antennas (of either type). The time estimates shown in Table 7 are based on the assumption that the antenna manufacturers will begin manufacturing antennas as soon as the orders are received unless they are manufacturing at their current capacity. [Table 7 Omitted].

We also propose to include in the Phase Scheduling Tool a specific number of antennas that can be manufactured and delivered at any given time. Based on those numbers, some stations may be able to receive their antenna without waiting for any additional time, but other stations may have to wait for their antennas to be delivered. The Phase Scheduling Tool will place such stations in a queue until the antenna can be delivered, based on the station's assigned number in a simulation order. In addition, the Phase Scheduling Tool will assume that manufacturers have an inventory of 20 antennas at the start of the 39-month transition period, and that capacity will increase over the course of the transition period. These proposed assumptions are listed in Table 8 below. [Table 8 Omitted].

The completion of the Pre-Construction Stage for a given station is the maximum completion time for these two activities—either the time required for Administration/Planning activities or the time required for the manufacture and delivery of the antennas. For stations in early phases, the Pre-Construction Stage is usually the time required for Administration/Planning. For a station assigned to a later phase, the station will likely have completed the Administration/Planning activities before the delivery of its antenna, and therefore, its Pre-construction Stage will be completed when the antenna is delivered.

Construction Stage Inputs. The approach to modeling the Construction Stage is similar to that of the Pre-Construction Phase and consists of two activities: (1) The time to complete all general facets of construction (called ''Construction-Related Work''); and (2) the time required by tower crews to complete installation of equipment on the tower. As with Pre-Construction Stage activities, these activities can occur in parallel but the estimated completion time for the Stage is the time required to complete both these activities. In addition, like the

Administration/Planning category in the Pre-Construction Stage, the Construction-Related Work category is a catch-all category of work for the Construction Stage. The estimated time for this activity includes estimates of the time to complete all construction work and associated management and coordination activities. More specifically, Construction-Related Work includes estimates for the time associated with installing the transmitter components, combiners, RF mask filters and the transmission line to the tower base. Construction-Related Work also allows time for any possible installation of liquid cooling systems, AC power, and connection to remote control equipment and input signal connections if required. Finally, Construction-Related Work includes time required for performing any tower modifications and any final testing of the system. Table 9 proposes estimates of the time to complete all work included in the ''Construction-Related Work'' category. [Table 9 Omitted]

The Construction-Related Work estimates the minimum amount of time required for a station to complete the Construction Stage. The other process in the Construction Stage work is tower work. The time required for tower work is both tower and antenna specific. Table 10 lists the different characteristics that determine the amount of time required to perform tower work. [Table 10 Omitted]. If a station did not need to wait for an antenna crew to become available in order to complete its tower work, then the amount of time the station would take to complete the Construction Stage would be the larger of the time estimated for construction-related work and the time estimated for the station to complete work on its tower. However, not every station will be able to have a tower crew as soon as needed. The Phase Scheduling Tool will place any station that is waiting for a tower crew to become available in a queue until a crew becomes available, based on the station's assigned number in a simulation order. Stations will be removed from the queue according to their simulation order.

We propose to include in the Phase Scheduling Tool specific estimates regarding the number of available tower crews. The record developed to date reflects different estimates as to the number and types of tower crews that will be available. In light of the variance in these estimates, we propose to place tower crews into three buckets: One for U.S. crews capable of servicing towers that are particularly difficult to work on due to height or location; one for U.S. crews that are capable of servicing easier towers; and one for Canadian crews. U.S. stations on towers that are above 300 feet in height and that are top-mounted or located on a candelabra can only draw from the pool of U.S. crews that can handle such difficult sites. Other U.S. stations can only draw from the other pool of U.S. crews, on the assumption that these difficult site crews will be fully occupied. Canadian stations can only draw from the pool of Canadian crews. It is likely that crews will travel between countries, but separating the crews in this way provides a more conservative estimate of the number of crews available in each country. We expect that the number of crews will increase as the transition proceeds. The specific estimates we propose are set forth below in Table 11. We assume a conservative growth rate in U.S. tower crews of 5%, but no growth in Canadian crews (which is very conservative). [Table 11 Omitted].

Other assumptions incorporated into the proposed Phase Scheduling Tool are: (1) The estimated time required to complete work on a tower is reduced or discounted if more than one station on the tower is transitioning in the same phase. The Phase Scheduling Tool assumes that antenna installations will be performed by a single tower crew at the same time for all stations located on a given tower that are assigned to the same phase. The total estimated time for work on the tower will be the time required for the most difficult station plus 10 percent for the second station and five percent for each additional station up to an additional 30 percent. Based on informal discussions with industry and the record developed to date, we believe that these proposed discounts are appropriately conservative; (2) The Phase Scheduling Tool assumes that 75 percent of all stations (including those with a licensed auxiliary antenna) will need to install an auxiliary antenna. For each station requiring an auxiliary antenna, one additional week of tower crew time is added to the tower crew time, which is the maximum time required for an auxiliary in Table 10; and (3) Where the estimated time required to complete an entire transition phase is less than four weeks because much of the work (other than transmission testing on the new channel) has already occurred prior to the start date for the testing period of that transition phase, the testing period window is scaled up to allow four weeks for testing.

Sample Output. This section provides sample results of the Phase Scheduling Tool using the baseline Phase Assignment Tool results and the proposed constraints and objectives, as presented in section III above, for simulated auction outcomes involving 114 MHz and 84 MHz clearing scenarios. Although Tables 12 and 13 below show the average number of weeks from the start of the phase to phase completion date, each phase completion date will be listed as a specific date when the final transition plan is released. This outputs of each clearing scenario are represented graphically below in Figures 12 and 13, respectively. As both Figures show, stations within each phase cannot start testing until the prior phase is complete, and all stations within a phase must cease operating on their pre-auction channels by the phase completion date. [Table 12, Figure 12, Table 13, and Figure 13 Omitted].

Appendix B—Initial Regulatory Flexibility Act Analysis

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The following small entities, as well as an estimate of the number of such small entities, are discussed in the IRFA: (1) Full power television stations; (2) Class A TV and LPTV stations; (3) wireless telecommunications carriers (except satellite); (4) wired telecommunications carriers; (5) cable television distribution services; (6) cable companies and systems; (7) cable system operators (Telecom Act standard); and (8) direct broadcast satellite (DBS) service.

Need for, and Objectives of, the Proposed Rule Changes. The Federal Communications Commission (Commission) delegated authority to the Media Bureau (Bureau) to establish construction deadlines within the 39-month post-incentive auction transition period for television stations that are assigned to new channels in the incentive auction repacking process. Pursuant to the Commission's direction, the Bureau, in consultation with the Wireless Telecommunications Bureau, the Office of Engineering and Technology and the Incentive Auction Task Force, is developing a plan for a ''phased transition schedule.'' The purpose of the Public Notice is to invite comment on the plan.

The Bureau proposes to use a Phase Assignment Tool that will use mathematical optimization techniques to assign stations to one of 10 ''transition phases.'' The phases will have sequential testing periods and deadlines or ''phase completion dates.'' The phase completion date is the last day that a station in its assigned phase may operate on its pre-auction channel. The specific constraints and objectives the Bureau proposed are set forth in Appendix A to the Public Notice.

The Bureau proposes to use a Phase Scheduling Tool to estimate the time required for stations in each phase to complete the tasks required to transition to their pre-auction channels in light of resource availability. The Bureau will use the Phase Scheduling Tool to guide it in establishing phase completion dates for each phase. This is the date by which stations within that phase must cease operations on their pre-auction channels. Appendix A details the specific tasks or processes that the Bureau proposes to model in the Phase Scheduling Tool for each stage of the transition process, as well as the estimated time and resource availability for each task.

Under the proposed plan, the transition phases will begin at the same time, but will have sequential phase completion dates. Each phase will have a defined ''testing period,'' ending with the phase completion date. For each phase after the first one, the testing period will begin on the day after the phase completion date for the prior phase. The need for a station to coordinate with other stations during the testing period will depend on whether it is part of a ''linked-station set,'' that is, a set of two or more stations assigned to the same phase with interference relationships or ''dependencies.'' Stations that are not part of a linked-station set may test on their post-auction channels during the testing period without the need for coordination. Stations that are part of a linked-station set must coordinate testing with stations in the set so as not avoid undue interference. Such stations must transition to their post-auction channels simultaneously.

As part of the proposed plan, the Bureau is seeking comment on whether to allow

increased temporary interference between stations that are still operating on their pre-auction channels and stations testing or operating on their post-auction channels in order to facilitate the transition. The staff's analysis indicates that allowing temporary pairwise (station-to-station) interference above the 0.5 percent authorized by the rules governing increased permanent interference is likely to significantly reduce inter-dependencies between stations and facilitate coordination. The Bureau proposes to allow temporary pairwise interference increases of up to two percent, which it believes will produce substantial benefits without undue disruption to television service during the transition.

The Bureau is also considering whether to assign some stations to temporary channels during the transition as another means of reducing the size or number of linked-station sets and facilitate the transition. The Bureau proposes to limit such assignments, however, to stations in complex ''cycles'' of inter-dependency. The Bureau also proposes to limit such assignments to channels that are close to stations' ultimate channel assignments, and to relatively low power stations, in order to limit the associated burdens and costs. Temporary channel assignments would replicate pre-auction coverage area and population served. Because the Bureau anticipates that stations would need to commence operations on temporary facilities early in the transition, it proposes to require that stations assigned to temporary channels apply for special temporary authority (STA) within ninety days of the *Closing and Reassignment PN's* release.

If the Bureau decides to use temporary channel assignments, it tentatively concludes that stations will have must-carry rights on their temporary channels. It also proposes that any temporary channel assignments in the 600 MHz Band would be subject to the inter-service interference (ISIX) protections adopted in the ISIX Third Report and Order. In addition, a full power or Class A station operating on a temporary channel could displace a low power television (LPTV) station. An operating LPTV station displaced by a temporary channel assignment could file for a new channel during the post-auction LPTV displacement window. Alternatively, the displaced LPTV station could go silent or seek temporary authorization to operate its facility at variance from its authorized parameters in order to prevent interference.

Because the Commission anticipated the possibility of using temporary channels to facilitate the transition and stated that the reasonably incurred costs of equipment needed to move to temporary channels are eligible for reimbursement, the Bureau notes that such costs would be eligible for reimbursement in the same manner as costs related to construction of permanent post-auction channel facilities. Multichannel Video Programming Distributors (MVPDs) likewise should be eligible for reimbursement of all eligible costs in order to continue to carry a reassigned station operating on a temporary channel.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements. If the Bureau decides to use temporary channels, it proposes to require that stations assigned to temporary channels apply for special temporary authority (STA) within ninety days of the Closing and Reassignment PN's release. It also proposes that any temporary channel assignments in the 600 MHz Band would be subject to the inter-service interference (ISIX) protections adopted in the ISIX Third Report and Order, which requires, among other things, that wireless carriers prepare and retain a study demonstrating that no interference will be caused to full-power or Class A broadcast television stations. We believe the proposals will not have a significant effect on the reporting, recordkeeping, or other compliance requirements of regulatees. To the extent that commenters believe that any of the proposals would impose any additional reporting, recordkeeping, or compliance requirement on small entities, we ask that they describe the nature of that burden.

Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standard; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

In general, alternatives to proposed rules or policies are discussed only when those rules pose a significant adverse economic impact on small entities. In this context, however, the proposed transition plan set forth in the Public Notice generally confers benefits. In particular, the intent of the plan is to ensure that all stations are able to complete a timely transition to their final post-auction channel facilities without delay and without incurring unnecessary costs. Although certain proposals, such as the use of temporary channels and increased interference, may impose additional burdens on stations and MVPDs, the benefits of such proposals (such as further facilitating the successful post-incentive auction transition) outweigh any burdens associated with compliance. Further, eligible stations and MVPDs that incur additional costs associated with these proposals may seek reimbursement. In addition, if a full power or Class A station operating on a temporary channel displaces an operating LPTV station, such LPTV station could file for a new channel during the post-auction LPTV displacement window. Alternatively, the displaced LPTV station could go silent or seek temporary authorization to operate its facility at variance from its authorized parameters in order to prevent interference.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 2016–25333 Filed 10–21–16; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 81, No. 205
Monday, October 24, 2016

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

October 18, 2016.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: (1) 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; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by November 23, 2016 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Identifying Program Components and Practices that Influence SNAP Application Processing Timeliness Rates.

OMB Control Number: 0584–NEW.

Summary of Collection: The Food and Nutrition Act of 2008, as amended (the Act), Sections 11(e)(3) and 11(e)(9) requires that initial SNAP applications be processed and benefits provided within 30 days of the application date, or within 7 days for expedited applications.

Need and Use of the Information: FNS monitors compliance with statutory requirements through the SNAP Quality Control System (SNAP–QC). Results of these monitoring activities have indicated that a majority of States do not meet the acceptable performance criterion of a 95 percent application processing timeliness (APT) rate. The primary purpose of this study is to determine best practices for facilitating high APT rates, and to identify policy and procedural practices that hinder and facilitate high APT rates.

Description of Respondents: 51 State, Local or Tribal Government including the District of Columbia.

Number of Respondents: 360.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 536.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2016–25556 Filed 10–21–16; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

October 19, 2016.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) 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; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by November 23, 2016 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725—17th Street NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Importation of Mangoes from India

OMB Control Number: 0579–0312

Summary of Collection: Under the Plant Protection Act (7 U.S.C. 7701 *et seq),* the Secretary of Agriculture is authorized to carry out operations or measures to detect, eradicate, suppress, control, prevent, or retard the spread of plant pests new to the United States or not known to be widely distributed throughout the United States. The Animal and Plant Health Inspection Service (APHIS) regulates the importation of fruits and vegetables into the continental United States from certain parts of the world as provided in ''subpart-Fruit and Vegetables'' (7 CFR

319.56–1 through 319.56–75). In accordance with these regulations, mangoes from India may be imported into the United States only under certain conditions to prevent the introduction of plant pests into the United States.

Need and Use of the Information: APHIS amended the fruits and vegetables regulations to allow the importation into the continental United States of mangoes from India under certain conditions. As a condition of entry, the mangoes have to undergo irradiation treatment and be accompanied by a phytosanitary certificate with additional declaration statement providing specific information regarding the treatment and inspection of the mangoes and the orchards in which they were grown. The additional information collection activities include a preclearance workplan, trust fund agreement, compliance agreement, monitoring of inspections, orchard mutual agreement, irradiation treatment package labeling, recordkeeping, treatment certification, and denial and withdrawal certification. Failure to collect this information would greatly hinder APHIS' ability to ensure that mangoes from India are not carrying plant pests.

Description of Respondents: Business or other for-profit; Federal Government (Foreign)

Number of Respondents: 75

Frequency of Responses: Recordkeeping; Reporting: On occasion

Total Burden Hours: 1,710

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2016–25617 Filed 10–21–16; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Designation of Hastings Grain Inspection, Inc. To Provide Class X or Class Y Weighing Services

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: GIPSA is announcing the designation of Hastings Grain Inspection, Inc. (Hastings) to provide Class X or Class Y weighing services under the United States Grain Standards Act (USGSA), as amended.

DATES: Effective August 5, 2016.

FOR FURTHER INFORMATION CONTACT: Jacob Thein, 816–866–2223 or *FGIS.QACD@usda.gov*

SUPPLEMENTARY INFORMATION: In the December 9, 2014, **Federal Register** (79 FR 73027), GIPSA announced the designation of Hastings to provide official services under the USGSA, effective October 1, 2014, to September 30, 2017. Subsequently, Hastings asked GIPSA to amend their designation to include official weighing services. The USGSA authorizes the Secretary to designate authority to perform official weighing to an agency providing official inspection services within a specified geographic area, if such agency is qualified under 7 U.S.C. 79. Under 7 U.S.C. 79(a), GIPSA evaluated information regarding the designation criteria in section 7 U.S.C. 79 and determined that Hastings is qualified to provide official weighing services in their currently assigned geographic area.

Hastings' designation is amended to include Class X or Class Y weighing within their assigned geographic area, effective August 5, 2016, to September 30, 2017. Interested persons may obtain official services by contacting Hastings at (402) 462–4254.

Authority: 7 U.S.C. 71–87k.

Susan B. Keith,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2016–25613 Filed 10–21–16; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration (GIPSA)

Amendment to the Designation of Lincoln Grain Inspection Service, Inc.

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: Lincoln Grain Inspection Service, Inc.'s (Lincoln) geographical territory is amended to exclude the area previously designated to Lincoln within New Mexico and Texas. Lincoln advised GIPSA that they will cease providing official services in New Mexico and Texas on October 31, 2016. Accordingly, GIPSA is announcing that the portion of Lincoln's designation within New Mexico and Texas will be canceled effective October 31, 2016. The designation of Lincoln is from April 1, 2015, to March 31, 2018, but from October 31, 2016, through March 31, 2018 it will apply only to the geographic area listed below due to the voluntary cancellation. For official services in the New Mexico and Texas areas after October 31, 2016, contact Ron Metz, Field Office Manager, Domestic Inspection Operations Office, at telephone number 816–659–8400.

DATES: Effective October 31, 2016

FOR FURTHER INFORMATION CONTACT: Sharon Lathrop, 816–891–0415 or *FGIS.QACD@usda.gov*

SUPPLEMENTARY INFORMATION: The United States Grain Standards Act (USGSA) authorizes the Secretary to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services 7 U.S.C. 79(f). Under 7 U.S.C. 79(g), designations of official agencies are effective for no longer than five years, unless terminated by the Secretary, and may be renewed according to the criteria and procedures prescribed in 7 U.S.C. 79(f).

Lincoln Designation

Pursuant to 7 U.S.C. 79(f)(2), the following geographic area, in the States of Iowa and Nebraska, is assigned to this official agency.

In Iowa and Nebraska

Bounded on the North (in Nebraska) by the northern York, Seward, and Lancaster County lines; the northern Cass County line east to the Missouri River; the Missouri River south to U.S. Route 34. U.S. Route 34 east to Interstate 29; Bounded on the East by Interstate 29 south to the Fremont County line; the northern Fremont and Page County lines; the eastern Page County line south to the Iowa-Missouri State line; the Iowa Missouri State line west to the Missouri River; the Missouri River south-southeast to the Nebraska Kansas State line; Bounded on the South by the Nebraska-Kansas State line west to County Road 1 mile west of U.S. Route 81; Bounded on the West by County Road 1 mile west of U.S. Route 81 north to State Highway 8; State Highway 8 east to U.S. Route 81; U.S. Route 81 north to the Thayer County line; the northern Thayer County line east; the western Saline County line; the southern and western York County lines.

The following grain elevators are not part of this geographic area assignment and are assigned to: Omaha Grain Inspection Service, Inc.: Goode Seed & Grain, McPaul, Fremont County, Iowa; and Haveman Grain, Murray, Cass County, Nebraska.

Authority: 7 U.S.C. 71–87k.

Susan B. Keith,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2016–25610 Filed 10–21–16; 8:45 am]

BILLING CODE 3410–KD–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Montana Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Montana Advisory Committee to the Commission will convene at 11:00 a.m. (MDT) on Thursday, November 10, 2016, via teleconference. The purpose of the planning meeting is for the Advisory Committee to discuss the transcript and plan next steps regarding the briefing meeting on Border Town Discrimination Against Native Americans in Billings held on August 29, 2016.

DATES: Thursday, November 10, 2016, at 11:00 a.m. (MDT).

ADDRESSES: To be held via teleconference:

Conference Call Toll-Free Number: 1–888–430–8694, Conference ID: 1007989.

FOR FURTHER INFORMATION CONTACT: Malee V. Craft, Regional Director, *mcraft@usccr.gov*, 303–866–1040.

SUPPLEMENTARY INFORMATION: Members of the public may listen to the discussion by dialing the following Conference Call Toll-Free Number: 1–888–430–8694; Conference ID: 1007989. Please be advised that before being placed into the conference call, the operator will ask callers to provide their names, their organizational affiliations (if any), and an email address (if available) prior to placing callers into the conference room. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free phone number.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service (FRS) at 1–800–977–8339 and provide the FRS operator with the Conference Call Toll-Free Number: 1–888–430–8694, Conference ID: 1007989. Members of the public are invited to submit written comments; the comments must be received in the regional office by Monday, December 12, 2016. Written comments may be mailed to the Rocky Mountain Regional Office, U.S. Commission on Civil Rights, 1961 Stout Street, Suite 13–201, Denver, CO 80294, faxed to (303) 866–1050, or emailed to Evelyn Bohor at *ebohor@usccr.gov.* Persons who desire additional information may contact the Rocky Mountain Regional Office at (303) 866–1040.

Records and documents discussed during the meeting will be available for public viewing as they become available at *https://database.faca.gov/committee/meetings.aspx?cid=259* and clicking on the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Rocky Mountain Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *www.usccr.gov*, or to contact the Rocky Mountain Regional Office at the above phone number, email or street address.

Agenda:

Welcome and Roll Call
- Norma Bixby, Chair, Montana State Advisory Committee
- Malee V. Craft, Regional Director and Designated Federal Official (DFO)

Discuss Transcript of briefing on Border Town Discrimination in Montana
- Montana Advisory Committee

Next Steps
- Montana Advisory Committee

Open Session

Dated: October 18, 2016.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2016–25592 Filed 10–21–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Southeast Region Dealer and Interview Family of Forms.

OMB Control Number: 0648–0013.

Form Number(s): None.

Type of Request: Regular (revision and extension of a currently approved information collection).

Number of Respondents: 7,494.

Average Hours per Response: Dealer reporting for monitoring Federal fishery annual catch limits (ACLs): Coastal fisheries dealers reporting, 10 minutes; mackerel dealer reporting (non-gillnet), 10 minutes; mackerel dealer reporting (gillnet), 10 minutes; mackerel vessel reporting (gillnet), 10 minutes; wreckfish dealer reporting, 10 minutes.

Bioprofile data from Trip Interview programs (TIP): Shrimp Interviews, 10 minutes; Fin Fish interviews, 10 minutes.

Burden Hours: 5,028.

Needs and Uses: This request is for revision and extension of a current information collection.

Fishery quotas are established for many species in the fishery management plans developed by the Gulf of Mexico Reef Fish Fishery Management Council, the South Atlantic Fishery Management Council, and The Caribbean Fishery Management Council. The Southeast Fisheries Science Center has been delegated the responsibility to monitor these quotas. To do so in a timely manner, seafood dealers that handle these species are required to report the purchases (landings) of these species. The frequency of these reporting requirements varies depending on the magnitude of the quota (*e.g.,* lower quota usually require more frequent reporting) and the intensity of fishing effort. The most common reporting frequency is twice a month; however, some fishery quotas, (*e.g.,* the mackerel gill net) necessitate weekly or by the trip reporting.

In addition, information collection included in this family of forms includes interview with fishermen to gather information on the fishing effort, location and type of gear used on individual trips. This data collection is conducted for a subsample of the fishing trips and vessel/trips in selected commercial fisheries in the Southeast region and commercial fisheries of the US Caribbean. Fishing trips and individuals are selected at random to provide a viable statistical sample. These data are used for scientific analyses that support critical conservation and management decisions made by national and international fishery management organizations.

A revision to this collection is requested because the Caribbean Fishery Management Council has asked that commercial trip interviews be conducted for the fisheries of the Caribbean. In order to support this

request, the SEFSC has developed a sampling procedure which will require additional commercial trip interview with fishers in the Caribbean. This data collection is authorized under 50 CFR part 622.5.

Affected Public: Business or other for-profit organizations; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

This information collection request may be viewed at reginfo.gov. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Dated: October 18, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–25551 Filed 10–21–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE947

Caribbean Fishery Management Council (CFMC); Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Caribbean Fishery Management Council's (Council) Outreach and Education Advisory Panel (OEAP) will meet in Puerto Rico.

DATES: The meeting will be held on November 17, 2016, from 10 a.m. to 4 p.m.

ADDRESSES: The meeting will be held at CFMC Office, 270 Muñoz Rivera Avenue, Suite 401 San Juan, Puerto Rico 00918.

FOR FURTHER INFORMATION CONTACT: Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918, telephone: (787) 766–5926.

SUPPLEMENTARY INFORMATION: The OEAP will meet to discuss the items contained in the following agenda:

- Call to Order
- Adoption of Agenda
- OEAP Chairperson's Report
  - Status of:
    - Responsible Seafood Consumption Campaign
    - CFMC Report 157th Regular Meeting
    - 2017 Calendar
    - *Fuete y Verguilla* Issue Celebrating 40 Year of the Magnusson Stevens Act and the CFMC
    - Caribbean Fishery App
    - USVI Activities
    - Social Media for Council Communications with Stakeholders
    - PEPCO
    - MREP Caribbean
    - Island-Based Fisheries Management Plans (FMPs)
- Other Business

The meeting is open to the public, and will be conducted in English. Fishers and other interested persons are invited to attend and participate with oral or written statements regarding agenda issues.

Special Accommodations

This meeting is physically accessible to people with disabilities. For more information or request for sign language interpretation and/other auxiliary aids, please contact Mr. Miguel A. Rolón, Executive Director, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico, 00918, telephone (787) 766–5926, at least 5 days prior to the meeting date.

Dated: October 19, 2016.

Tracey L. Thompson,

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

[FR Doc. 2016–25653 Filed 10–21–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE971

Caribbean Fishery Management Council; Public Meetings

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

ACTION: Notice of scoping meetings on Federal permits to harvest queen snapper and cardinal snapper (Snapper Unit 2) from Puerto Rico EEZ waters.

SUMMARY: The Caribbean Fishery Management Council is considering establishing federal permits to harvest queen snapper and cardinal snapper (Snapper Unit 2) from Puerto Rico EEZ waters and is conducting scoping meetings to obtain public comments regarding this matter.

Dates and Addresses

November 14, 2016, 7 p.m.–10 p.m.—Corporación de Pescadores Unidos, Playa Húcares, Sector El Morillo, Carr. #3 Km. 65.9, Naguabo, Puerto Rico;

November 15, 2016, 7 p.m.–10 p.m.—Mayagüez Holiday Inn, 2701 Hostos Avenue, Mayagüez, Puerto Rico

FOR FURTHER INFORMATION CONTACT: Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 766–5926.

SUPPLEMENTARY INFORMATION: The goal of these scoping meetings is to allow the public to comment on the options listed below and to provide alternative options not yet considered by the Council and NMFS, on federal permits to harvest queen snapper and cardinal snapper (Snapper Unit 2) from Puerto Rico EEZ waters.

Actions and Alternatives

Action 1: Establish a commercial permit to harvest queen snapper and cardinal snapper (Snapper Unit 2 [SU2]) from the Puerto Rico exclusive economic zone (EEZ).

Option 1 (No Action): Do not require a commercial permit for harvest of queen snapper and cardinal snapper from the Puerto Rico EEZ.

Option 2: Require a commercial permit for harvest of queen snapper and cardinal snapper from the Puerto Rico EEZ. If Option 2 is selected, the Council must also select Option 3, 4, or 5.

Sub-option A: Establish an open access commercial permit for harvest of queen snapper and cardinal snapper from the Puerto Rico EEZ, with no limit on the number of permits that may be issued.

Sub-option B: Establish a limited entry commercial permit for harvest of queen snapper and cardinal snapper from the Puerto Rico EEZ in which, following some period of eligibility, no new permits would be issued. If this sub-option is chosen, guidelines for transferring permits would need to be established.

Option 3: Recognize the Puerto Rico Department of Natural and Environmental Resources (PRDNER) commercial queen snapper and cardinal snapper harvest permit as the required commercial permit for harvest of queen snapper and cardinal snapper in the Puerto Rico EEZ.

Option 4: Require a federal permit as the required commercial permit for harvest of queen snapper and cardinal snapper from the Puerto Rico EEZ.

Sub-option A: The required federal permit would be assigned to the individual fisher or to their business, and therefore valid regardless of the vessel from which the fisher is operating.

Sub-option B: The required federal permit would be assigned to a vessel and therefore valid for all licensed fishers operating from that vessel.

Option 5: Require either the Puerto Rico commercial queen snapper and cardinal snapper harvest permit, or a separate federal commercial SU2 harvest permit, for commercial harvest of queen snapper and cardinal snapper from the Puerto Rico EEZ.

Action 2: Permit eligibility.

Option 1 (No Action): Do not establish eligibility requirements for obtaining a commercial permit to harvest queen snapper and cardinal snapper from the Puerto Rico EEZ.

Option 2: Require the applicant for a commercial permit to harvest queen snapper and cardinal snapper from the Puerto Rico EEZ to hold a valid commercial license to fish in the U.S. EEZ.

Option 3: Require the applicant for a commercial permit to harvest queen snapper and cardinal snapper from the Puerto Rico EEZ to provide proof of previous queen snapper or cardinal snapper harvest activity during a specific period of time.

Sub-option A: Use the most recent three years of reported commercial landings of queen snapper and/or cardinal snapper to determine eligibility.

Sub-option B: Require the fisher to provide evidence of commercial queen snapper and/or cardinal snapper landings for at least three of the most recent five years for which landings data are available.

Sub-option C: Other.

Option 4: Require the applicant for a commercial permit to harvest queen snapper and cardinal snapper from the Puerto Rico EEZ to provide proof of average annual landings of queen snapper and cardinal snapper during the specific period of time identified in Option 3.[1]

Sub-option A: Minimum reported average annual landings of x pounds whole weight.

Sub-option B: Minimum reported average annual landings of y pounds whole weight.

Sub-option C: Minimum reported average annual landings of z pounds whole weight.

Option 5: Other/Alternate Eligibility Requirements?

[1] Choosing Option 4 assumes that Option 3 was first chosen.

Action 3: Allowable gear.

Option 1 (No Action): Do not define allowable gear for commercial harvest of queen snapper and cardinal snapper from Puerto Rico EEZ waters.

Option 2: Define the allowable gear for commercial harvest of queen snapper and cardinal snapper from Puerto Rico EEZ waters.

Sub-option A: Manual hook-and-line (no power retrieval).

Sub-option B: Bandit gear.

Sub-option C: Other.

Action 4: Allowable number of fishing trips.

Option 1 (No Action): Do not specify a maximum number of allowable fishing trips per year for commercial harvest of queen snapper and cardinal snapper from the Puerto Rico EEZ.

Option 2: Specify a maximum number of allowable fishing trips per year for commercial harvest of queen snapper and cardinal snapper from the Puerto Rico EEZ.

Sub-option A: x trips.

Sub-option B: y trips.

Sub-option C: z trips.

Sub-option D: Other.

Action 5: Commercial trip limits.

Option 1 (No Action): Do not specify a commercial trip limit for queen snapper and cardinal snapper harvested from the Puerto Rico EEZ.

Option 2: Specify a commercial trip limit (in pounds) for queen snapper and cardinal snapper harvested from the Puerto Rico EEZ.

Sub-option A: x pounds whole weight.

Sub-option B: y pounds whole weight.

Sub-option C: z pounds whole weight.

Sub-option D: Other.

Action 6: * Reporting method for fishers commercially permitted to harvest queen snapper and cardinal snapper from the Puerto Rico EEZ.

Option 1 (No Action): Do not establish a method to report landings of queen snapper and cardinal snapper from the Puerto Rico EEZ. PRDNER requires commercial catch reporting forms be used to report commercial harvest of queen snapper and cardinal snapper from Puerto Rico territorial and EEZ waters. Forms can be submitted in-person, by fax, or by email.

Option 2: Require permitted commercial fishers to report landings of queen snapper and cardinal snapper from the Puerto Rico EEZ using a form specifically designed for this purpose. Forms can be submitted in-person, by fax, or by email.

Option 3: Require fishers to record and report landings of queen snapper and cardinal snapper from the Puerto Rico EEZ using an electronic methodology. Forms will be submitted electronically via a pre-established communications conduit.

Option 4: Allow fishers reporting landings of queen snapper and cardinal snapper from the Puerto Rico EEZ to choose between the PRDNER commercial catch reporting form or an electronic reporting method.

* *Note*—Fishers permitted to harvest queen snapper and cardinal snapper from the Puerto Rico EEZ, who also harvest queen snapper and cardinal snapper from territorial waters, would be required to report landings from both areas.

Action 7: Frequency of reporting for fishers permitted to harvest queen snapper and cardinal snapper from Puerto Rico EEZ waters.

Option 1 (No Action): Do not specify a frequency for submitting landings reports of queen snapper and cardinal snapper. Puerto Rico requires that fishers submit landings reports of commercially harvested queen snapper and cardinal snapper from territorial waters within 60 days of the fishing activity.

Option 2: Require fishers permitted to harvest queen snapper and cardinal snapper from the Puerto Rico EEZ to submit landings reports daily, regardless of fishing activity or lack thereof.

Option 3: Require fishers permitted to harvest queen snapper and cardinal snapper from the Puerto Rico EEZ to submit landings reports within 24 hours following completion of a fishing trip for which queen snapper and cardinal snapper were harvested from the Puerto Rico EEZ.

Option 4: Require fishers permitted to harvest queen snpper and cardinal snapper from the Puerto Rico EEZ to submit landings reports weekly, regardless of fishing activity or lack thereof.

Option 5: Other?

Copy of the Scoping Document can be can be found at the Caribbean Council Web site at *caribbeanfmc.com.*

Written comments can be sent to the Council not later than November 30, 2016, by regular mail to the address below, or via email to *graciela_cfmc@yahoo.com*

Special Accommodations

These meetings are physically accessible to people with disabilities. For more information or request for sign language interpretation and other auxiliary aids, please contact Mr. Miguel A. Rolón, Executive Director, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico, 00918–1903, telephone (787) 766–5926, at least 5 days prior to the meeting date.

Dated: October 19, 2016.

Tracey L. Thompson,

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

[FR Doc. 2016–25654 Filed 10–21–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE981

Mid-Atlantic Fishery Management Council (MAFMC); Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC's) *Summer Flounder, Scup,* and *Black Sea Bass* Advisory Panel will hold a public meeting via Webinar, jointly with the Atlantic States Marine Fisheries Commission's (ASMFC's) *Summer Flounder, Scup,* and *Black Sea Bass* Advisory Panel.

DATES: The meeting will be held from 10:00 a.m. to 12:00 p.m. on Monday, November 14, 2016, to view the agenda, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will take place via Webinar with a telephone-only connection option. The Webinar can be accessed, at *http://mafmc.adobeconnect.com/scup_quota_ap/.* To access via telephone, dial 1–800–832–0736 and use room number 5068871.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331 or on their Web site, at *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION:

Agenda

The Mid-Atlantic Fishery Management Council's *Summer Flounder, Scup,* and *Black Sea Bass* Advisory Panel, together with the Atlantic States Marine Fisheries Commission's Advisory Panel, will meet on Monday, November 14, 2016, via Webinar (see **DATES** and **ADDRESSES**). The purpose of this meeting is to discuss potential changes to the dates of the three commercial quota periods for the *Scup* fishery. The three quota periods are each allocated a different percentage of the annual commercial quota and different possession limits are in effect during each period. The Council is considering initiating a framework adjustment, or other management action, to modify the dates of these quota periods, based on past requests from Advisory Panel members. During this meeting, advisors will review a preliminary analysis of the potential impacts of modifying the quota period dates, will review recommendations from the Monitoring Committee, and will have an opportunity to provide the Council with additional input on a potential management action to modify these dates.

A detailed agenda and background documents will be made available on the Council's Web site, at *www.mafmc,org*, prior to the meeting.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 business days prior to the meeting.

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

Dated: October 19 2016.

Tracey L. Thompson,

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

[FR Doc. 2016–25642 Filed 10–21–16; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE974

Fisheries of the Gulf of Mexico and South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 51 Stock Identification (ID) webinar for Gray Snapper.

SUMMARY: The SEDAR 51 assessment of the Gray Snapper will consist of a data workshop, a review workshop, and a series of assessment webinars.

DATES: The SEDAR 51 Stock ID webinar will be held November 14, 2016, from 1 p.m. to 3 p.m.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; telephone: (843) 571–4366; email: *Julie.neer@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the Stock ID webinars are as follows:

1. Participants will use review genetic studies, growth patterns, existing stock definitions, prior SEDAR stock ID recommendations, and any other relevant information on Gray Snapper stock structure.

2. Participants will make recommendations on biological stock structure and define the unit stock or stocks to be addressed through this assessment.

3. Participants will provide recommendations to address Council management jurisdictions, to support management of the stock or stocks, and specification of management benchmarks and fishing levels by Council jurisdiction in a manner consistent with the productivity measures of the stock.

4. Participants will document work group discussion and recommendations through a Data Workshop working paper for SEDAR 51.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: October 19, 2016.

Tracey L. Thompson,

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

[FR Doc. 2016–25651 Filed 10–21–16; 8:45 am]

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COMMODITY FUTURES TRADING COMMISSION

Final Order Regarding Southwest Power Pool, Inc. Application To Exempt Specified Transactions; Amendment to the Final Order Exempting Specified Transactions of Certain Independent System Operators and Regional Transmission Organizations

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is issuing a final order in response to an application from Southwest Power Pool, Inc. (''SPP'') to exempt specified transactions from certain provisions of the Commodity Exchange Act (''CEA'' or ''Act'') and Commission regulations. In this release, the Commission is also amending an order issued on March 28, 2013 exempting other specified transactions from certain provisions of the CEA and Commission regulations.

DATES: The effective date for the SPP Final Order and the Amended RTO–ISO Order is October 24, 2016.

FOR FURTHER INFORMATION CONTACT: Robert B. Wasserman, Chief Counsel, 202–418–5092, *rwasserman@cftc.gov,* Alicia L. Lewis, Special Counsel, 202–418–5862, *alewis@cftc.gov,* or Andrée Goldsmith, Special Counsel, 202–418–6624, *agoldsmith@cftc.gov,* Division of Clearing and Risk; David P. Van Wagner, Chief Counsel, 202–418–5481, *dvanwagner@cftc.gov,* or Riva Spear Adriance, Senior Special Counsel, 202–418–5494, *radriance@cftc.gov,* Division of Market Oversight, in each case at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Overview

The Commission is issuing a final order (''SPP Final Order'') in response to an application (''Exemption Application'')[1] from SPP to exempt certain Transmission Congestion Rights, Energy Transactions, and Operating Reserve Transactions (collectively, the ''SPP Covered Transactions'') from certain provisions of the CEA[2] and Commission regulations. The SPP Final Order exempts contracts, agreements, and transactions for the purchase or sale of the limited electric energy-related products that are specifically described within the SPP Final Order from certain provisions of the CEA and Commission regulations, with the exception of the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the Act, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations § 23.410(a) and (b), § 32.4, and part 180.[3] The exemption in the SPP Final Order also will exempt such transactions from private actions pursuant to CEA section 22.[4] To be eligible for the exemption contained in the SPP Final Order, the contract, agreement, or transaction must be offered or entered into in a market administered by SPP pursuant to SPP's tariff, rate schedule, or protocol (collectively, ''Tariff''), and the Tariff must have been approved by the Federal Energy Regulatory Commission (''FERC''). In addition, the contract, agreement, or transaction must be entered into by persons who are ''appropriate persons,'' as defined in sections 4(c)(3)(A) through (J) of the Act,[5] ''eligible contract participants,'' as defined in section 1a(18)(A) of the Act and Commission regulations,[6] or persons who are in the business of: (i) Generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system. The SPP Final Order also extends to any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to the SPP Covered Transactions. Finally, the SPP Final Order is subject to other conditions set forth therein. Authority for issuing the exemption is found in section 4(c)(6) of the Act.[7] The Commission issued a proposed order and request for comment with respect to SPP's Exemption Application (''SPP Proposed Order'') on May 18, 2015.[8]

[1] In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Southwest Power Pool, Inc., Oct. 17, 2013, as amended Aug. 1, 2014.

[2] 7 U.S.C. 1 *et seq.*

[3] The foregoing provisions are referred to as the ''Excepted Provisions.''

[4] 7 U.S.C. 25.

[5] 7 U.S.C. 6(c)(3)(A) through (J).

[6] 7 U.S.C. 1a(18)(A). *See also* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' 77 FR 30596, May 23, 2012.

[7] 7 U.S.C. 6(c)(6).

[8] Notice of Proposed Order and Request for Comment on an Application for an Exemptive Order From Southwest Power Pool, Inc. From Certain Provisions of the Commodity Exchange Act

A copy of the Exemption Application is available on the Commission's Web site at *http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/spp4camdappl080114.pdf;* the attachments to the Application are posted at *http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/spp4cattach-a-gg080114.pdf.* A chart submitted by SPP that sets forth the status of its implementation of the standards set forth in FERC Order No. 741 is posted at *http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/spp4caddendum_b.pdf.* A copy of the SPP Proposed Order is available at 80 FR 29490, and on the Commission's Web site at *http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2015-12346a.pdf.* A copy of the comment file with respect to the SPP Proposed Order is available on the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1586.*

The Commission is also amending an order issued on March 28, 2013 pursuant to the authority in section 4(c)(6) of the Act exempting specified electric energy transactions from certain provisions of the CEA and Commission regulations (''RTO–ISO Order'').[9] The RTO–ISO Order was issued in response to a consolidated petition from certain regional transmission organizations (''RTOs'') and independent system operators (''ISOs''). The RTO–ISO Order exempted contracts, agreements, and transactions for the purchase or sale of the limited electric energy-related products that are specifically described within the RTO–ISO Order from certain provisions of the CEA and Commission regulations, with the exception of the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the Act, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180. The RTO–ISO Order did not specifically mention CEA section 22. The Commission issued a proposal to amend the RTO–ISO Order and request for comment on May 9, 2016 (''RTO–ISO Order Proposed Amendment'').[10] The Commission is amending the text of the RTO–ISO Order to also exempt the transactions covered under that order from private actions pursuant to CEA section 22 (''Amended RTO–ISO Order'').

A copy of the RTO–ISO Order is available at 78 FR 19880 (April 2, 2013), and on the Commission's Web site at *http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-07634a.pdf.* A copy of the RTO–ISO Order Proposed Amendment is available at 81 FR 30245 (May 16, 2016), and on the Commission's Web site at *http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-11385a.pdf.* A copy of the comment file with respect to the RTO–ISO Order Proposed Amendment is available on the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1697.*

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I. Relevant Dodd-Frank Provisions[11]

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[12] Title VII of the Dodd-Frank Act amended the CEA and altered the scope of the Commission's

Pursuant to the Authority Provided in Section 4(c)(6) of the Act, 80 FR 29490, May 21, 2015. The SPP Proposed Order was published in the **Federal Register** on May 21, 2015.

[9] Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act, 78 FR 19880, Apr. 2, 2013. The RTO–ISO Order was published in the **Federal Register** on April 2, 2013.

[10] Notice of Proposed Amendment to and Request for Comment on the Final Order in Response to a Petition from Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act, 81 FR 30245, May 16, 2016. The RTO–ISO Order Proposed Amendment was published in the **Federal Register** on May 16, 2016.

[11] For a fuller discussion, *see* RTO–ISO Order at 19881–82.

[12] *See* Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/hr4173_enrolledbill.pdf.*

exclusive jurisdiction.[13] In particular, it expanded the Commission's exclusive jurisdiction, which had included futures traded, executed, and cleared on CFTC-regulated exchanges and clearinghouses, to also cover swaps traded, executed, or cleared on CFTC-regulated exchanges or clearinghouses.[14] As a result, the Commission's exclusive jurisdiction now includes swaps as well as futures.

The Dodd-Frank Act also added a savings clause that addresses the roles of the Commission, FERC, and state regulatory authorities as they relate to certain agreements, contracts, or transactions traded pursuant to the tariff or rate schedule of an RTO or ISO that has been approved by FERC or the state regulatory authority.[15] That savings clause, paragraph (I)(i) of CEA section 2(a)(1), preserves the statutory authority of FERC and state regulatory authorities over agreements, contracts, or transactions entered into pursuant to a tariff or rate schedule approved by FERC or a State regulatory authority, that are (I) not executed, traded, or cleared on an entity or trading facility subject to registration, or (II) executed, traded, or cleared on a registered entity or trading facility owned or operated by an RTO or ISO.[16] However, paragraph (I)(ii) of CEA section 2(a)(1) also preserves the Commission's statutory authority over such agreements, contracts, or transactions.[17]

The Dodd-Frank Act granted the Commission specific powers to exempt certain contracts, agreements, or transactions from duties otherwise required by statute or Commission regulation by adding, as relevant here, new section 4(c)(6) to the CEA. Section 4(c)(6) provides that the Commission shall, if certain conditions are met, issue exemptions from the ''requirements'' of the CEA for certain transactions entered into pursuant to a tariff or rate schedule approved or permitted to take effect by FERC or a state regulatory authority.[18]

The Commission must act ''in accordance with'' sections 4(c)(1) and (2) of the CEA when issuing an exemption under section 4(c)(6).[19] Section 4(c)(1) grants the Commission the authority to exempt any agreement, contract, or transaction or class of transactions, including swaps, from certain provisions of the CEA, in order to promote responsible economic or financial innovation and fair competition.[20] Section 4(c)(2)[21] of the Act further provides that the Commission may not grant exemptive relief unless it determines that: (1) The exemption would be consistent with the public interest and the purposes of the CEA; (2) the transaction will be entered into solely between ''appropriate persons'' as that term is defined in section 4(c);[22] and (3) the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.[23] In enacting section 4(c), Congress noted that the purpose of the provision is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.[24]

II. Background

A. RTO–ISO Order

On March 28, 2013, the Commission issued the RTO–ISO Order, which exempts specified transactions of particular RTOs and ISOs[25] from certain provisions of the CEA and Commission regulations. The scope of the RTO–ISO Order includes transactions that fall within the definitions of ''Financial Transmission Rights,'' ''Energy Transactions,'' ''Forward Capacity Transactions,'' or ''Reserve or Regulation Transactions''[26] (collectively, the ''RTO–ISO Covered Transactions'') and that are offered or sold in a market administered by one of the petitioning RTOs or ISOs pursuant to a tariff, rate schedule, or protocol that has been approved or permitted to take effect by FERC or PUCT.[27] In addition, to be eligible for the exemption in the RTO–ISO Order, all parties to the agreements, contracts, or transactions that are covered by the RTO–ISO Order must be: (1) ''appropriate persons,'' as defined in section 4(c)(3)(A) through (J) of the CEA; (2) ''eligible contract participants,'' as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or (3) in the business of (i) generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system.[28] To be eligible for the exemption in the RTO–ISO Order, the transactions must comply with all other enumerated terms and conditions in the RTO–ISO Order.[29] The relief granted in, and the conditions imposed by, the SPP Proposed Order are consistent with the analogous provisions of the RTO–ISO Order.

In the RTO–ISO Order, the Commission excepted from the exemption the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the Act, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.[30] The RTO–ISO Order did not discuss CEA section 22.

B. SPP Exemption Application

On October 17, 2013, SPP filed an Exemption Application[31] with the Commission requesting that the

[13] Section 722(e) of the Dodd-Frank Act.

[14] *See* 7 U.S.C. 2(a)(1)(A). The Dodd-Frank Act also added section 2(h)(1)(A), which requires swaps to be cleared if required to be cleared and not subject to a clearing exception or exemption. *See* 7 U.S.C. 2(h)(1)(A).

[15] *See* 7 U.S.C. 2(a)(1)(I).

[16] 7 U.S.C. 2(a)(1)(I)(i).

[17] *See* 7 U.S.C. 2(a)(1)(I)(ii).

[18] *See* 7 U.S.C. 6(c)(6). CEA section 4(c)(6) provides that the Commission shall issue an exemption only if the Commission determines that the exemption would be consistent with the public interest and the purposes of this Act. Moreover, the Commission must act in accordance with 4(c)(1) and 4(c)(2) when issuing an exemption under section 4(c)(6).

[19] 7 U.S.C. 6(c)(6).

[20] 7 U.S.C. 6(c)(1).

[21] 7 U.S.C. 6(c)(2).

[22] Section 4(c)(3) of the CEA further outlines who may constitute an appropriate person for the purpose of a particular 4(c) exemption and includes, as relevant to the SPP Final Order: (a) Any person that qualifies for one of ten defined categories of appropriate persons; or (b) such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

[23] 7 U.S.C. 6(c)(2).

[24] H.R. Rep. No. 102–978, 102d Cong. 2d Sess., 1992 U.S.C.C.A.N. 3179, 3213 (1992).

[25] Six entities (the ''Requesting Parties'') jointly filed a petition requesting the exemption provided in the RTO–ISO Order: Midwest Independent Transmission System Operator, Inc. (''MISO''), ISO New England, Inc. (''ISO NE''), and PJM Interconnection, L.L.C. (''PJM'') are RTOs subject to regulation by FERC; California Independent System Operator Corporation (''CAISO'') and New York Independent System Operator, Inc. (''NYISO'') are ISOs subject to regulation by FERC; and the Electric Reliability Council of Texas, Inc. (''ERCOT'') performs the role of an ISO and is subject to regulation by the Public Utility Commission of Texas (''PUCT''). *See* RTO–ISO Order at 19882.

[26] *See id.* at 19912–13.

[27] *See id.* at 19913. The exemption in the RTO–ISO Order also applies to ''any person or class of persons offering, entering into, rendering advice, or rendering other services with respect'' to any of the RTO–ISO Covered Transactions. *See id.* at 19912. These entities, including the six Requesting Parties (*see supra* note 25) are hereinafter referred to collectively as the ''RTO–ISO Covered Entities.''

[28] *See id.* at 19913–14.

[29] *See id.* at 19912–15.

[30] *See id.* at 19912.

[31] SPP filed an amended Exemption Application on August 1, 2014. Citations herein to ''Exemption Application'' are to the amended Exemption Application.

Commission exercise its authority under section 4(c)(6) of the CEA [32] and section 712(f) of the Dodd-Frank Act [33] to exempt certain contracts, agreements, and transactions for the purchase or sale of specified electric energy products, that are offered pursuant to a FERC-approved Tariff, from most provisions of the Act.[34] SPP is an RTO subject to regulation by FERC. As described in greater detail below, FERC encouraged the formation of RTOs to administer the electric energy transmission grid on a regional basis.[35]

SPP specifically requested that the Commission exempt from most provisions of the CEA certain ''transmission congestion rights,'' ''energy transactions,'' and ''operating reserve transactions,'' as those terms are defined in the Exemption Application, if such transactions are offered or entered into pursuant to a Tariff under which SPP operates that has been approved by FERC, as well as any persons (including SPP, its members and its market participants) offering, entering into, rendering advice, or rendering other services with respect to such transactions.[36] SPP asserted that each of the transactions for which an exemption is requested is: (a) Subject to a long-standing, comprehensive regulatory framework for the offer and sale of such transactions established by FERC, and (b) part of, and inextricably linked to, SPP's delivery of electric energy and the organized wholesale electric energy markets that are subject to regulation and oversight by FERC.[37] SPP expressly excluded from the Exemption Application any request for relief from the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the Act, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4 and part 180,[38] and such provisions explicitly have been carved out of the SPP Proposed Order. SPP asserted that it is seeking the requested exemption in order to provide greater legal certainty with respect to the regulatory requirements that apply to the transactions that are the subject of the Exemption Application.[39]

As discussed above,[40] the relief that SPP requested is substantially similar to the relief the Commission granted in the RTO–ISO Order.

C. SPP Proposed Order

On May 18, 2015, the Commission issued the SPP Proposed Order.[41] The exemptive relief proposed in the SPP Proposed Order was substantially similar to the exemptive relief granted by the Commission in the RTO–ISO Order.

1. Transactions Proposed To Be Exempted

In the SPP Proposed Order, the Commission proposed to exempt the purchase and sale of three types of SPP Covered Transactions: (1) Transmission Congestion Rights (''TCRs''), (2) Energy Transactions, and (3) Operating Reserve Transactions, each as defined below, pursuant to section 4(c)(6) of the CEA.[42]

A TCR [43] was proposed to be defined as ''a transaction, however named, that entitles one party to receive, and obligates another party to pay, an amount based solely on the difference between the price for electric energy, established on an electric energy market administered by SPP, at a specified source (*i.e.,* where electric energy is deemed injected into SPP's grid) and a specified sink (*i.e.,* where electric energy is deemed withdrawn from SPP's grid).'' [44] As set forth in the SPP Proposed Order, TCRs would be exempt only where each TCR is linked to, and the aggregate volume of TCRs for any period of time is limited by, the physical capability (after accounting for counterflow) of SPP's electric energy transmission system for such period; SPP serves as the market administrator for the market on which the TCRs are transacted; each party to the transaction is a market participant of SPP (or is SPP itself) and the transaction is executed on a market administered by SPP; and the transaction does not require any party to make or take physical delivery of electric energy.[45]

''Energy Transactions'' were proposed to be defined as transactions in the SPP ''Day-Ahead Market'' [46] or ''Real-Time Balancing Market,'' [47] as those terms are defined in the SPP Proposed Order, for the purchase or sale of a specified quantity of electric energy at a specified location (including virtual bids and offers) where the price of electric energy is established at the time the transaction is executed.[48] Performance occurs in the Real-Time Balancing Market by either the physical delivery or receipt of the specified electric energy or a cash payment or receipt at the price established in the Day-Ahead Market or Real-Time Balancing Market; and the aggregate cleared volume of both physical and cash-settled energy transactions for any period of time is limited by the physical capability of the electric energy transmission system operated by SPP for that period of time.[49]

''Operating Reserve Transactions'' were proposed to be defined as transactions:

(1) In which SPP, for the benefit of load-serving entities and resources, purchases, through auction, the right, during a period of

[32] 7 U.S.C. 6(c)(6).

[33] *See* section 712(f) of the Dodd-Frank Act.

[34] *See* Exemption Application at 1.

[35] *See id.* at 2 n.7.

[36] *See id.* at 11–15.

[37] *See id.* at 17.

[38] *See id.* at 1.

[39] *See id.* at 11.

[40] *See supra* section II.A.

[41] 80 FR 29490 (May 21, 2015).

[42] *Id.* at 29493–94, 29516–17. As set forth in the SPP Proposed Order, SPP represents that the terms ''Transmission Congestion Rights,'' ''Energy Transactions,'' and ''Operating Reserve Transactions'' are SPP's equivalent of the following terms set forth in the RTO–ISO Order: ''Financial Transmission Right,'' ''Energy Transactions,'' and ''Reserve or Regulation Transactions,'' respectively. SPP also avers that its transactions are defined in a manner consistent with the terms set forth in the RTO–ISO Order. *Id.* at 29493 n.51.

[43] As set forth in the SPP Proposed Order, SPP's markets will also include Auction Revenue Rights (''ARRs''). ARRs are allocated to transmission customers based on historical network load or transmission service reservations (or equivalent service taken under a grandfathered agreement between an SPP transmission owner and a customer). ARRs are granted exclusively to transmission service customers (*i.e.,* not to other market participants or speculators) based on their transmission service (or grandfathered service) and are subject to SPP's simultaneous feasibility analysis of the capability of the SPP Transmission System. ARRs are not traded in SPP's market; instead, ARRs entitle the holder to a share of revenues from SPP-administered transmission congestion right auctions or may be ''self-converted'' at the customer's election into a transmission congestion right. *Id.* at 29493 n.52.

[44] *Id.* at 29493; *see also id.* at 29517. The proposed definition of TCR is similar to the definition of financial transmission right (''FTR'') in the RTO–ISO Order. However, the proposed definition of TCR does not include TCR options, whereas the RTO–ISO Order's definition of FTR includes such rights in the form of options. *Id.* at 29493 n.53; *cf.* RTO–ISO Order at 19913 (defining the term FTR to include FTRs and FTRs in the form of options).

[45] 80 FR at 29493.

[46] ''Day-Ahead Market'' was defined in the SPP Proposed Order as ''an electric energy market administered by SPP on which the price of electric energy at a specified location is determined, in accordance with SPP's Tariff, for specified time periods, none of which is later than the second operating day following the day on which the Day Ahead Market clears.'' *Id.* at 29517.

[47] ''Real-Time Balancing Market'' was defined in the SPP Proposed Order as ''an electric energy market administered by SPP on which the price of electric energy at a specified location is determined, in accordance with SPP's Tariff, for specified time periods within the same 24-hour period.'' *Id.*

[48] *Id.* at 29493; *see also id.* at 29517. The definition of Energy Transactions is similar to the definition used by the Commission in the RTO–ISO Order. *See* RTO–ISO Order at 19913.

[49] 80 FR at 29493; *see also id.* at 29517.

time as specified in SPP's Tariff, to require the seller of such right to operate electric energy facilities in a physical state such that the facilities can increase or decrease the rate of injection or withdrawal of a specified quantity of electric energy into or from the electric energy transmission system operated by SPP with:

(a) Physical performance by the seller's facilities within a response time interval specified in SPP's Tariff (Reserve Transaction); or

(b) prompt physical performance by the seller's facilities (Area Control Error Regulation Transaction);

(2) For which the seller receives, in consideration, one or more of the following:

(a) Payment at the price established in SPP's Day-Ahead or Real-Time Balancing Market, as those terms are defined in the SPP Proposed Order, price for electric energy applicable whenever SPP exercises its right that electric energy be delivered (including ''Demand Response,'' as defined in the SPP Proposed Order);

(b) Compensation for the opportunity cost of not supplying or consuming electric energy or other services during any period during which SPP requires that the seller not supply energy or other services;

(c) An upfront payment determined through the auction administered by SPP for this service;

(d) An additional amount indexed to the frequency, duration, or other attributes of physical performance as specified in SPP's Tariff; and

(3) In which the value, quantity, and specifications of such transactions for SPP for any period of time shall be limited to the physical capability of the electric energy transmission system operated by SPP for that period of time.[50]

Finally, in the SPP Proposed Order, the Commission clarified that financial transactions that are not tied to the allocation of the physical capabilities of an electric energy transmission grid would not be suitable for exemption, and were therefore not covered by the SPP Proposed Order, because such activity would not be inextricably linked to the physical delivery of electric energy.[51]

2. Conditions to the SPP Proposed Order

In the SPP Proposed Order, the Commission proposed four conditions, each of which is consistent with the RTO–ISO Order. First, the Commission proposed that all parties to the agreements, contracts, or transactions that are covered by the SPP Proposed Order must be ''appropriate persons,'' as such term is defined in sections 4(c)(3)(A) through (J) of the Act, ''eligible contract participants,'' as such term is defined in section 1a(18)(A) of the Act and in Commission regulation 1.3(m),[52] or persons who are in the business of: (i) Generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system.[53]

Second, the Commission proposed that the agreements, contracts, or transactions that are covered by the SPP Proposed Order must be offered or sold pursuant to SPP's Tariff, which has been approved or permitted to take effect by FERC.[54]

Third, the Commission proposed that neither SPP's Tariff nor other governing documents may include any requirement that SPP notify a member prior to providing information to the Commission in response to a subpoena or other request for information or documentation.[55]

Finally, the Commission proposed that information-sharing arrangements that are satisfactory to the Commission between the Commission and FERC must remain in full force and effect.[56] The Commission proposed that this condition also requires that SPP comply with the Commission's requests on an as-needed basis for related transactional and positional market data.[57]

3. Additional Limitations

In the SPP Proposed Order, the Commission expressly noted that the proposed exemption was based upon the representations made in the Exemption Application and in the supporting materials provided by SPP and its counsel, and that any material change or omission in the facts and circumstances that alter the grounds for the SPP Proposed Order might require the Commission to reconsider its finding that the exemption contained therein is appropriate and/or in the public interest and consistent with the purposes of the CEA.[58] The Commission highlighted several of SPP's representations as being of particular importance, including: (1) The exemption sought by SPP relates to the transactions described in the SPP Proposed Order, which are primarily entered into by commercial participants that are in the business of generating, transmitting, and distributing electric energy; [59] (2) SPP was established for the purpose of providing affordable, reliable electric energy to consumers within its geographic region; [60] (3) the transactions described in the SPP Proposed Order are an essential means, designed by FERC as an integral part of its statutory responsibilities, to enable the reliable delivery of affordable electric energy; [61] (4) each of the transactions defined in the SPP Proposed Order taking place on SPP's markets is monitored by both a market administrator (SPP) and an independent market monitor (''SPP Market Monitor'') responsible to FERC; [62] and (5) each transaction defined in the SPP Proposed Order is directly tied to the physical capabilities of SPP's electric energy grid.[63]

In the SPP Proposed Order, the Commission explicitly reserved the authority to, in its discretion, revisit any of the terms of the relief provided by the SPP Proposed Order, including, but not limited to, making a determination that certain entities and transactions should be subject to the Commission's jurisdiction.[64] The Commission also explicitly reserved the authority to, in its discretion, suspend, terminate, or otherwise modify or restrict the exemption granted in the SPP Proposed Order.[65] Finally, the Commission announced its intention to exclude from the exemptive relief its general anti-fraud and anti-manipulation authority,

[50] *Id.* at 29517; *see also id.* at 29493–94.

[51] *See id.* at 29494.

[52] *Id.* Consistent with the RTO–ISO Order, the Commission proposed to use its authority pursuant to CEA section 4(c)(3)(K) to include eligible contract participants as appropriate persons for the purposes of this SPP Final Order. *See* RTO–ISO Order at 19896, 19913; *see also* 7 U.S.C. 1a(18)(A) and Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' 77 FR 30596, May 23, 2012.

[53] 80 FR at 29494. Consistent with the RTO–ISO Order, the Commission also proposed to use its authority pursuant to CEA section 4(c)(3)(K) to include persons who are in the business of: (i) Generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system. *See* RTO–ISO Order at 19899, 19913, 19914.

[54] 80 FR at 29494.

[55] *Id.*

[56] *Id.* The CFTC and FERC signed a Memorandum of Understanding (''MOU'') Regarding Information Sharing and Treatment of Proprietary Trading and Other Information on January 2, 2014 (''CFTC–FERC Information Sharing MOU''), which addresses the sharing of information in connection with market surveillance and investigations into potential market manipulation, fraud, or abuse. The MOU is *available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcfercismou2014.pdf.*

[57] 80 FR at 29494.

[58] *See id.; see also id.* at 29518. These limitations are consistent with the RTO–ISO Order. *See* RTO–ISO Order at 19914–15.

[59] *See* 80 FR at 29494; *see also* Exemption Application at 17.

[60] *See* 80 FR at 29494; *see also* Exemption Application at 2, 17.

[61] *See* 80 FR at 29494; *see also generally* FERC Order No. 888; FERC Order No. 2000; 18 CFR 35.34(k)(2); Exemption Application at 17.

[62] *See* 80 FR at 29494; *see also* Exemption Application at 17.

[63] *See* 80 FR at 29494; *see also* Exemption Application at 12–15.

[64] *See* 80 FR at 29518.

[65] *See id.*

and scienter-based prohibitions, under the CEA over SPP and the transactions defined in the SPP Proposed Order, including sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the CEA and any implementing regulations promulgated thereunder including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.[66]

The Commission explained in the SPP Proposed Order that neither the proposed nor the final RTO–ISO Order discussed, referred to, or mentioned CEA section 22, which provides for private rights of action for damages against persons who violate the CEA, or persons who willfully aid, abet, counsel, induce, or procure the commission of a violation of the Act.[67] The Commission explained that by enacting CEA section 22, Congress provided private rights of action as a means for addressing violations of the Act as an alternative or supplement to Commission enforcement action.[68] The Commission observed that it would be highly unusual for the Commission to reserve to itself the power to pursue claims for fraud and manipulation—a power that includes the option of seeking restitution for persons who have sustained losses from such violations or a disgorgement of gains received in connection with such violations—while at the same time, without explanation, denying private rights of action and damages remedies for the same violations.[69] The Commission stated that if it intended to take such a differentiated approach (*i.e.,* to limit the rights of private persons to bring such claims while reserving to itself the right to bring the same claims), the RTO–ISO Order would have included a discussion or analysis of the reasons therefore.[70] The Commission therefore stated that, in the Commission's view, the RTO–ISO Order does not prevent private claims for fraud or manipulation under the CEA.[71] The Commission further stated that this view would apply equally to the SPP Proposed Order.[72]

D. *Aspire* v. *GDF Suez*

In February 2015, the United States District Court for the Southern District of Texas dismissed a private lawsuit on the ground that the CEA section 22 private right of action was not available to the plaintiffs under the RTO–ISO Order.[73] The lawsuit alleged that certain electricity generators in ERCOT's market manipulated the market price of electricity by, among other things, intentionally withholding electricity generation during times of tight supply.[74] The suit further alleged that this conduct created artificial and unpredictable prices in the secondary futures markets.[75] The claim thus alleged that defendants were manipulating contract prices in the derivatives commodities market in violation of the Act.[76] The District Court dismissed the claim, finding that under the RTO–ISO Order, the private right of action in CEA section 22 was ''unavailable to [p]laintiffs.'' [77] In February 2016, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's ruling.[78]

E. RTO–ISO Order Proposed Amendment

On May 9, 2016, the Commission issued a notice of proposed order and request for comment which proposed to amend the text of the RTO–ISO Order to explicitly provide that the RTO–ISO Order does not exempt the entities covered under the RTO–ISO Order from the private right of action found in section 22 of the CEA[79] with respect to the Excepted Provisions.[80]

In the RTO–ISO Order Proposed Amendment, the Commission noted that, currently, Paragraph 1 of the RTO–ISO Order states that the Commission:

> Exempts, subject to the conditions and limitations specified herein, the execution of the electric energy-related agreements, contracts, and transactions that are specified in paragraph 2 of this Order and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect thereto, from all provisions of the CEA, except, in each case, the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.[81]

The RTO–ISO Order Proposed Amendment stated that, under the RTO–ISO Order, for those CEA requirements from which the RTOs and ISOs are exempt, there can be no claim under CEA section 22 with respect to those requirements.[82] The Commission further stated RTO–ISO Order did not specifically note that the exemption contained therein did not apply to actions pursuant to CEA section 22 with respect to the Excepted Provisions.[83]

In light of the *Aspire* court ruling discussed above,[84] in the RTO–ISO Order Proposed Amendment, the Commission proposed to amend the text of the RTO–ISO Order to clarify that the RTO–ISO Covered Entities are not exempt from the private right of action in CEA section 22 with respect to the Excepted Provisions. Specifically, the Commission proposed to amend Paragraph 1 of the RTO–ISO Order to read as follows (the additional language is italicized):

> Exempts, subject to the conditions and limitations specified herein, the execution of the electric energy-related agreements, contracts, and transactions that are specified in paragraph 2 of this Order and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect thereto, from all provisions of the CEA, except, in each case, the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180. *This exemption also does not apply to actions pursuant to CEA section 22 with respect to the foregoing enumerated provisions.*[85]

The Commission proposed the foregoing amendment to the RTO–ISO Order in order to ensure clarity.[86] In addition, the RTO–ISO Order Proposed Amendment gave the following additional reasons for proposing the amendment: (1) Amending the RTO–ISO Order to explicitly preserve the private right of action with respect to fraud and manipulation would not cause regulatory uncertainty or duplicative or inconsistent regulation; (2) conflicting judicial interpretations regarding the nature of the RTO–ISO Covered Transactions would not affect the jurisdiction of FERC or any relevant state regulatory authority; (3) the private

[66] *See id.* at 29515, 29516.

[67] *Id.* at 29493.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Aspire Commodities, L.P.* v. *GDF Suez Energy N. Am., Inc.,* No. H–14–1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015).

[74] *Id.* at *1–*2.

[75] *Id.* at *2.

[76] *See id.*

[77] *Id.* at *5.

[78] *See Aspire Commodities, L.P.* v. *GDF Suez Energy N. Am., Inc.,* No. 15–20125, 640 F. App'x 358 (5th Cir. Feb. 25, 2016).

[79] 7 U.S.C. 25.

[80] 81FR 30245.

[81] 81 FR at 30247; *see also* RTO–ISO Order at 19912.

[82] 81 FR 30247.

[83] *Id.*

[84] *See supra* section II.D.

[85] 81 FR 30248. The RTO–ISO Order Proposed Amendment did not alter any of the other terms or conditions of the RTO–ISO Order.

[86] *Id.*

right of action in the CEA is instrumental in protecting the American public, deterring bad actors, and maintaining the credibility of the markets subject to the Commission's jurisdiction; (4) the private right of action under CEA section 22 was established by Congress as an integral part of the CEA's enforcement and remedial scheme; and (5) the Commission's preservation of section 22 liability with respect to the Excepted Provisions is consistent with the Commission's actions in prior 4(c) orders.[87]

III. Summary of Comments

A. Overview of Comments

The Commission requested public comments on both the SPP Proposed Order and the RTO–ISO Order Proposed Amendment.

The public comment period on the SPP Proposed Order ended on June 22, 2015. The Commission received thirteen (13) comment letters on the SPP Proposed Order from twelve (12) commenters,[88] the majority of which provided general support for the proposed exemption.[89] The comment letters on the SPP Proposed Order addressed the following issues: preservation of the private right of action found in section 22 of the CEA; the Commission's jurisdiction; and the use of the term ''member'' in the SPP Proposed Order. In determining the scope and content of the SPP Final Order, the Commission has taken into account the issues raised by commenters.

The public comment period on the RTO–ISO Order Proposed Amendment ended on June 15, 2016. The Commission received forty-eight (48) comment letters on the RTO–ISO Order Proposed Amendment from forty-six (46) commenters,[90] all of which addressed the proposed preservation of the private right of action found in section 22 of the CEA. In determining the scope and content of the Amended RTO–ISO Order, and the scope and content of the portions of the SPP Final Order related to the private right of action, the Commission has taken into account the issues raised by commenters.

B. Private Right of Action Under CEA Section 22

1. Summary of Comments

In response to the SPP Proposed Order, a number of commenters objected to the inclusion in the SPP Proposed Order of language proposing to preserve, in the RTO–ISO Order, private rights of action under CEA section 22 with respect to the Excepted Provisions, and these commenters asked that such language not be included in the SPP Final Order.[91] Some commenters asserted that the Commission's proposed clarification of the RTO–ISO Order would deprive the RTOs and ISOs of due process and the right to comment on this aspect of the RTO–ISO Order. The Joint Trade Associations, for example, argued that the Commission's preservation of a private right of action under section 22 of the CEA in the proposed exemption would retroactively impose requirements that were not contemplated or discussed in prior proceedings.[92] GSENA likewise stated that the Commission cannot retroactively alter the RTO–ISO Order ''by simply reciting its belief or intent.'' [93] COPE echoed this objection.[94] A number of commenters asserted that the language regarding the preservation of private rights of action under CEA section 22 would amount to a retroactive alteration of the RTO–ISO Order, so the Commission should have provided notice to market participants and an opportunity to comment on the alteration.[95] Also, commenters argued that the inclusion in the SPP Proposed Order of language stating that the intent of the RTO–ISO Order was to preserve such private rights of action would be

[87] *See id.* at 30248–49.

[88] All comment letters are available through the Commission's Web site at: *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1586*. Comments addressing the SPP Proposed Order were received from: Aspire Commodities, LP (''Aspire (1)''); Association of Electric Companies of Texas, Inc. (''AECT''); Coalition of Physical Energy Companies (''COPE''); Staff of the Federal Energy Regulatory Commission (''FERC Staff (1)''); First Principles Economics, LLC (''First Principles''); GDF Suez Energy North America, Inc. (''GSENA (1)''); International Energy Credit Association (''IECA (1)''); Joint Trade Associations (collectively referring to the American Public Power Association, Edison Electric Institute, Electric Power Supply Association, and the National Rural Electric Cooperative Association); Public Utility Commission of Texas (''PUCT (1)''); RTO–ISO Commenters (collectively referring to PJM Interconnection, L.L.C., Electric Reliability Council of Texas, Inc., and the California Independent System Operator Corporation); SPP; and Texas Competitive Power Advocates (''TCPA''). COPE submitted an original comment letter on June 22, 2015 and submitted a second comment letter on June 23, 2015. The second comment letter, which was dated June 22, 2015, contained a correction to the version of COPE's comment letter that was originally submitted, and therefore superseded COPE's original comment letter. The corrected version of COPE's comment letter is herein referred to as ''COPE (1).'' COPE submitted a third comment letter after the expiration of the comment period, on June 25, 2015.

[89] *See, e.g.,* Aspire at 1; AECT at 1; COPE (1) at 2; First Principles at 1; GSENA (1) at 2; IECA at 3; Joint Trade Associations at 2; PUCT (1) at 2; SPP at 1; and TCPA at 2.

[90] All comment letters are available through the Commission's Web site at: *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1697*. Comments addressing the RTO–ISO Order Proposed Amendment were received from: AKCSC; American Electric Power Company, Inc. (''AEP''); American Gas Association (''AGA''); Arizona Electric Power Cooperative, Inc.; Aspire Commodities, LP (''Aspire (2)'') Basin Electric Power Cooperative (''Basin''); Better Markets; Catherine Corn; bilmem ne; Coalition of Physical Energy Companies (''COPE (2)''); Commercial Energy Working Group (''CEWG''); Delaware Division of the Public Advocate, Indiana Office of Utility Consumer Counselor, Maryland Office of People's Counsel, Office of People's Counsel for the District of Columbia, New Jersey Division of Rates Council, Pennsylvania Office of Consumer Advocate, Consumer Advocate Division of the Public Service Commission of West Virginia (''PJM JCA''); East Kentucky Power Cooperative, Inc.; East Texas Electric Cooperative, Inc.; Edison Electric Institute (''EEI''); Electric Power Supply Association (''EPSA''); Exelon Generation Company (''Exelon''); Staff of the Federal Energy Regulatory Commission Staff (''FERC Staff (2)''); GDF Suez Energy North America, Inc. (''GSENA (2)''); Golden Spread Electric Cooperative (''Golden Spread''); Hoosier Energy Rural Electric Cooperative, Inc.; International Energy Credit Association (''IECA (2)''); ISO/RTO Council (''IRC''); ITC Great Plains, LLC (''ITC''); Kansas City Power & Light Company (''KCP&L''); Large Public Power Council (''LPPC''); Minnkota Power Cooperative, Inc.; MISO Transmission Owners; Missouri Joint Municipal Electric Utility Commission (''MJMEUC''); National Association of Regulatory Utility Commissioners (''NARUC''); National Rural Electric Cooperative Association and American Public Power Association (collectively, the ''NFP Electric Associations''); North Carolina Electric Membership Corporation; Oklahoma Municipal Power Authority (''OMPA''); Old Dominion Electric Cooperative; Omaha Public Power District (''OPPD''); Prairie Power, Inc.; PSEG Companies (''PSEG''); Public Utility Commission of Texas (''PUCT (2)''); Raiden Commodities (''Raiden''); Southern Illinois Power Cooperative; Sunflower Electric Power Corporation; Tenaska Energy, Inc. (''Tenaska''); Texas Industrial Energy Consumers (''TIEC''); Westar Energy, Inc. (''Westar''); Western Farmers Electric Cooperative; and Xcel Energy Services Inc. (''Xcel''). Both Exelon and Golden Spread submitted two duplicate comments; any reference to either commenter below refers to the letter attachment on the Commission's Web site at the above link. In addition, twelve electric cooperatives submitted substantively identical comment letters: Arizona Electric Power Cooperative, Inc., East Kentucky Power Cooperative, Inc., East Texas Electric Cooperative, Inc., Golden Spread Electric Cooperative, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Minnkota Power Cooperative, Inc., North Carolina Electric Membership Corporation, Old Dominion Electric Cooperative, Prairie Power, Inc., Southern Illinois Power Cooperative, Sunflower Electric Power Corporation, and Western Farmers Electric Cooperative. These twelve commenters are collectively referred to in the discussion that follows as the ''Electric Cooperative Commenters,'' and any citations to such commenters are to the letter of the Arizona Electric Power Cooperative.

[91] *See, e.g.,* Joint Trade Associations at 5; COPE (1) at 3, 5; GSENA (1) at 3; PUCT (1) at 3.

[92] Joint Trade Associations at 5.

[93] GSENA (1) at 3.

[94] COPE (1) at 5 (''[A] retroactive statement of agency intent'' is not sufficient to change the plain meaning of the RTO–ISO Order).

[95] Joint Trade Associations at 5–6; COPE (1) at 5; IECA (1) at 2; RTO–ISO Commenters at 3; PUCT (1) at 4.

contrary to the plain meaning of the RTO–ISO Order.[96] In addition, in response to the SPP Proposed Order, commenters asserted that allowing private rights of action could (1) create a regulatory conflict that would be inconsistent with Congress' directive that the CFTC and FERC coordinate their actions to avoid conflicting or duplicative regulation; [97] (2) give rise to inconsistent rulings among the Commission, FERC, state regulatory agencies and federal district courts regarding the regulatory scheme for transactions in the RTO–ISO markets; [98] (3) adversely affect the ability of the Commission and FERC to determine under the CFTC–FERC jurisdictional MOU [99] how to exercise their respective authorities; [100] (4) result in inconsistent court decisions; [101] (5) be costly; [102] and (6) be inconsistent with other orders issued by the Commission pursuant to the authority in CEA section 4(c).[103] Separately, in response to the SPP Proposed Order, FERC Staff raised concerns about the effect of allowing private rights of action under CEA section 22 on FERC's regulatory authority, and requested that the Commission clarify that its action on SPP's application does not limit or otherwise affect FERC's authority.[104]

In light of the comments received with respect to the SPP Proposed Order, the Commission proposed an amendment to the RTO–ISO Order to address the private right of action issue directly and to solicit further comment from the public on that issue.

As noted above, the Commission received comments in response to the RTO–ISO Order Proposed Amendment. Specifically, a number of commenters asserted that the private right of action is not necessary in the context of the RTO–ISO markets given the comprehensive regulatory scheme to which those markets are subject. For example, IRC asserted that the RTO–ISO markets are ''comprehensively regulated'' by FERC and PUCT, with substantial enforcement tools, resources, and experience.[105] According to several commenters, FERC's broad enforcement authority over the RTO–ISO markets, including the authority to conduct investigations, re-settle markets, grant refunds, order disgorgement, impose civil penalties, and refer cases to the Department of Justice for criminal prosecution, renders the private right of action unnecessary in such markets.[106] In addition, FERC Staff noted that section 206 of the Federal Power Act (''FPA'') authorizes FERC to determine, either on its own motion or as a result of a complaint, that an existing rate or market feature is unjust and unreasonable, and to establish prospectively a just and reasonable rate.[107] Similarly, PUCT argued that it has an established complaint process to accommodate claims of fraud and manipulation.[108] More broadly, commenters asserted that both FERC and PUCT have sufficient processes in place for private parties to air their concerns.[109] Commenters also noted that the RTO–ISO markets are subject to an additional layer of oversight by independent market monitors, which are tasked with tracking the behavior of RTO–ISO market participants and reporting suspicious behavior to FERC or PUCT.[110] On the other hand, Aspire, Better Markets, and Raiden asserted that the private right of action protects market participants by deterring fraudulent or manipulative conduct in the RTO–ISO markets, and that private rights of action serve as a vital tool to augment the Commission's limited resources.[111] Aspire and Raiden further argued that market participants are in the best position to observe and take action with respect to market manipulation, and that they are properly incentivized to bring private claims to seek compensation for any damages suffered.[112]

In addition, several commenters argued that preserving the CEA section 22 private right of action in this context would result in regulatory and/or legal uncertainty. A number of commenters asserted that private rights of action could disrupt the regulatory framework in place over the RTO–ISO markets,[113] undermine the efficiency and effectiveness of the RTO–ISO markets,[114] interfere with FERC's and PUCT's ability to maintain the integrity and efficiency of the RTO–ISO markets,[115] and interfere with FERC's and PUCT's ability to determine how the transactions in the RTO–ISO markets should be regulated so as to produce just and reasonable rates.[116] Several commenters asserted that a judicial determination regarding the nature of the transactions in the RTO–ISO markets (*i.e.,* whether a particular transaction is a swap) could affect FERC's or PUCT's jurisdiction over such transactions.[117] In response to the Commission's question regarding the effect of the CEA's savings clause on such concerns, several commenters expressed the view that such clause is subject to differing interpretations, and as such, it is not clear how a court would interpret the interaction between the savings clause in CEA section 2(a)(1)(I) and the ''exclusive jurisdiction'' language in section 2(a)(1)(A).[118] Better Markets and Aspire, on the other hand, argued that allowing private rights of action in the RTO–ISO markets would not blur the boundaries of the Commission's and FERC's jurisdiction over such markets, and that the savings clause in CEA section 2(a)(1)(I) would prevent any judicial interpretations regarding the nature of the transactions in the RTO–ISO markets from affecting FERC's or PUCT's jurisdiction over such transactions.[119] Separately, FERC Staff requested that, if the Commission were to amend the RTO–ISO Order to provide a private right of action under the CEA in the RTO–ISO markets, the Commission reiterate in its final order that the Commission does not have exclusive jurisdiction over transactions covered by the RTO–ISO Order.[120]

Separately, a number of commenters argued that permitting private actions under CEA section 22 against RTO–ISO market participants could result in conflicting or inconsistent court decisions.[121] In addition, commenters

[96] *See, e.g.,* Joint Trade Associations at 5; COPE (1) at 3; PUCT (1) at 3–4.

[97] Joint Trade Associations at 7; IECA at 3.

[98] RTO–ISO Commenters at 5.

[99] Memorandum of Understanding Between the Federal Energy Regulatory Commission and the Commodity Futures Trading Commission (''CFTC–FERC Jurisdictional MOU''), Jan. 2, 2014, *available at http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftcfercjmou2014.pdf.*

[100] RTO–ISO Commenters at 5–6; 9–10.

[101] Joint Trade Associations at 6; RTO–ISO Commenters at 8–9.

[102] COPE (1) at 4; PUCT (1) at 6.

[103] RTO–ISO Commenters at 6–7.

[104] FERC Staff (1) at 2.

[105] IRC at 5–6. The IRC also argued that a Commission order should not be amended, expanded, or withdrawn absent a change in the law or the facts underlying the order. *Id.* at 12.

[106] *See, e.g.,* EPSA at 4; GSENA (2) at 3; MISO Transmission Owners at 5; PSEG at 2.

[107] FERC Staff (2) at 3.

[108] PUCT (2) at 11.

[109] *See, e.g.,* AGA at 3; EPSA at 5; GSENA (2) at 3; PUCT (2) at 11.

[110] *See, e.g.,* EEI at 10; PJM JCA at 4; MISO Transmission Owners at 5–6; PUCT (2) at 11–12; Xcel at 2.

[111] Aspire (2) at 2; Better Markets at 2–3; Raiden at 4.

[112] Aspire (2) at 6; Raiden at 6.

[113] *See, e.g.,* Basin at 1; EEI at 8; ITC at 2; OMPA at 1; TIEC at 1–2.

[114] Westar at 2.

[115] EPSA at 8.

[116] IRC at 8.

[117] *See, e.g.,* EEI at 7; IRC at 9; MISO Transmission Owners at 12.

[118] *See, e.g.,* MISO Transmission Owners at 12; PUCT at 11.

[119] Better Markets at 3–4; Aspire at 7.

[120] FERC Staff (2) at 4.

[121] *See, e.g.,* AGA at 3–4; PUCT (2) at 5.

claimed that allowing private rights of action in the RTO–ISO markets could provide an opportunity for private plaintiffs to collaterally attack market rules, tariffs, or filed rates that have been approved or permitted to take effect by the relevant regulator.[122] Such a result, commenters argued, could make it difficult for market participants to rely on the established market rules, resulting in a chilling effect on otherwise appropriate market behavior, and could inject uncertainty and instability into the RTO–ISO markets.[123] Several commenters also suggested that private rights of action could create an opportunity for courts to second-guess policy decisions made by FERC and PUCT,[124] or for private litigants to force judicial revision of RTO–ISO market rules with which they disagree.[125] Aspire and Better Markets argued, on the other hand, that the private right of action does not present any increased risk of inconsistent judicial decisions, as the Commission already has the authority to bring actions under the fraud and manipulation provisions that are reserved in the RTO–ISO Order.[126]

Furthermore, a number of commenters argued that allowing private rights of action in the RTO–ISO markets would be contrary to congressional intent. Several commenters pointed out that the FPA expressly prohibits private rights of action; thus, commenters argued that allowing CEA section 22 private actions in the RTO–ISO markets would be contrary to the express intent of Congress.[127] Commenters also urged that allowing private rights of action would create a regulatory conflict that is inconsistent with Congress' directive that the CFTC and FERC coordinate their actions to avoid conflicting or duplicative regulation,[128] and would adversely affect the ability of the Commission and FERC to determine under the CFTC–FERC Jurisdictional MOU [129] how to exercise their respective authorities.[130] On the other hand, Better Markets argued that preserving the private right of action would not be contrary to congressional intent, since Congress specifically included a private right of action in the CEA.[131]

Several commenters also claimed that preserving the CEA section 22 private right of action would be inconsistent with prior Commission action. According to EEI, the RTO–ISO Order was consistent with previous orders issued by the Commission in that it did not contain any reference to or discussion of CEA section 22.[132] EEI further pointed to a grant of temporary exemptive relief from provisions of the CEA added or amended by Title VII of the Dodd-Frank Act that referenced certain terms that the Commission had not yet defined.[133] That order expressly stated that ''[t]o the extent that the Final Order provides [4(c)] exemptive relief [from certain provisions of the CEA], such exemptive relief would, in effect, *preclude a person from succeeding in a private right of action under CEA section 22(a)* for violation of such provisions.'' [134] Both the IRC and EEI noted that the Commission has only expressly preserved the CEA section 22 private right of action in two prior 4(c) orders, both of which were superseded by Congress.[135] The IRC claimed that it is not unusual for the Commission to reserve its own authority to address fraud and manipulation without also reserving private litigants' right to do so.[136] COPE argued that there is no valid policy argument to require all orders issued under CEA section 4(c) to be the same.[137] EPSA echoed this argument, noting that the Commission's actions in prior 4(c) orders should not control its decision on the private right of action here.[138]

A number of commenters addressed the cost implications of allowing private rights of action in the RTO–ISO markets. For instance, several commenters argued that allowing private actions in the RTO–ISO markets would be costly, and that costs will be passed onto electricity consumers.[139] The Electric Cooperative Commenters noted that costs will arise due to private litigation whether or not a private plaintiff can prove that market manipulation occurred.[140] In addition, COPE asserted that private litigants could be motivated in part by monetary gain, whereas FERC, PUCT, and the Commission are motivated by the public interest.[141] A number of commenters further asserted that consumers will bear the indirect costs of increased private litigation in the RTO–ISO markets, claiming that such costs would include indirect costs due to (1) increased regulatory uncertainty; [142] (2) increased risk; [143] (3) decreased liquidity in RTO–ISO products that are used to hedge and manage risk as market participants limit or forego activity in the RTO–ISO markets; [144] and (4) court decisions forcing RTOs and ISOs to change their infrastructure.[145] PUCT also argued that allowing private litigants to bring actions against participants in the RTO–ISO markets would increase the costs associated with operating those markets.[146] On the other hand, Better Markets argued that if the private right of action were available, market participants would not incur any increased costs of compliance because they would already be on notice of, and complying with, the fraud and manipulation provisions in the CEA.[147]

Lastly, Xcel and GSENA argued that allowing private rights of action in the RTO–ISO markets would ultimately result in reduced investment in renewable and efficient energy.[148]

2. Commission Determination

The Commission has determined, in the limited context of the RTO–ISO markets which are the subject of the Amended RTO–ISO Order and the SPP

[122] *See, e.g.,* AEP at 2; AGA at 3; COPE (2) at 6, 7; EPSA at 7; Exelon at 2; GSENA at 2; IRC at 10; MISO Transmission Owners at 7; OPPD at 5; PUCT (2) at 5; Tenaska at 2; Westar at 3. In response to the Commission's request for comments regarding the filed rate doctrine, the IRC and PUCT noted that courts have identified several exceptions to the filed rate doctrine, so there is no guarantee that a federal judge would grant a motion to dismiss based on such doctrine. IRC at 11; PUCT (2) at 10–11; *see also* MISO Transmission Owners at 11–12. The IRC further argued that, to the extent the filed rate doctrine would bar the types of private claims brought under CEA section 22, such a fact would undercut the rationale for allowing such private claims. IRC at 11.

[123] *See, e.g.,* PUCT (2) at 5; MISO Transmission Owners at 7; COPE (2) at 7; EPSA at 7; GSENA (2) at 2–3; OMPA at 3; OPPD at 5; PSEG at 3; Tenaska at 2–3; TIEC at 3–4; Xcel at 3.

[124] AGA at 4; TIEC at 3.

[125] EEI at 10.

[126] Aspire at 7; Better Markets at 3.

[127] *See, e.g.,* CEWG at 2; EEI at 8; Exelon at 2; IRC at 6; KCP&L at 7; MISO Transmission Owners at 9; IECA at 4; FERC Staff (2) at 2–3.

[128] AGA at 3; CEWG at 5; FERC Staff (2) at 3.

[129] *See supra* note 99.

[130] OPPD at 2–3; FERC Staff (2) at 2.

[131] Better Markets at 3.

[132] EEI at 6.

[133] Effective Date for Swap Regulation, 76 FR 42508, July 19, 2011.

[134] EEI at 6–7.

[135] EEI at 7 n.19; IRC at 12 n.32.

[136] IRC at 12.

[137] COPE (2) at 8.

[138] EPSA at 11.

[139] *See, e.g.,* AGA at 4; CEWG at 4; EPSA at 5–6; Exelon at 3–4; IRC at 10; KCP&L at 4; MISO Transmission Owners at 9; MJMEUC at 3; NFP Electric Associations at 6; PUCT (2) at 5; and TIEC at 4.

[140] Electric Cooperative Commenters at 3. The Electric Cooperative Commenters also requested that, if the Commission were to allow private rights of action under CEA section 22 in the RTO–ISO markets, such actions not be allowed (1) against commercial end-user-only entities, or (2) to challenge commercial-end-user-only hedging transactions. *Id.*

[141] COPE (2) at 6; *see also* AEP at 2–3; EEI at 11; NFP Electric Associations at 5–6; Xcel at 3.

[142] AEP at 2.

[143] Exelon at 3–4.

[144] *Id.*

[145] EPSA at 6.

[146] PUCT (2) at 5.

[147] Better Markets at 3.

[148] Xcel at 3–4; GSENA (2) at 4.

Final Order, to issue a complete exemption from the private right of action in CEA section 22, including with respect to claims based on fraud or manipulation. The Commission is persuaded by several factors raised by the commenters. Considering all of these factors together, rather than any of these factors alone, or any subset of these factors, the Commission concludes that in the limited context of activities within the RTO–ISO markets, there should be a complete exemption from private claims under CEA section 22.

Initially, the Commission agrees that the unique nature of the RTO–ISO markets differentiates this issue from other contexts in which a private right of action is essential.

The RTO–ISO markets are heavily regulated by FERC and PUCT, with whom the Commission shares jurisdiction. This regulation is ''pervasive'' and it includes rate monitoring, tariff approval, authorization of market rules and pricing mechanisms, and real-time oversight of markets.[149] As part of an articulated regulatory structure, these markets are also subject to close surveillance not only by the regulators but also by independent market monitors.[150] In addition, FERC and PUCT support their regulation of the electric power markets with an enforcement program that includes the authority to order civil penalties, disgorgement, and to resettle the market.[151]

Furthermore, the Commission will continue to police these markets for fraud, manipulation and other unfair trading activities and, as contemplated by Congress, it can and will cooperate with these fellow regulators to deter and prevent unlawful trading activities in the RTO–ISO markets. In the same vein, the Commission and FERC both have the authority to take enforcement action, and to seek restitution on behalf of injured market participants that fall in their jurisdiction.[152]

Moreover, the Commission is further persuaded to issue an express exemption from the private right of action in the context of the RTO–ISO markets because private rights of action appear in tension with the intent of Congress in this context. In 2005, Congress amended the FPA to give FERC the authority to pursue manipulation of the electricity markets.[153] At that time, Congress focused on whether there should be a private right of action for manipulation of these specific markets. Congress explicitly declined to grant such a right of action.[154] This was a more particularized determination regarding the merits of private enforcement in these unique markets than the legislative judgment reflected in CEA section 22 that there should be a generally applicable private right of action for fraud and manipulation in the Commission's jurisdictional markets.

Finally, the Commission is persuaded that there is a potential for private rights of action regarding the entities and transactions in the RTO–ISO markets to interfere with FERC and PUCT oversight of these markets. Based on the totality of these factors, the Commission concludes that in the limited context of activities within these unique markets, there should be a complete exemption from private claims under CEA section 22.

The Commission's determination regarding the CEA section 22 private right of action does not in any way affect the Commission's own authority to address fraudulent or manipulative conduct in these markets within the Commission's jurisdiction And, in cooperation with electricity regulators, the Commission will remain vigilant in policing these markets for fraud, manipulation and other illegal activity.

In addition, in light of the above, the Commission encourages market participants who observe potential fraud or manipulation in the markets subject to the Commission's jurisdiction to bring their concerns to the Commission. The whistleblower provisions of the Commodity Exchange Act and Commission regulations continue to apply in this context and are available pursuant to their terms.[155]

C. Use of the Term ''Member'' in the SPP Proposed Order

With respect to the Commission's use of the term ''member'' in the SPP Proposed Order, the Joint Trade Associations noted that the Commission used the term ''member'' throughout the SPP Proposed Order, and that while such term may have a defined meaning within the context of other Commission-regulated markets, such term is not defined for purposes of the SPP Proposed Order in the context of RTO and ISO markets.[156] The Joint Trade Associations urged the Commission to clarify that the term ''member,'' as used in the context of RTO and ISO markets, refers to a market participant that is bound by the relevant tariff and that also meets the conditions to be considered an ''appropriate person'' that are set forth in the SPP Proposed Order.[157] The Commission notes that this is consistent with its understanding of the term ''member'' in this context.[158]

IV. Section 4(c) Determinations

A. Section 4(c) Analysis

1. Overview of CEA Section 4(c)

a. Sections 4(c)(6)(A) and (B)

As discussed above in section I., the Dodd-Frank Act amended CEA section 4(c) to add sections 4(c)(6)(A) and (B), which provide authority to exempt certain transactions entered into: (a) Pursuant to a tariff or rate schedule approved or permitted to take effect by FERC, or (b) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality.[159] Indeed, section 4(c)(6) provides that if the Commission determines that the exemption would be consistent with the public interest and the purposes of this Act, the

[149] FERC Staff (2) at 1–3.

[150] *E.g.,* FERC Staff (2) at 2; PJM JCA at 4; PUCT (2) at 11–12.

[151] FERC Staff (2) at 2; EPSA at 3–4.

[152] 7 U.S.C. 13a–1(d)(3) (Commission authority to seek restitution); 16 U.S.C. 825h (describing FERC's remedial authority under the FPA); *Pub. Util. Comm'n of Cal.* v. *FERC,* 462 F.3d 1027, 1047–48 (9th Cir. 2006) (holding that section 309 of the FPA authorizes FERC to order restitution for profits gained as a result of a statutory or tariff violation); *see also Consol. Edison Co. of N.Y., Inc.* v. *FERC,* 347 F.3d 964, 967 (D.C. Cir. 2003) (same).

[153] *E.g.,* FERC Staff (2) at 2–3 & n.2.

[154] *Id.*

[155] The Commission recognizes the arguments of Aspire, Raiden, and Better Markets regarding the fact that the existence of a private right of action would protect market participants by deterring fraudulent or manipulative conduct in the RTO–ISO markets. Aspire (2) at 2; Raiden at 4; Better Markets at 2–3. However, the Commission is of the view that, for all of the reasons stated in this section, such concerns are mitigated.

[156] Joint Trade Associations at 8.

[157] *Id.*

[158] This is also intended to address the concerns raised in SPP's comment letter with respect to the use of the terms ''member'' and ''market participant.'' SPP at 3–4.

[159] The exemption language in section 4(c)(6) states that if the Commission determines that the exemption would be consistent with the public interest and the purposes of this Act, the Commission shall, in accordance with paragraphs (1) and (2) of section 4(c), exempt from the requirements of this Act an agreement, contract, or transaction that is entered into (A) pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission; (B) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality; or (C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f)).

Commission *shall* issue such an exemption.[160] However, any exemption considered under section 4(c)(6)(A) and/or (B) must be done ''in accordance with [CEA sections 4(c)(1) and (2)].'' [161]

b. Section 4(c)(1)

As described above in section I., CEA section 4(c)(1) requires that the Commission act ''by rule, regulation, or order, after notice and opportunity for hearing.'' It also provides that the Commission may act ''either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both'' and that the Commission may provide an exemption from any provisions of the CEA except subparagraphs (C)(ii) and (D) of section 2(a)(1).

c. Discussion of Comments on Sections 4(c)(6) and 4(c)(1)

The Commission noted in the RTO–ISO Order Proposed Amendment that, based on the difference in language between CEA sections 4(c)(6) and 4(c)(1), it is not clear that section 4(c)(6) provides the Commission with the authority to exempt from the section 22 private right of action. The Commission further noted that, while section 4(c)(1) authorizes the Commission to grant exemptions from the Act's ''requirements'' or ''from any other provision of this Act,'' section 4(c)(6) authorizes the Commission to exempt from the Act's ''requirements'' only.[162]

In response to this discussion, Aspire argued that section 4(c)(6), in authorizing exemptions from the CEA's ''requirements'' only, does not authorize the Commission to grant an exemption from the section 22 private right of action, since the private right of action is not a ''requirement'' of the CEA.[163] IRC argued, on the other hand, that the narrower language in section 4(c)(6) does not limit the scope of the exemptions that the Commission may grant under sections 4(c)(1) and 4(c)(2).[164]

As noted above in section IV.A.1.a., in granting an exemption under section 4(c)(6) of the CEA, the Commission must act ''in accordance with'' section 4(c)(1), which grants the Commission the discretionary authority to exempt from the Act's ''requirements'' or ''from any other provision of this Act'' if it makes certain findings.[165] The policy basis for the Commission's decision to grant an exemption from the CEA section 22 private right of action under section 4(c)(6) applies equally, in the context of the present issue, to a decision to take the same action pursuant to section 4(c)(1), and the Commission has made the findings required under that provision in sections III.B.2., IV.A.2., and IV.A.3. Accordingly, even if the Commission were limited under section 4(c)(6) from granting an exemption from the CEA section 22 private right of action in the present context, the Commission would and does, for the reasons discussed above in section III.B.2., in the alternative exercise its discretion to grant such an exemption pursuant to its authority in section 4(c)(1) of the Act.

d. Section 4(c)(2)

As set forth above in section I., CEA section 4(c)(2) requires the Commission to determine that: To the extent an exemption provides relief from any of the requirements of CEA section 4(a), the requirement should not be applied to the agreement, contract or transaction; the exempted agreement, contract, or transaction will be entered into solely between appropriate persons; [166] and the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA.[167]

e. Section 4(c)(3)

As explained in section I. above, CEA section 4(c)(3) outlines who may constitute an appropriate person for the purpose of a 4(c) exemption, including as relevant to this SPP Final Order: (a) Any person that fits in one of ten defined categories of appropriate persons; or (b) such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.[168]

2. CEA Section 4(c) Determinations—SPP Final Order

a. Commission Jurisdiction

Subject to the limitations set forth in the CEA, sections 4(c)(6)(A) and (B) of the Act grant the Commission the authority to exempt certain electric energy transactions provided that the Commission determines, among other things, that such exemption is consistent with the public interest and purposes of the CEA.[169] The Commission received a comment from FERC in response to the SPP Proposed Order relating to the Commission's interpretation of its jurisdiction pursuant to section 4(c)(6).[170]

FERC argued that the Commission should ''interpret the [Dodd-Frank Act] as not applying to any contract or instrument traded in an RTO or ISO market pursuant to a FERC-accepted or

[160] 7 U.S.C. 6(c)(6).

[161] CEA section 4(c)(6) explicitly directs the Commission to consider any exemption proposed under 4(c)(6) in accordance with CEA sections 4(c)(1) and (2).

[162] *See* 81 FR 30249.

[163] *See* Aspire (2) at 4.

[164] *See* IRC at 13.

[165] 7 U.S.C. 6(c)(1). The Commission has also considered that CEA section 22 may in fact be interpreted to impose a ''requirement.'' Section 22 states that certain persons who violate the Act or Commission regulations ''shall be liable for actual damages.'' 7 U.S.C. 25(a). This could be construed as a ''requirement'' to compensate the victim.

[166] *See* CEA section 4(c)(2)(B)(i) and the discussion of CEA section 4(c)(3) below.

[167] *See* CEA section 4(c)(2)(B)(ii). CEA section 4(c)(2)(A) also requires that the exemption would be consistent with the public interest and the purposes of the CEA, but that requirement duplicates the requirement of section 4(c)(6).

[168] CEA section 4(c)(3), 7 U.S.C. 6(c)(3), provides that the term ''appropriate person'' shall be limited to the following persons or classes thereof: (A) A bank or trust company (acting in an individual or fiduciary capacity); (B) A savings association; (C) An insurance company; (D) An investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); (E) A commodity pool formed or operated by a person subject to regulation under this Act; (F) A corporation, partnership, proprietorship, organization, trust, or other business entity with a net worth exceeding $1,000,000 or total assets exceeding $5,000,000, or the obligations of which under the agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by any such entity or by an entity referred to in subparagraph (A), (B), (C), (H), (I), or (K) of this paragraph; (G) An employee benefit plan with assets exceeding $1,000,000, or whose investment decisions are made by a bank, trust company, insurance company, investment adviser registered under the Investment Advisers Act of 1940 (15 U.S.C. 80a–1 *et seq.*), or a commodity trading advisor subject to regulation under this Act; (H) Any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing; (I) A broker-dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) acting on its own behalf or on behalf of another appropriate person; (J) A futures commission merchant, floor broker, or floor trader subject to regulation under this Act acting on its own behalf or on behalf of another appropriate person; (K) Such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

[169] *See* discussion regarding CEA section 4(c)(6) in section IV.A.1.a. *supra.* As noted above in section IV.A.1.c., to the extent that the Commission's action on the private right of action issue, with respect to both the SPP Final Order and the Amended RTO–ISO Order, requires further authority under section 4(c)(1), the Commission can and does exercise its discretion to take such action pursuant to such authority.

[170] FERC Staff (1) at 2. The Commission received the same comment from FERC Staff in response to the RTO–ISO Order Proposed Amendment. *See* FERC Staff (2) at 2. The Commission's determination with respect to this comment applies to both the SPP Final Order and the Amended RTO–ISO Order.

approved tariff or rate schedule.'' [171] Specifically, in its comment letter in response to the SPP Proposed Order, FERC maintained that RTO and ISO markets and transmission services are ''tightly integrated'' and ''regulated to a greater extent than other commodity markets.'' [172] FERC thus asserted that interpreting the Dodd-Frank Act to not apply to contracts or instruments traded in an RTO or ISO market pursuant to a FERC-accepted or approved tariff or rate schedule is ''the most appropriate application of [the Dodd-Frank Act] to these circumstances.'' [173] FERC further asserted that, while it does not take issue with the Commission's retention of anti-manipulation authority in the SPP Proposed Order, FERC also ''retains its anti-manipulation authority, as well as its regulatory and oversight responsibilities, with respect to RTO and ISO markets.'' [174] FERC accordingly requested that the Commission ''clarify that its action on SPP's application, including any statements in this proceeding with respect to private claims for fraud or manipulation under the Commodity Exchange Act, do not limit or otherwise affect FERC's authority.'' [175]

In response to FERC's comment, the Commission notes that the interpretation of the Dodd-Frank Act proffered by FERC is contrary to the express language of that statute. The Dodd-Frank Act added a savings clause to the CEA that addresses the roles of the Commission, FERC, and state agencies as they relate to transactions traded pursuant to FERC- or state-approved tariffs or rate schedules. As noted above in section I., section 2(a)(1)(I) of the Act states that nothing in the Act limits or affects the statutory authority of FERC and state regulatory authorities over agreements, contracts, or transactions entered into pursuant to a tariff or rate schedule approved by FERC or a state regulatory authority, and also preserves the Commission's statutory authority over such agreements, contracts, or transactions. Moreover, while section 4(c)(6) of the CEA, added by the Dodd-Frank Act, empowers the Commission to exempt contracts, agreements, or transactions traded pursuant to a Tariff or rate schedule that has been approved or permitted to take effect by FERC or a state regulatory authority, it does not permit the Commission to automatically or mechanically apply the exemption. Instead, section 4(c)(6) mandates that the Commission initially determine that the exemption would be in the public interest and consistent with the purposes of the CEA, that the exemption would be applied only to agreements, contracts, or transactions that are entered into solely between appropriate persons, and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA.

The Commission further notes, for purposes of clarification and as requested by FERC, that nothing in the SPP Final Order (or in the Amended RTO–ISO Order) limits or otherwise affects FERC's authority.

b. Consistent With the Public Interest and the Purposes of the CEA

As required by CEA section 4(c)(2)(A), as well as section 4(c)(6), the Commission determines that the SPP Final Order is consistent with the public interest and the purposes of the CEA. Section 3(a) of the CEA provides that transactions subject to the CEA affect the national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.[176] Section 3(b) of the CEA identifies the purposes of the CEA as follows: (1) To serve the public interests described in subsection (a) through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission; and (2) to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this Act and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants.[177]

Consistent with the proposed determinations set forth in the SPP Proposed Order,[178] the Commission finds that: (a) The SPP Covered Transactions have been, and are, subject to a long-standing regulatory framework for the offer and sale of the Transactions established by FERC; and (b) the SPP Covered Transactions administered by SPP are part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to FERC regulation and oversight. For example, FERC Order No. 2000 (which, along with FERC Order No. 888, encouraged the formation of RTOs and ISOs to operate the electronic transmission grid and to create organized wholesale electric energy markets) requires an RTO to demonstrate that it has four minimum characteristics: (1) Independence from any market participant; (2) a scope and regional configuration which enables the RTO to maintain reliability and effectively perform its required functions; (3) operational authority for its activities, including being the security coordinator for the facilities that it controls; and (4) short-term reliability.[179] In addition, SPP stated that an RTO must demonstrate to FERC that it performs certain self-regulatory and/or market monitoring functions.[180] SPP also represented that it is ''responsible for ensur[ing] the development and operation of market mechanisms to manage transmission congestion'' [181] and for establishing ''market mechanisms [that] must accommodate broad participation by all market participants, and must provide all transmission customers with efficient price signals that show the consequences of their transmission usage decisions.'' [182]

Furthermore, as explained by SPP and discussed in the SPP Proposed Order, the Commission notes that the SPP

[171] FERC Staff (1) at 2; *see also* FERC Staff (2) at 2.

[172] FERC Staff (1) at 2.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] 7 U.S.C. 5(a).

[177] 7 U.S.C. 5(b).

[178] *See* 80 FR at 29495–96.

[179] *See id.* at 29495.

[180] *See id.; see also id.* at 29495 n.81 (explaining that, according to SPP, SPP must employ a transmission pricing system that promotes efficient use and expansion of transmission and generation facilities; develop and implement procedures to address parallel path flow issues within its region and with other regions; serve as a provider of last resort of all ancillary services required by FERC Order No. 888 including ensuring that its transmission customers have access to a Real-Time balancing market; be the single OASIS (Open-Access Same-Time Information System) site administrator for all transmission facilities under its control and independently calculate Total Transmission Capacity and Available Transmission Capability; provide reliable, efficient, and not unduly discriminatory transmission service, it must provide for objective monitoring of markets it operates or administers to identify market design flaws, market power abuses and opportunities for efficiency improvements; be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades; and ensure the integration of reliability practices within an interconnection and market interface practices among regions). *See* Exemption Application at 18.

[181] *See* 80 FR at 29495–96; *see also* Exemption Application at 18.

[182] *See* 80 FR at 29496; *see also* Exemption Application at 18–19; 18 CFR 35.34(k)(2).

Covered Transactions are entered into by commercial participants that are in the business of generating, transmitting, and distributing electric energy,[183] and that SPP was established for the purpose of providing affordable, reliable electric energy to consumers within its geographic region.[184] Additionally, the SPP Covered Transactions that take place on SPP's markets are overseen by the SPP Market Monitor, required by FERC to identify manipulation of electric energy on SPP's markets.[185]

Moreover, fundamental to the Commission's ''public interest'' and ''purposes of the [Act]'' analysis is the fact that the SPP Covered Transactions are inextricably tied to SPP's physical delivery of electric energy.[186] Another important factor is that the SPP Final Order is explicitly limited to SPP Covered Transactions taking place on markets that are monitored by the SPP Market Monitor, SPP, or both, and FERC. In contrast, an exemption for transactions that are not so monitored, or not related to the physical capacity of an electric transmission grid, or not directly linked to the physical generation and transmission of electric energy, or not limited to appropriate persons,[187] is unlikely to be in the public interest or consistent with the purposes of the CEA, taking such transactions outside the scope of the SPP Final Order.

Finally, the extent to which the SPP Final Order is consistent with the public interest and the purposes of the Act can, in major part, be assessed by the extent to which the Tariff and activities of SPP, and supervision by FERC, are congruent with, and sufficiently accomplish, the regulatory objectives of the relevant Core Principles set forth in the CEA for derivatives clearing organizations (''DCOs'') and swap execution facilities (''SEFs''). Specifically, ensuring the financial integrity of the SPP Covered Transactions and the avoidance of systemic risk, as well as protection from the misuse of participant assets, are addressed by the Core Principles for DCOs. Providing a means for managing or assuming price risk and discovering prices, as well as prevention of price manipulation and other disruptions to market integrity, are addressed by the Core Principles for SEFs. Deterrence of price manipulation (or other disruptions to market integrity) and protection of market participants from fraudulent sales practices is achieved by the Commission retaining and exercising its jurisdiction over these matters. Therefore, the Commission has incorporated its DCO and SEF Core Principle analyses, set forth in the SPP Proposed Order,[188] into its consideration of the SPP Final Order's consistency with the public interest and the purposes of the Act. In the same way, the Commission has considered how the public interest and the purposes of the CEA are also addressed by the manner in which SPP complies with FERC's credit reform policy.[189]

The Commission specifically requested comment on (a) whether it used the appropriate standard in making its section 4(c) determination, and (b) whether the SPP Proposed Order is consistent with the public interest and the purposes of the CEA. The Commission received no comments in response to these requests. The Commission therefore determines that it used the appropriate standard in making its public interest and purposes of the CEA determination. The Commission believes that the standards set forth in FERC regulation 35.47 appear to achieve goals similar to the regulatory objectives of the Commission's DCO Core Principles.[190] Moreover, as set forth in the Commission's DCO Core Principle analysis in the SPP Proposed Order, the Commission determines that SPP's policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of this SPP Final Order, the regulatory objectives of the DCO Core Principles in the context of the SPP Covered Transactions.[191] Also, as set forth in the Commission's SEF Core Principles analysis in the SPP Proposed Order, the Commission has determined that SPP's policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of this SPP Final Order, the regulatory objectives of the SEF Core Principles in the context of the SPP Covered Transactions.[192] The Commission further determines that, for the reasons set forth in this SPP Final Order, the requested exemptive relief is consistent with the public interest and the purposes of the CEA.

c. CEA Section 4(a) Should Not Apply to the Transactions or Entities Eligible for the Exemption

CEA section 4(c)(2)(A) requires, in part, that the Commission determine that the SPP Covered Transactions described in the SPP Final Order should not be subject to CEA section 4(a)—generally, the Commission's exchange trading requirement for a contract for the purchase or sale of a commodity for future delivery. As set forth in the SPP Proposed Order, the Commission has examined the SPP Covered Transactions, SPP, and its markets using the CEA Core Principle requirements applicable to a DCO and to a SEF as a framework for its public interest and purposes of the CEA determination.[193] As further support for this determination, the Commission also is relying on the public interest and the purposes of the Act analysis in subsection IV.A.2.b. above. In so doing, the Commission has determined that, due to the FERC regulatory scheme and the RTO market structure applicable to the SPP Covered Transactions, the linkage between the SPP Covered Transactions and that regulatory scheme, and the unique nature of the market participants that would be eligible to rely on the exemption,[194] CEA section 4(a) should not apply to the SPP Covered Transactions under the SPP Final Order.[195]

d. Appropriate Persons

Section 4(c)(2)(B)(i) of the CEA [196] requires that the Commission determine that the exemption is restricted to SPP Covered Transactions entered into solely between ''appropriate persons,'' as that term is defined in section 4(c)(3) of the Act.[197] Section 4(c)(3) defines the term ''appropriate person'' to include: (1) any person that falls within one of the ten categories of persons delineated in sections 4(c)(3)(A) through (J) of the Act; or (2) such other persons that the Commission determines to be appropriate pursuant to the limited authority provided by section 4(c)(3)(K).[198] The Commission may determine that persons that do not meet the requirements of sections 4(c)(3)(A) through (J) are ''appropriate persons'' for purposes of section 4(c) only if it determines that such persons are

[183] *See* 80 FR at 29496; *see also* Exemption Application at 17.

[184] *See id.*

[185] *See id.*

[186] *See* 80 FR at 29496; *see also* Exemption Application at 12–15, 17 (describing the SPP Covered Transactions and noting that each of them ''is part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to FERC's regulation and oversight'').

[187] *See* appropriate persons discussion *infra* IV.A.2.d.

[188] *See* 80 FR at 29499–515.

[189] *See* section IV.B. *infra;* 80 FR at 29498–99.

[190] *Cf.* RTO–ISO Order at 19900–01.

[191] *Cf. id.* at 19901.

[192] *Cf. id.* at 19902.

[193] *See* 80 FR at 29499–515.

[194] *See* appropriate persons analysis, section IV.A.2.d. *infra; see also* 80 FR at 29496–97.

[195] The Commission notes that such a determination would be consistent with a similar determination made in the RTO–ISO Order. *See* RTO–ISO Order at 19895.

[196] 7 U.S.C. 6(c)(2)(B)(i).

[197] 7 U.S.C. 6(c)(3).

[198] *Id.; see also supra* note 168.

''appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.'' [199]

Consistent with the RTO–ISO Order, the Commission proposed to limit the exemption to transactions where all parties thereto are ''appropriate persons,'' as defined in sections 4(c)(3)(A) through (J) of the Act,[200] ''eligible contract participants,'' as defined in section 1a(18)(A) of the Act [201] and in Commission regulation 1.3(m),[202] or persons who are in the business of: (i) Generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system.[203] The Commission did not receive any comments objecting to this proposed limitation. Therefore, pursuant to the authority set forth in section 4(c)(3)(K) of the CEA and consistent with the RTO–ISO Order, the Commission has determined that ''eligible contract participants,'' as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m), and ''persons who are in the business of: (i) Generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system,'' are appropriate persons for purposes of the SPP Final Order, in light of their financial or other qualifications. Accordingly, this limitation has been incorporated into the SPP Final Order unchanged.

The Commission believes that this expansion, when combined with the ''appropriate persons'' definition delineated in sections 4(c)(3)(A) through (J) of the CEA, would appear to strike the appropriate balance because the exemption would apply only to those market participants that can demonstrate the financial wherewithal or the requisite business activities and congruent expertise to qualify as appropriate persons under section 4(c)(3)(K) of the CEA.[204] The Commission has determined that ''eligible contract participants,'' as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m), are appropriate persons for purposes of the SPP Final Order in light of their financial or other qualifications, or the applicability of regulatory protections. Moreover, the Commission is using the authority provided by section 4(c)(3)(K) of the CEA to determine that a ''person who actively participates in the generation, transmission, or distribution of electric energy,'' as defined within the SPP Final Order, is an appropriate person for purposes of the exemption provided therein.[205] The SPP Final Order defines a ''person who actively participates in the generation, transmission, or distribution of electric energy'' as ''a person that is in the business of: (1) Generating, transmitting, or distributing electric energy; or (2) providing electric energy services that are necessary to support the reliable operation of the transmission system.'' The Commission has determined that the inclusion of transactions entered into by such persons is proper because such persons' active participation in the physical markets provides them with the requisite ''qualifications'' necessary to be deemed an ''appropriate person'' under CEA section 4(c)(3)(K) for purposes of the SPP Final Order.

e. Effect on the Commission's or Any Contract Market's Ability To Discharge Its Regulatory or Self-Regulatory Duties Under the CEA

CEA section 4(c)(2)(B)(ii) requires the Commission to make a determination regarding whether exempting the SPP Covered Transactions will have a material adverse effect on the ability of the Commission or any contract markets to perform regulatory or self-regulatory duties.[206] In making this determination, the Commission should consider such regulatory concerns as ''market surveillance, financial integrity of participants, protection of customers, and trade practice enforcement.'' [207] These considerations are similar to the purposes of the CEA as defined in section 3, initially addressed in the public interest and purposes of the CEA discussion.

The Commission proposed to determine that the exemption would not have a material adverse effect on the Commission's or any contract market's ability to discharge its regulatory function.[208] In the SPP Proposed Order, the Commission noted the following assertion by SPP as support for its determination:

> Under Section 4(d) of the Act, the Commission will retain authority to conduct investigations to determine whether SPP is in compliance with any exemption granted in response to this request. . . . [T]he requested exemptions would also preserve the Commission's existing enforcement jurisdiction over fraud and manipulation. This is consistent with section 722 of the Dodd-Frank Act, the existing MOU between the FERC and the Commission and other protocols for inter-agency cooperation. SPP will continue to retain records related to the Transactions, consistent with existing obligations under FERC regulations.
>
> The regulation of exchange-traded futures contracts and significant price discovery contracts (''SPDCs'') will be unaffected by the requested exemptions. Futures contracts based on electricity prices set in SPP's markets that are traded on a designated contract market and SPDCs will continue to be regulated by and subject to the requirements of the Commission. No current requirement or practice of SPP or of a contract market will be affected by the Commission's granting the requested exemptions.[209]

In addition, the Commission stated that the limitation in the SPP Proposed Order to SPP Covered Transactions between certain appropriate persons avoids potential issues regarding financial integrity and customer protection.[210]

Moreover, the Commission did not propose to exempt SPP from certain CEA provisions, including sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and any implementing regulations promulgated thereunder including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180, to the extent that those sections prohibit fraud or manipulation of the price of any swap, contract for the sale of a commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market.[211] As such, the Commission proposed to expressly retain authority to pursue fraudulent or manipulative conduct.[212]

In addition, the Commission proposed that granting the SPP Proposed Order for the SPP Covered Transactions would not have a material adverse effect on the ability of any contract market to discharge its self-regulatory duties under the Act.[213] Specifically, with respect to TCRs and Operating Reserve Transactions, the Commission found that the exemption would not have a material adverse effect on any contract market carrying out its self-regulatory function because these transactions did

[199] 7 U.S.C. 6(c)(3)(K).

[200] 7 U.S.C. 6(c)(3)(A)–(J).

[201] 7 U.S.C. 1a(18)(A).

[202] 17 CFR 1.3(m).

[203] 80 FR 29496–97. The Commission notes that the proposed limitation is consistent with the RTO–ISO Order. *See* RTO–ISO Order at 19913.

[204] *Cf.* RTO–ISO Order at 19899.

[205] *Cf. id.* at 19897.

[206] 7 U.S.C. 6(c)(2)(B)(ii).

[207] *See* H.R. Rep. No. 102–978, 102d Cong. 2d Sess., 1992 U.S.C.C.A.N. 3179, 3211 (1992).

[208] 80 FR 29497–98.

[209] *Id.* at 29497 (quoting Exemption Application at 22).

[210] *Id.*

[211] *Id.*

[212] *Id.* Nor did SPP seek an exemption from these provisions. *See id.* at 29497 n.107; Exemption Application at 1.

[213] 80 FR at 29497.

not appear to be used for price discovery or as settlement prices for other transactions in Commission-regulated markets.[214] With respect to Energy Transactions, the Commission proposed that, while these transactions did have a relationship to Commission-regulated markets because they can serve as a source of settlement prices for other transactions within Commission jurisdiction, they should not pose regulatory burdens on a contract market because SPP has market monitoring systems in place to detect and deter manipulation that takes place on its markets.[215] In addition, the Commission noted that, as a condition to the SPP Proposed Order, the Commission would be able to obtain data from FERC with respect to activity on SPP's markets that may impact trading on Commission-regulated markets.[216]

Finally, the Commission noted that if the SPP Covered Transactions ever could be used in combination with trading activity or in a position in a designated contract market (''DCM'') contract to conduct market abuse, both the Commission and DCMs have sufficient independent authority over DCM market participants to monitor for such activity.[217]

While the Commission did not receive any comments on its proposed determination that the exemption would not have a material adverse effect on the Commission's ability to discharge its regulatory duties, an important caveat should be made. With regard to the SEF Core Principle 3 analysis and general statements regarding the SPP Market Monitor's ability to detect and deter manipulation, the Commission notes that such statements were not meant to be construed as a final and irrevocable approval of the integrity of reference prices derived from SPP's markets. The Commission retains the authority to question and obtain additional information in a timely manner regarding the underlying prices to which TCRs and other electric energy contracts, which are subject to the Commission's jurisdiction, settle. As previously discussed, the Commission maintains the responsibility of ensuring that exchange-traded and cleared financial electric energy contracts are constructed such that the settlement mechanism produces prices that accurately reflect the underlying supply and demand fundamentals of SPP's markets and are not readily susceptible to manipulation. For this reason, as originally proposed, the Commission has conditioned the SPP Final Order upon access to related transactional and positional data from SPP's markets.[218]

For the reasons set forth herein and in the SPP Proposed Order, the Commission determines that the exemption for the SPP Covered Transactions in this SPP Final Order would not have a material adverse effect on the Commission's or any contract market's ability to discharge its regulatory function.

3. CEA Section 4(c) Determinations—Amended RTO–ISO Order

a. Consistent With the Public Interest and Purposes of the CEA

As required by CEA section 4(c)(2)(A), as well as section 4(c)(6), the Commission previously determined that the exemption set forth in the RTO–ISO Order is consistent with the public interest and the purposes of the CEA.[219] The amendment to the RTO–ISO Order does not alter the Commission's prior determinations with respect to the public interest and purposes of the CEA, and the Commission incorporates such prior determinations into the Amended RTO–ISO Order.

In addition, the Commission determines that the current amendment to the RTO–ISO Order, which explicitly provides that the exemption set forth therein extends to private actions under CEA section 22, is in the public interest for all of the reasons stated in section III.B.2.[220]

b. Other Section 4(c) Determinations

In the RTO–ISO Order, the Commission made a number of other determinations under CEA section 4(c), including:

- The Dodd-Frank Act applies to contracts and instruments traded in RTO or ISO markets pursuant to a FERC- or state-approved tariff or rate schedule, subject to the Commission's authority under CEA section 4(c)(6) to exempt contracts, agreements, or transactions traded pursuant to such a tariff or rate schedule upon determining that the exemption would be in the public interest and consistent with the purposes of the CEA; that the exemption would be applied only to agreements, contracts, or transactions that are entered into solely between appropriate persons; and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA.[221]
- Due to the FERC or PUCT regulatory scheme and the RTO or ISO market structure already applicable to the SPP Covered Transactions, the linkage between the SPP Covered Transactions and those regulatory schemes, and the unique nature of the market participants that are eligible to rely on the exemption in the RTO–ISO Order, CEA section 4(a) should not

[214] *Id.*

[215] *Id.; see also id.* at 29494, 29496.

[216] *Id.* at 29497.

[217] *Id.* at 29497–98.

[218] *See* section IV.B. *infra.*

[219] *See* RTO–ISO Order at 19894–95, 19900–02. The Commission's prior determination was based on a number of findings, including that (a) the RTO–ISO Covered Transactions have been, and are, subject to a long-standing, regulatory framework for the offer and sale of the Transactions established by FERC or PUCT; (b) the RTO–ISO Covered Transactions administered by the RTOs, ISOs, or ERCOT are part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to FERC and PUCT regulation and oversight; (c) the RTO–ISO Covered Transactions are entered into primarily by commercial participants that are in the business of generating, transmitting, and distributing electric energy; (d) the Requesting Parties were established for the purpose of providing affordable, reliable electric energy to consumers within their geographic region; (e) the RTO–ISO Covered Transactions that take place on the Requesting Parties' markets are overseen by Market Monitoring Units, required by FERC and PUCT to identify manipulation of electric energy on the RTO–ISO Covered Entities' markets; (f) the RTO–ISO Covered Transactions are inextricably tied to the Requesting Parties' physical delivery of electric energy; (g) the RTO–ISO Order is explicitly limited to RTO–ISO Covered Transactions taking place on markets that are monitored by either an independent Market Monitoring Unit, a market administrator (the RTO, ISO, or ERCOT), or both, and a government regulator (FERC or PUCT); (h) the standards set forth in FERC regulation 35.47 appear to achieve goals similar to the regulatory objectives of the Commission's DCO Core Principles, and substantial compliance with such requirements was key to the Commission's determination that the tariffs and activities of the Requesting Parties and supervision by FERC or PUCT are congruent with, and—in the context of the RTO–ISO Covered Transactions—sufficiently accomplish, the regulatory objectives of each DCO Core Principle; (i) the Requesting Parties' policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of the RTO–ISO Order, the regulatory objectives of the DCO Core Principles in the context of the RTO–ISO Covered Transactions; and (j) the Requesting Parties' policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of the RTO–ISO Order, the regulatory objectives of the SEF Core Principles in the context of the RTO–ISO Covered Transactions. *Id.*

[220] The Commission received one comment regarding the public interest findings in the RTO–ISO Order Proposed Amendment. EPSA argued that in the RTO–ISO Order Proposed Amendment, the Commission proposed to ''automatically or mechanically bypass the required analysis'' under CEA sections 4(c)(1) and 4(c)(2), and that the Commission's proposed public interest findings with respect the proposed amendment to explicitly preserve the CEA section 22 private right of action were insufficient. EPSA at 7–8. The Commission is of the view that the public interest analysis in the RTO–ISO Order Proposed Amendment, and that set forth herein, is neither automatic nor mechanical, and that such analyses meet the requirements of sections 4(c)(1) and 4(c)(2). Moreover, given the Commission's determination with respect to the private right of action issue, the Commission is of the view that EPSA's concern is now moot.

[221] *See* RTO–ISO Order at 19893–94; *see also* CEA section 4(c)(6).

apply to the SPP Covered Transactions under the RTO–ISO Order.[222]

• Eligible contract participants, as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m), are appropriate persons for purposes of the RTO–ISO Order in light of their financial or other qualifications, or the applicability of regulatory protections.[223] In addition, a ''person who actively participates in the generation, transmission, or distribution of electric energy,'' as defined within the RTO–ISO Order, is an appropriate person for purposes of the exemption provided therein.[224]

• The exemption in the RTO–ISO Order for the SPP Covered Transactions would not have a material adverse effect on the Commission's or any contract market's ability to discharge its regulatory function.[225]

The amendment to the RTO–ISO Order does not alter the Commission's determination with respect to any of the above 4(c) determinations. Therefore, the Commission hereby incorporates such prior 4(c) determinations, and the findings on which such determinations are based, into the Amended RTO–ISO Order. All transactions that were permitted pursuant to the exemption set forth in the RTO–ISO Order are still permitted under the Amended RTO–ISO Order. The only change made by the amendment to the RTO–ISO Order is that the Amended RTO–ISO Order provides explicitly that the exemption set forth therein also extends to actions pursuant to CEA section 22.

B. Additional Limitations and Provisions—SPP Final Order

As described in detail above,[226] the Commission expressly noted in the SPP Proposed Order[227] that the proposed exemption was based upon the representations made in the Exemption Application and in the supporting materials provided by SPP and its counsel,[228] and that any material change or omission in the facts and circumstances that alter the grounds for the SPP Proposed Order might require the Commission to reconsider its finding that the exemption contained therein is appropriate and/or in the public interest and consistent with the purposes of the CEA. The Commission did not receive any comments on this proposal. As such, the SPP Final Order is based on the representations made by SPP and its counsel in the Exemption Application, the supplemental information, and supporting materials filed with the Commission. In particular, the Commission notes that the following representations are of particular importance and integral to the Commission's decision to grant the exemption set forth in this SPP Final Order: (1) The exemption requested by SPP relates to SPP Covered Transactions that are primarily entered into by commercial participants that are in the business of generating, transmitting and distributing electric energy;[229] (2) SPP was established for the purpose of providing affordable, reliable electric energy to consumers within its geographic region;[230] (3) the SPP Covered Transactions are an essential means, designed by FERC as an integral part of its statutory responsibilities, to enable the reliable delivery of affordable electric energy;[231] (4) each of the SPP Covered Transactions taking place on SPP's markets is monitored by both a market administrator (SPP) and the SPP Market Monitor;[232] and (5) each SPP Covered Transaction is directly tied to the physical capabilities of SPP's electric energy grid.[233] Therefore, the Commission affirms that any material change or omission in the facts and circumstances that alter the grounds for the SPP Final Order might require the Commission to reconsider its finding that the exemption contained therein is appropriate and consistent with the public interest and purposes of the CEA. The Commission reiterates that the SPP Covered Transactions must be tied to the allocation of the physical capabilities of an electric energy transmission grid in order to be suitable for exemption because such activity would be inextricably linked to the physical delivery of electric energy.

In addition, the Commission proposed to exclude from the exemptive relief its general anti-fraud and anti-manipulation, and scienter-based prohibitions over SPP and the SPP Covered Transactions under the CEA, including sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o*, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the CEA and any implementing regulations promulgated thereunder including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.[234] The Commission received no comments regarding this reservation of authority.

The Commission believes it prudent to reserve in the SPP Final Order its anti-fraud and anti-manipulation authority, as well as those scienter-based prohibitions in the specified provisions of the Act and Commission regulations (without finding it necessary in this particular context to preserve other enforcement authority). The Commission notes that reservation of enforcement authority is standard practice with exemptive orders issued pursuant to CEA section 4(c). The Commission also believes it is important to highlight that, as with all exemptions issued pursuant to CEA section 4(c), the exemption shall not affect the authority of the Commission under any other provision of the CEA to conduct investigations in order to determine compliance with the requirements or conditions of such exemption or to take enforcement action for any violation of any provision of the CEA or any rule, regulation or order thereunder caused by the failure to comply with or satisfy such conditions or requirements.[235]

In the SPP Proposed Order, the Commission also proposed to make a number of additional determinations, including but not limited to the following:

• The Commission proposed to determine that the requirements set forth in FERC regulation 35.47 appear to achieve goals similar to the regulatory objectives of the Commission's DCO Core Principles, and substantial compliance with such requirements is key to the Commission's determination that the Tariff and activities of SPP and supervision by FERC are congruent with, and—in the context of the SPP Covered Transactions—sufficiently accomplish, the regulatory objectives of each DCO Core Principle.[236]

• The Commission proposed to determine that, on the basis of SPP's

[222] *See* RTO–ISO Order at 19895; *see also* CEA section 4(c)(2)(A).

[223] *See* RTO–ISO Order at 19896; *see also* CEA section 4(c)(2)(B)(i).

[224] *See* RTO–ISO Order at 19897; *see also* CEA section 4(c)(2)(B)(i).

[225] *See* RTO–ISO Order at 19903–04; *see also* CEA section 4(c)(2)(B)(ii).

[226] *See* section II.C.3. *supra.*

[227] *See* 80 FR at 29494, 29518.

[228] As part of its Exemption Application, SPP provided the Commission with a legal opinion that provided the Commission with assurance that the netting arrangements contained in the approach selected by SPP to satisfy the obligations contained in FERC regulation 35.47(d) will, in fact, provide SPP with enforceable rights of setoff against any of its market participants under Title 11 of the United States Code in the event of the bankruptcy of the market participant. *See* Memorandum regarding Enforceability of Netting Practices from Hunton & Williams LLP to SPP, dated December 2, 2013.

[229] *See* 80 FR at 29494; *see also* Exemption Application at 17.

[230] *See* 80 FR at 29494; *see also* Exemption Application at 2, 17.

[231] *See* 80 FR at 29494; *see also generally* FERC Order No. 888; FERC Order No. 2000; 18 CFR 35.34(k)(2); *see also* Exemption Application at 17.

[232] *See* 80 FR at 29494; *see also* Exemption Application at 17.

[233] *See* 80 FR at 29494; *see also* Exemption Application at 12–15.

[234] *See* 80 FR at 29515, 29516.

[235] *See* 7 U.S.C. 6(d).

[236] 80 FR 29498–99.

representations and consistent with the RTO–ISO Order, it is not necessary, when considering the requisite public interest and purposes of the CEA determinations, to impose position limits on SPP's Integrated Marketplace.[237]

• The Commission proposed to determine that SPP's practices or Tariff and supervision by FERC are congruent with, and, in the context of the SPP Covered Transactions, sufficiently accomplish, the regulatory objectives of the Core Principles set forth in the CEA for DCOs.[238]

• The Commission proposed to determine that SPP's practices or Tariff and supervision by FERC are congruent with, and, in the context of the SPP Covered Transactions, sufficiently accomplish, the regulatory objectives of the Core Principles set forth in the CEA for SEFs.[239]

In the SPP Proposed Order, the Commission proposed to limit the scope of the exemption to certain specified transactions:

• The SPP Proposed Order would exempt Transmission Congestion Rights, Energy Transactions, and Operating Reserve Transactions from most requirements of the CEA, and the SPP Proposed Order would not extend the exemption beyond these three specifically-defined transactions.[240] The SPP Proposed Order would include any modifications to existing transactions that do not alter the SPP Covered Transactions' characteristics in a way that would cause them to fall outside the definitions of the SPP Covered Transactions, and that are offered by SPP pursuant to a FERC-approved Tariff.

• The SPP Proposed Order would exempt products that qualify as one of the three defined SPP Covered Transactions, regardless of whether or not SPP offers the particular product at the present time.[241]

In the SPP Proposed Order, the Commission proposed to condition the exemption on the following:

• The SPP Proposed Order would be conditioned upon requiring (1) that an information sharing arrangement acceptable to the Commission be executed between the Commission and FERC and continue to be in effect, and (2) ''SPP's compliance with the Commission's requests through FERC to share, on an as-needed basis and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within SPP's possession for products in SPP's markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data.''[242]

• The SPP Proposed Order would be conditioned upon requiring that ''[n]either the Tariff nor any other governing documents of SPP shall include any requirement that SPP notify its members prior to providing information to the Commission in response to a subpoena or other request for information or documentation.''[243]

The Commission received no comments on the above proposed determinations, limitations, and conditions, and hereby incorporates such determinations, limitations, and conditions into the SPP Final Order. As noted in the SPP Proposed Order and earlier in this SPP Final Order, the SPP Covered Transactions are inextricably tied to SPP's physical delivery of electric energy, and they take place on markets that are monitored by the SPP Market Monitor, SPP, or both, and FERC. Specifically, with respect to TCRs and Operating Reserve Transactions, the Commission found that the exemption would not have a material adverse effect on any contract market carrying out its self-regulatory function because these transactions did not appear to be used for price discovery or as settlement prices for other transactions in Commission-regulated markets. With respect to Energy Transactions, while Energy Transactions did have a relationship to Commission-regulated markets because they can serve as a source of settlement prices for other transactions within Commission jurisdiction, they should not pose regulatory burdens on a contract market because SPP has market monitoring systems in place to detect and deter manipulation that takes place on its markets. Furthermore, conditioning the exemption provided in the SPP Final Order upon the Commission's ability to obtain related transactional and positional data from SPP, and SPP's compliance with such requests by sharing the requested information, is meant to enable the Commission to continue discharging its regulatory duties under the Act as set forth in CEA section 3.[244]

V. Related Matters

A. Regulatory Flexibility Act

1. Introduction

The Regulatory Flexibility Act (''RFA'') requires that the Commission consider whether the exemptions set forth in the SPP Final Order and in the Amended RTO–ISO Order will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[245]

2. SPP Final Order

In the SPP Proposed Order, the Commission found that SPP should not be considered a small entity based on the central role it plays in the operation of the electronic transmission grid and the creation of organized wholesale electric markets that are subject to FERC regulatory oversight,[246] analogous to functions performed by DCMs and DCOs, which the Commission has previously determined not to be ''small entities.''[247] The SPP Proposed Order included entities that qualify as (1) ''appropriate persons'' pursuant to CEA sections 4(c)(3)(A) through (J), (2) ''eligible contract participants'' (''ECPs''), as defined in CEA section 1a(18)(A) and Commission regulation 1.3 (m), or (3) persons who are in the business of: (i) Generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system.[248] The Commission previously determined that ECPs are not ''small entities'' for purposes of the RFA.[249] As a result, the

[237] *Id.* at 29511.

[238] *Id.* at 29499–508.

[239] *Id.* at 29508–15.

[240] *Id.* at 29515.

[241] *Id.* at 29516.

[242] *Id.* at 29517.

[243] *Id.*

[244] 7 U.S.C. 5.

[245] 5 U.S.C. 601 *et seq.*

[246] 80 FR at 29518. *See* Enhancement of Electricity Market Surveillance and Analysis Through Ongoing Electronic Delivery of Data From Regional Transmission Organizations and Independent System Operators, 77 FR 26674, 26685–86, May 7, 2012 (RFA analysis as conducted by FERC regarding six RTOs and ISOs, including SPP).

Commission staff also performed an independent RFA analysis based on Subsector 221 of sector 22 (utilities companies) of the Small Business Administration (''SBA''), which defines any small utility corporation as one that does not have more than 250 employees. *See* 13 CFR 121.201 (1–1–15 Edition). Staff concludes that SPP is not a small entity, since SPP represents that it employs more than 500 employees. *See* Exemption Application Attachments at 8.

[247] *See* A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609, Aug. 29, 2001 (DCOs); Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18618–19, Apr. 30, 1982 (DCMs).

[248] *See* 80 FR at 29517. Under CEA section 2(e), only ECPs are permitted to participate in a swap, subject to the end-user clearing exception.

[249] *See* Opting Out of Segregation, 66 FR 20740, 20743, Apr. 25, 2001.

Commission certified that the SPP Proposed Order would not have a significant economic impact on a substantial number of small entities for purposes of the RFA, and requested written comments regarding this certification.[250] The Commission did not receive any comments with respect to its RFA analysis in the SPP Proposed Order.

The relief provided in the SPP Final Order to a person who actively participates in the generation, transmission, or distribution of electric energy may impact some small entities to the extent they may fall within standards established by the SBA regulations defining any small utility corporation as one that does not have more than 250 employees.[251] However, based on the Commission's existing information about SPP's markets, its market participants consist mostly of entities exceeding the thresholds defining ''small entities'' set out above.

The Commission is of the view that the SPP Final Order alleviates the economic impact that the exempt entities, including any small entities that may opt to take advantage of the exemption set forth in the SPP Final Order, otherwise would be subjected to by exempting certain of their transactions from the application of substantive regulatory compliance requirements of the CEA and Commission regulations thereunder. Accordingly, the Commission is of the view that the SPP Final Order does not have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the exemption set forth in the SPP Final Order would not have a significant economic impact on a substantial number of small entities.

3. Amended RTO–ISO Order

With respect to the Amended RTO–ISO Order, the Commission previously determined that the RTO–ISO Order would not have a significant economic impact on a substantial number of small entities.[252] The Amended RTO–ISO Order does not substantively change the scope of the exemption set forth in the RTO–ISO Order. Furthermore, the RFA analysis in the RTO–ISO Order is still valid. Specifically, the RTOs and ISOs covered by the Amended RTO–ISO Order should not be considered small entities based on the central role they play in the operation of the electronic transmission grid and the creation of organized wholesale electric markets that are subject to FERC and PUCT regulatory oversight,[253] analogous to functions performed by DCMs and DCOs, which, as noted above, the Commission has previously determined not to be ''small entities.'' [254] In addition, the Amended RTO–ISO Order includes entities that qualify as (1) ''appropriate persons'' pursuant to CEA sections 4(c)(3)(A) through (J), (2) ECPs, as defined in CEA section 1a(18)(A) and Commission regulation 1.3 (m), or (3) persons who are in the business of: (i) Generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system. As noted above, the Commission has previously determined that ECPs are not ''small entities'' for purposes of the RFA.[255] The Commission is of the view that, based on the Commission's existing information about the RTOs' and ISOs' markets, their market participants consist mostly of entities exceeding the thresholds defining ''small entities.'' [256]

Also, the Amended RTO–ISO Order would continue to alleviate the economic impact that the exempt entities, including any small entities that may opt to take advantage of the exemption set forth in the RTO–ISO Order, otherwise would be subjected to by continuing to exempt certain of their transactions from the application of substantive regulatory compliance requirements of the CEA and Commission regulations thereunder. Accordingly, the Commission does not expect the Amended RTO–ISO Order to have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the exemption set forth in the Amended RTO–ISO Order would not have a significant economic impact on a substantial number of small entities.[257]

B. Paperwork Reduction Act

1. Introduction

The purposes of the Paperwork Reduction Act of 1995 (''PRA'') [258] are, among other things, to minimize the paperwork burden to the private sector, ensure that any collection of information by a government agency is put to the greatest possible uses, and minimize duplicative information collections across the government. The PRA applies to all information, ''regardless of form or format,'' whenever the government is ''obtaining, causing to be obtained [or] soliciting'' information, and includes and requires ''disclosure to third parties or the public, of facts or opinions,'' when the information collection calls for ''answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.'' [259]

2. SPP Final Order

The SPP Proposed Order provided that the exemption would be expressly conditioned upon information sharing arrangements between the Commission and FERC that are acceptable to the Commission continuing to be in effect.[260] The Commission determined that the PRA would not apply because the SPP Proposed Order did not impose any new recordkeeping or information collection requirements, or other collections of information on ten or more persons that require approval of the Office of Management and Budget (''OMB''). The Commission did not receive any comments regarding this determination. The SPP Final Order thus incorporates the information sharing condition unchanged from the SPP Proposed Order, and this condition is consistent with the RTO–ISO Order.

3. Amended RTO–ISO Order

With respect to the Amended RTO–ISO Order, the Commission previously determined that the RTO–ISO Order did not impose any new recordkeeping or information collection requirements, or other collections of information on ten or more persons that require OMB

[250] 80 FR at 29518.

[251] *See* note 246 *supra* (citing 13 CFR 121.201).

[252] *See* RTO–ISO Order at 19906–07.

[253] *See* note 246 *supra; see also* RTO–ISO Order at 19906.

[254] *See* note 247 *supra; see also* RTO–ISO Order at 19906.

[255] *See* note 249 *supra; see also* RTO–ISO Order at 19906.

[256] *See* note 246 *supra* (citing 13 CFR 121.201). The threshold established by the SBA regulations define any small utility corporation as one that does not have more than 250 employees; *see also* RTO–ISO Order at 19907.

[257] The Commission received one comment with respect to the RFA analysis in the RTO–ISO Order Proposed Amendment. The NFP Electric Associations argued that the RFA analysis in the RTO–ISO Order Proposed Amendment was ''abbreviated and conclusory,'' that the members of the NFP Electric Associations are ''small entities'' for purposes of the RFA, and that the amendment proposed in the RTO–ISO Order Proposed Amendment would have a negative impact on such entities. *See* NFP Electric Associations at 8. The Commission is of the view that the RFA analysis in the RTO–ISO Order Proposed Amendment, and that set forth herein, is sufficiently detailed and not conclusory. Moreover, given the Commission's determination with respect to the private right of action issue, the Commission is of the view that the NFP Electric Associations' concern is now moot.

[258] 44 U.S.C. 3501 *et seq.*

[259] 44 U.S.C. 3502(3).

[260] 80 FR at 29517.

approval.[261] The Amended RTO–ISO Order does not impose any recordkeeping or information collection requirements, or other collections of information on ten or more persons that require OMB approval.

C. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA[262] requires the Commission to ''consider the costs and benefits'' of its actions before promulgating a regulation under the CEA or issuing certain orders. In issuing the SPP Final Order and the Amended RTO–ISO Order, the Commission is required by CEA sections 4(c)(6) and 4(c)(1) to ensure that they are consistent with the public interest. In much the same way, section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

1. SPP Final Order

a. Background

On October 17, 2013, SPP filed an Exemption Application [263] with the Commission requesting that the Commission exercise its authority under section 4(c)(6) of the CEA and section 712(f) of the Dodd-Frank Act to exempt certain contracts, agreements, and transactions for the purchase or sale of specified electric energy products, that are offered pursuant to a FERC-approved Tariff, from most provisions of the Act.[264] SPP asserted that each of the transactions for which an exemption is requested is (a) subject to a long-standing, comprehensive regulatory framework for the offer and sale of such transactions established by FERC, and (b) part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to regulation and oversight by FERC. SPP expressly excluded from the Exemption Application any request for relief from the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o*, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the Act, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4 and part 180,[265] and such provisions explicitly have been carved out of the SPP Final Order.[266]

b. SPP Proposed Order and Request for Comment on the Commission's Proposed Consideration of Costs and Benefits

Upon consideration of the Exemption Application, the Commission issued the SPP Proposed Order, which proposed to exempt Transmission Congestion Rights, Energy Transactions, and Operating Reserve Transactions pursuant to section 4(c)(6) of the CEA.[267] The Commission proposed to limit the exemption set forth in the SPP Proposed Order to persons who are (1) ''appropriate persons,'' as defined in CEA sections 4(c)(3)(A) through (J); (2) ''eligible contract participants,'' as defined in CEA section 1a(18)(A) and Commission regulation 1.3(m); or (3) persons who actively participate in the generation, transmission, or distribution of electric energy.[268] Furthermore, under the SPP Proposed Order, the agreement, contract, or transaction must be offered or sold pursuant to SPP's Tariff, which has been approved by FERC.[269] The exemption in the SPP Proposed Order would extend to any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to the SPP Covered Transactions.[270]

In the SPP Proposed Order, the Commission clarified that financial transactions that are not tied to the allocation of the physical capabilities of an electric energy transmission grid would not be suitable for exemption, and were therefore not covered by the SPP Proposed Order because such activity would not be inextricably linked to the physical delivery of electric energy.[271]

The SPP Proposed Order expressly requested public comment on the Commission's proposed cost-benefit considerations, including with respect to reasonable alternatives; the magnitude of specific costs and benefits, and data or other information to estimate a dollar valuation; and any impact on the public interest factors specified in CEA section 15(a).[272] The Commission did not receive any comments on its proposed cost-benefit considerations as set forth in the SPP Proposed Order.

c. Summary of the SPP Final Order

As discussed above, the SPP Final Order makes certain determinations with respect to the scope of relief, including the scope of the SPP Covered Transactions.[273] The Commission determined that any products that are offered by SPP, presently or in the future, pursuant to a Tariff that has been approved by FERC and that fall within the provided definitions of the SPP Covered Transactions, as well as any modifications to existing products that are offered by SPP pursuant to a Tariff that has been approved by FERC and that do not alter the characteristics of the SPP Covered Transactions in a way that would cause such products to fall outside these definitions, are intended to be included within the SPP Final Order.[274] In this way, the Commission's SPP Final Order provides beneficial flexibility and efficiency in that, if the product qualifies as one of the three SPP Covered Transactions in the SPP Final Order, SPP would not be required to request or to obtain future supplemental relief for a modified product. At the same time, however, the Commission declined to include the phrase ''directly related to, and a logical outgrowth of'' in the definitions of the SPP Covered Transactions because such phrase is too vague and too potentially far reaching to permit meaningful analysis under the Commission's statutory standard of review.

The SPP Final Order also sets forth certain conditions to the effectiveness of the exemption set forth therein. First, the Commission must be able to obtain through FERC positional and transactional data within SPP's possession for products in SPP's markets that are related to markets

[261] *See* RTO–ISO Order at 19907–08.

[262] 7 U.S.C. 19(a).

[263] As noted above, SPP filed an amended Exemption Application on August 1, 2014, and citations to ''Exemption Application'' herein are to the amended Exemption Application. *See* note 31 *supra.*

[264] *See* 80 FR at 29491; *see also* Exemption Application at 1–2, 11–15.

[265] *See* 80 FR at 29491; *see also* Exemption Application at 1.

[266] *See* paragraph 1 of the SPP Final Order.

[267] *See* 80 FR at 29516–18; *see also* section II.C.1. *supra.*

[268] *See* 80 FR at 29517.

[269] *See id.*

[270] *See id.* at 29516.

[271] *See id.* at 29494.

[272] *See id.* at 29522. As a general matter, in considering the costs and benefits of its actions, the Commission endeavors to quantify estimated costs and benefits where reasonably feasible. Here, however, the Commission considers the costs and benefits of this SPP Final Order mostly in qualitative terms because the commenters provided no such data or information to assist the Commission in doing so despite the SPP Proposed Order's request.

[273] *See* section IV.B. *supra.*

[274] *See id.*

subject to the Commission's jurisdiction, including any pertinent information concerning such data.[275] Second, the exemption is expressly conditioned upon the requirement that neither the Tariff nor any other governing documents of SPP shall include any requirement that SPP notify its members prior to providing information to the Commission in response to a subpoena or other request for information or documentation.[276]

In the discussion that follows, the Commission considers the costs and benefits of the SPP Final Order to the public and market participants generally, and to SPP specifically. It also considers the costs and benefits of the exemption described in the SPP Final Order, in light of the public interest factors enumerated in CEA section 15(a).

d. Baseline

The Commission's baseline for consideration of the costs and benefits of the SPP Final Order is the costs and benefits that the public and market participants (including SPP) would experience in the absence of this proposed regulatory action. In other words, the baseline is a situation in which the Commission takes no action and exercises jurisdiction, meaning that the transactions that are the subject of SPP's Exemption Application would be required to comply with all of the CEA and Commission regulations, as applicable.[277] In such a scenario, the public and market participants would experience the full benefits and costs related to the CEA and Commission regulations, but as discussed in detail above, the transactions would still be subject to the congruent regulatory regime of FERC.[278]

The Commission also considers the regulatory landscape as it exists outside the context of the Dodd-Frank Act's enactment. In this instance, it also is important to highlight the fact that each of the transactions for which an exemption is requested is already subject to a long-standing, comprehensive regulatory framework for the offer and sale of such transactions established by FERC.[279] For example, the costs and benefits attendant to the Commission's condition that transactions be entered into between ''appropriate persons'' as described in CEA section 4(c)(3) has an analog outside the context of the Dodd-Frank Act in FERC's minimum criteria for RTO market participants as set forth in FERC Order No. 741. Moreover, the Commission has granted similar relief to other RTOs and ISOs regulated by either FERC or PUCT.[280]

In the discussion that follows, the Commission endeavored to, where reasonably feasible, estimate quantifiable dollar costs of the SPP Final Order. The benefits and costs of the SPP Final Order, however, are not presently susceptible to meaningful quantification. Most of the costs arise from limitations on the scope of the SPP Final Order, and many of the benefits tied to those limitations arise from avoiding defaults and their implications that are clearly large in magnitude, but impracticable to estimate. Being unable to quantify, the Commission discusses proposed costs and benefits in qualitative terms.

e. Benefits

The Commission's comprehensive action in this SPP Final Order benefits the public and market participants in several substantial if unquantifiable ways, as discussed below. First, by cabining the SPP Covered Transactions to the definitions provided in this SPP Final Order, the Commission limits the financial risk that may impact the markets. The mitigation of such risk inures to the benefit of SPP, market participants, and the public, especially SPP's members and electric energy ratepayers.

The condition that only ''appropriate persons'' may enter into the SPP Covered Transactions benefits the public and the entities that fall under the ''appropriate persons'' definition themselves, by ensuring that only persons with resources sufficient to understand and manage the risks of the transactions are permitted to engage in the same. Further, the condition requiring that the SPP Covered Transactions only be offered or sold pursuant to a FERC-approved Tariff benefits the public by, for example, ensuring that the SPP Covered Transactions are subject to a regulatory regime that is focused on the physical provision of reliable electric energy, and also has credit requirements that are designed to achieve risk management goals congruent with the regulatory objectives of the Commission's DCO and SEF Core Principles. Absent these and other similar limitations on participant- and financial-eligibility, the integrity of the markets at issue could be compromised, and members and ratepayers left unprotected from potentially significant losses resulting from purely financial, speculative activity.

The Commission's retention of power to redress any fraud or manipulation in connection with the SPP Covered Transactions protects market participants and the public generally, as well as the financial markets for electric energy products. For example, the SPP Final Order is conditioned upon the Commission's ability to obtain certain positional and transactional data within SPP's possession from SPP. Through this condition, the Commission expects that it will be able to continue discharging its regulatory duties under the CEA. Further, the condition that SPP may not, in the future, maintain any Tariff provisions that would require SPP to notify members prior to providing the Commission with information will help maximize the effectiveness of the Commission's enforcement program.

In addition, explicitly providing an exemption from private claims under CEA section 22 will benefit market participants by allowing them to avoid legal and compliance costs due to an increased risk of private litigation under section 22. Moreover, granting an explicit exemption from the CEA section 22 private right of action reflects Congress' intent regarding how manipulation and fraud in the context of the RTO–ISO markets should be addressed. Lastly, providing an exemption from private actions pursuant to CEA section 22 will prevent any potential tension between the enforcement programs of FERC and PUCT, on the one hand, and private enforcement under the CEA, on the other.

f. Costs

The SPP Final Order is exemptive and provides ''appropriate persons'' engaging in SPP Covered Transactions relief from certain requirements of the CEA and attendant Commission regulations. As with any exemptive rule or order, the exemption in the SPP Final Order is permissive, meaning that SPP was not required to request it and is not required to rely on it. Accordingly, the Commission assumes that SPP would rely on the exemption only if the anticipated benefits warrant the costs of the exemption.

The Commission is of the view that SPP, market participants, and the public will experience minimal, if any, ongoing costs as a result of the determinations

[275] Paragraph 4(a) of the SPP Final Order.

[276] Paragraph 4(b) of the SPP Final Order.

[277] Under this situation, the statutory private right of action in CEA section 22 would remain intact and would apply, in accordance with its terms, to all applicable provisions of the CEA.

[278] Some benefits of CFTC regulation overlap with benefits of FERC regulation and, therefore, are attributable to both regimes.

[279] *See supra* section IV.A.2.b.

[280] *See* RTO–ISO Order; *see also supra* section II.A.

and conditions set forth in the SPP Final Order because, as SPP certifies pursuant to Commission regulation 140.99(c)(3)(ii), the attendant conditions are substantially similar to requirements that SPP and its market participants already incur in complying with FERC regulations.

The requirement that all parties to the agreements, contracts, or transactions that are covered by the exemption in the SPP Final Order must be (1) an ''appropriate person,'' as defined sections 4(c)(3)(A) through (J) of the CEA; (2) an ''eligible contract participant,'' as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or (3) a ''person who actively participates in the generation, transmission, or distribution of electric energy,'' as defined in paragraph 5(f) of the SPP Final Order—is not likely to impose any significant, incremental costs on SPP because its existing legal and regulatory obligations under the FPA and FERC regulations mandate that only eligible market participants may engage in the SPP Covered Transactions.

The requirement that the SPP Covered Transactions must be offered or sold pursuant to SPP's Tariff, which has been approved by FERC, is a statutory requirement for the exemption set forth in CEA section 4(c)(6) and therefore is not a cost attributable to an act of discretion by the Commission.[281] Moreover, requiring that SPP not operate outside its approved Tariff derives from existing legal requirements and is not a cost attributable to this SPP Final Order.

As described above, FERC imposes on SPP and the SPP Market Monitor various information management requirements.[282] These existing requirements are not materially different from the condition that neither SPP's Tariff nor other governing documents may include any requirement that SPP notify a member prior to providing information to the Commission in response to a subpoena, special call, or other request for information or documentation. This requirement is not likely to impose any significant, incremental costs on SPP because SPP's existing Tariff governing the sharing of information meets this condition.

Requiring that an information sharing arrangement between the Commission and FERC be in full force and effect is not a cost to SPP or to other members of the public because it has been an inter-agency norm since 2005.[283] The requirement that SPP comply with the Commission's requests on an as-needed basis for related transactional and positional market data will impose only minimal costs on SPP to respond because the Commission contemplates that any information requested will already be in SPP's possession.[284]

In addition, in granting an explicit exemption from the CEA section 22 private right of action, the Commission notes that there may be minimal costs associated with the fact that private litigants will not be permitted to vindicate their own interests or directly contribute to those interests through litigation with respect to fraud and manipulation in the RTO–ISO markets. However, as stated above in section III.B.2., such costs are mitigated by the fact that FERC and PUCT will continue to pervasively regulate such markets. In addition, nothing in the SPP Final Order affects the Commission's own authority to address fraudulent or manipulative conduct in the RTO–ISO markets, including the Commission's authority to seek restitution for the benefit of victims. Also, as noted above in section III.B.2., the Commission encourages market participants who observe potential fraud or manipulation in the markets subject to the Commission's jurisdiction to bring their concerns to the Commission.

g. Consideration of Alternatives

The Commission considered the costs and benefits of not issuing the exemption found in the SPP Final Order. The Commission declined this approach as inconsistent with Congressional intent and contrary to the public interest, since Congress, in the Dodd-Frank Act, required the Commission to exempt certain contracts, agreements or transactions from duties otherwise required by statute or Commission regulation by adding a new section that requires the Commission to exempt from its regulatory oversight agreements, contracts, or transactions traded pursuant to a FERC-approved tariff, where such exemption is in the public interest and consistent with the purposes of the CEA. In addition, not issuing the exemption found in the SPP Final Order would result in SPP being treated differently from the RTOs and ISOs covered by the Commission's previous RTO–ISO Order.

The Commission also considered the costs and benefits of expanding the definition of SPP Covered Transactions to include future products that are ''directly related to, and a logical outgrowth of'' existing products, as requested by SPP. The Commission declined this approach in part because of the concern that such an open-ended definition could present risks beyond those contemplated. At the same time, the Commission made clear that any new transactions that fall within the SPP Covered Transactions, which are explicitly defined in the SPP Final Order, and any modifications to existing transactions that do not alter the SPP Covered Transactions' characteristics in a way that would cause them to fall outside those definitions, that are offered by SPP pursuant to a FERC-approved Tariff, are intended to be included within the exemption in the SPP Final Order.[285] This provides a benefit in that no supplemental relief for such products would be required, which is a cost-mitigating efficiency gain for SPP.

The Commission also considered expressly preserving the statutory private right of action found in CEA section 22 with respect to fraud and manipulation. The Commission has considered the costs and benefits of such action in light of the comments received, and, for the reasons stated in section III.B.2., has been persuaded that issuing an explicit exemption from CEA section 22 is the appropriate course of action.

h. Consideration of CEA Section 15(a) Factors

i. Protection of Market Participants and the Public

As explained above, the Commission does not foresee that the SPP Final Order will have any negative effect on the protection of market participants and the public. More specifically, the SPP Covered Transactions, in light of the representations of SPP and in the context of SPP's regulation by FERC, do not appear to generate significant risks of the nature of those addressed by the CEA. The Commission has attempted to delineate the definitional boundaries for the SPP Covered Transactions in a manner that appropriately ring-fences

[281] *See* 7 U.S.C. 6(c)(6)(A), (B).

[282] *See* section IV.A.2.b. *supra.*

[283] The CFTC and FERC first signed an information sharing MOU on October 12, 2005. On January 2, 2014, as directed by Congress under the Dodd-Frank Act, the Commission and FERC entered into the CFTC–FERC Information Sharing MOU, which superseded the 2005 MOU and provided for the sharing of information for use in analyzing market activities and protecting market integrity. *See supra* note 56.

[284] SPP represents that its Tariff requires the sharing of information with the Commission without prior notice to market participants. *See* Exemption Application Attachments at 52, 54; *see also* section IV.B. *supra.*

[285] *See* section IV.B. *supra.*

against the possibility that they could generate such risks, either now or as they may evolve in the future. In addition, the Commission has limited the exemption set forth in the SPP Final Order to persons with resources sufficient to understand and manage the risks of the SPP Covered Transactions. This requirement serves to protect excluded market participants and it minimizes the risk of potential misuse of the exempt transactions.

ii. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission foresees little, if any, negative impact from the SPP Final Order on the efficiency, competitiveness, and financial integrity of markets regulated under the CEA. As discussed above, the Commission believes that the SPP Final Order will promote efficiency by allowing entities who partake of the exemption delineated therein transactional flexibility that the Commission understands to be valuable to their ability to efficiently deploy their limited resources. Further, the Commission believes that the SPP Final Order will increase competition by granting an exemption to SPP and appropriate persons, as defined in the SPP Final Order, that is similar in scope to the exemption granted to other RTOs and ISOs in the RTO–ISO Order. In addition, as discussed above, the Commission's retention of its full enforcement authority will help ensure that any misconduct in connection with the exempted transactions does not jeopardize the financial integrity of the markets under the Commission's jurisdiction.

iii. Price Discovery

The Commission does not believe that the SPP Final Order will materially impair price discovery in non-exempt markets subject to the Commission's jurisdiction. As discussed above, the SPP Covered Transactions are used to manage unique electric industry operational risks. As such, Transmission Congestion Rights and Operating Reserve Transactions appear to be ill-suited for exchange trading and/or to serve a useful price discovery function. In addition, as discussed above, while Energy Transactions can serve as a source of settlement prices for other transactions in Commission-regulated markets, SPP has a market monitoring system in place to detect and deter manipulation that takes place on its markets.

iv. Sound Risk Management Practices

The Commission believes that the SPP Final Order will promote the ability of SPP and its market participants to manage the operational risks posed by unique electric energy market characteristics, including the non-storable nature of electric energy and demand that can and frequently does fluctuate dramatically within a short time-span. As discussed above, the Commission understands that the SPP Covered Transactions are an important tool facilitating SPP's ability to efficiently manage operational risk in fulfillment of its public service mission to provide affordable, reliable electric energy.

v. Other Public Interest Considerations

In exercising its sections 4(c)(1) and 4(c)(6) exemptive authority in the SPP Final Order, the Commission is acting to promote the broader public interest by facilitating the supply of affordable, reliable electric energy, as contemplated by Congress.[286]

3. Amended RTO–ISO Order

a. Background

As discussed above, the RTO–ISO Order currently exempts contracts, agreements, and transactions for the purchase or sale of the limited electric energy-related products that are specifically described within the RTO–ISO Order from certain provisions of the CEA and Commission regulations, with the exception of the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.[287] The RTO–ISO Order did not discuss CEA section 22.

b. RTO–ISO Order Proposed Amendment and Request for Comment on the Commission's Proposed Consideration of Costs and Benefits

As discussed above, the Commission issued the RTO–ISO Order Proposed Amendment on May 9, 2016. The RTO–ISO Order Proposed Amendment proposed to amend the RTO–ISO Order to clarify that the RTO–ISO Order would not exempt the RTO–ISO Covered Entities from the private right of action found in section 22 of the CEA with respect to the Excepted Provisions.[288]

The RTO–ISO Order Proposed Amendment expressly requested public comment on the Commission's proposed cost-benefit considerations, including with respect to reasonable alternatives; the magnitude of specific costs and benefits, and data or other information to estimate a dollar valuation; and any impact on the public interest factors specified in CEA section 15(a).[289]

The Commission received four comments regarding the cost-benefit analysis in the RTO–ISO Order Proposed Amendment. The four commenters argued that the Commission's cost-benefit analysis of the amendment proposed in the RTO–ISO Order Proposed Amendment was inadequate or insufficient, and/or that the Commission underestimated the legal and regulatory costs of allowing private claims against market participants in the RTO–ISO markets.[290]

c. Summary of the Amended RTO–ISO Order

The Amended RTO–ISO Order exempts the RTO–ISO market participants and RTO–ISO Covered Transactions from private actions pursuant to CEA section 22.

In the discussion that follows, the Commission considers the costs and benefits of the Amended RTO–ISO Order to the public and market participants generally, and to the RTO–ISO Covered Entities specifically. It also considers the costs and benefits of the Amended RTO–ISO Order in light of the public interest factors enumerated in CEA section 15(a).

d. Baseline

In the RTO–ISO Order Proposed Amendment, the Commission proposed to exclude from the exemption set forth in the RTO–ISO Order the private right of action under CEA section 22. Thus, the Commission's proposed baseline for consideration of the costs and benefits was the opposite of that action, *i.e.* the costs and benefits that the public and market participants would experience if the existing RTO–ISO Order were to be interpreted to exempt market participants from liability under the CEA section 22 private right of action.[291] As discussed above,[292] the Commission received a number of comments in response to the RTO–ISO

[286] *See* related discussion in section I. *supra.*

[287] *See* RTO–ISO Order at 19912.

[288] *See supra* section II.E.

[289] 81 FR at 30253.

[290] EEI at 11; EPSA at 10; IRC at 13; NFP Electric Associations at 7.

[291] *See* 81 FR at 30252.

[292] *See supra* sections III.B.1. and III.B.2.

Order Proposed Amendment, and was persuaded by specific points made by such commenters to amend the RTO–ISO Order to grant an explicit exemption from the CEA section 22 private right of action. Given this change, the Commission believes it is more informative, for purposes of this analysis, to use as the baseline the costs and benefits that the public and market participants would have experienced if the RTO–ISO Order were amended as the Commission originally proposed to do in the RTO–ISO Order Proposed Amendment (in other words, if the RTO–ISO Order were amended to explicitly preserve the CEA section 22 private right of action).[293]

In the discussion that follows, the Commission endeavored to, where reasonably feasible, estimate quantifiable dollar costs of the amendment to the RTO–ISO Order. The costs and benefits of the amendment, however, are not presently susceptible to meaningful quantification. Being unable to quantify, the Commission discusses proposed costs and benefits in qualitative terms.

e. Benefits

Using the baseline described above,[294] amending the RTO–ISO Order to address the issue of exemption from the CEA section 22 private right of action one way or another will prevent future uncertainty with respect to the scope of the RTO–ISO Order. Amending the RTO–ISO Order to provide an express exemption from CEA section 22 will benefit RTO–ISO market participants by allowing them to avoid legal and compliance costs due to an increased risk of private litigation under section 22. Moreover, granting an explicit exemption from the CEA section 22 private right of action reflects Congress' intent regarding how manipulation and fraud in the context of the RTO–ISO markets should be addressed. Lastly, providing an exemption from private actions pursuant to CEA section 22 will prevent any potential tension between the enforcement programs of FERC and PUCT, on the one hand, and private enforcement under the CEA, on the other.

f. Costs

Using the baseline described above,[295] the Commission notes that there may be minimal costs associated with the fact that private litigants will not be permitted to vindicate their own interests or directly contribute to those interests through litigation with respect to fraud and manipulation in the RTO–ISO markets. However, as stated above in section III.B.2., such costs are mitigated by the fact that FERC and PUCT will continue to pervasively regulate such markets. In addition, nothing in the Amended RTO–ISO Order affects the Commission's own authority to address fraudulent or manipulative conduct in the RTO–ISO markets, including the Commission's authority to seek restitution for the benefit of victims. Also, as noted above in section III.B.2., the Commission encourages market participants who observe potential fraud or manipulation in the markets subject to the Commission's jurisdiction to bring their concerns to the Commission.

g. Consideration of Alternatives

The Commission considered not issuing the Amended RTO–ISO Order. The Commission considered the uncertainty that has arisen with respect to the scope of the RTO–ISO Order and the availability of a private right of action under the RTO–ISO Order, particularly following the court rulings in the *Aspire* v. *GDF Suez* action,[296] and has determined that a no-amendment alternative would prolong such uncertainty and thus be contrary to the public interest.

The Commission also proposed to amend the RTO–ISO Order to explicitly preserve the CEA section 22 private right of action with respect to fraud and manipulation.[297] The Commission has considered the costs and benefits of its proposed amendment in light of the comments received, and, for the reasons stated in section III.B.2., has been persuaded that issuing an explicit exemption from CEA section 22 is the appropriate course of action.

h. Consideration of CEA Section 15(a) Factors

i. Protection of Market Participants and the Public

The Commission notes that, while under the Amended RTO–ISO Order, private litigants will not be permitted to pursue fraud or manipulation claims under CEA section 22 with respect to the RTO–ISO markets, market participants will still be protected through the pervasive regulation of those markets by FERC and PUCT, and by the Commission's own authority to address fraud and manipulation in such markets.

ii. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission does not believe that the amendment to the RTO–ISO Order will have an effect on the efficiency, competitiveness, and financial integrity of the futures markets.

iii. Price Discovery

The Commission does not believe that the amendment to the RTO–ISO Order will have an effect on price discovery.

iv. Sound Risk Management Practices

The Commission does not believe that the amendment to the RTO–ISO Order will have a material effect on sound risk management practices.

v. Other Public Interest Considerations

The Commission believes that the amendment to the RTO–ISO Order will foster the public interest for the reasons discussed above in section III.B.2.

VI. SPP Final Order

Upon due consideration and consistent with the determinations set forth above, the Commission hereby issues the following order (''Order''):

Pursuant to its authority under sections 4(c)(1) and 4(c)(6) of the Commodity Exchange Act (''CEA'' or Act'') and in accordance with sections 4(c)(1) and (2) of the Act, the Commodity Futures Trading Commission (''CFTC'' or ''Commission'')

1. Exempts, subject to the conditions and limitations specified herein, the execution of the electric energy-related agreements, contracts, and transactions that are specified in paragraph 2 of this Order and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect thereto, from all provisions of the CEA, except, in each case, the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180. For the avoidance of doubt, this exemption applies to private actions pursuant to CEA section 22 with respect to all provisions of the Act, including the foregoing enumerated provisions, but does not restrict the Commission's enforcement authority pursuant to those provisions.

2. *Scope.* This exemption applies only to agreements, contracts and

[293] *See* 81 FR 30247–48.

[294] *See supra* section V.C.3.d.

[295] *See id.*

[296] *See supra* section II.D.

[297] *See* 81 FR 30245.

transactions that satisfy each of the following requirements:

a. The agreement, contract or transaction is for the purchase and sale of one of the following electric energy-related products:

(1) ''Transmission Congestion Rights'' defined in paragraph 5(a) of this Order, except that the exemption shall only apply to such Transmission Congestion Rights where:

(a) Each Transmission Congestion Right is linked to, and the aggregate volume of Transmission Congestion Rights for any period of time is limited by, the physical capability (after accounting for counterflow) of the electric energy transmission system operated by SPP for such period;

(b) SPP serves as the market administrator for the market on which the Transmission Congestion Rights are transacted;

(c) Each party to the transaction is a member of SPP (or is SPP itself) and the transaction is executed on a market administered by SPP; and

(d) The transaction does not require any party to make or take physical delivery of electric energy.

(2) ''Energy Transactions'' as defined in paragraph 5(b) of this Order.

(3) ''Operating Reserve Transactions'' as defined in paragraph 5(c) of this Order.

b. Each party to the agreement, contract or transaction is:

(1) An ''appropriate person,'' as defined in sections 4(c)(3)(A) through (J) of the CEA;

(2) an ''eligible contract participant,'' as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or

(3) a ''person who actively participates in the generation, transmission, or distribution of electric energy,'' as defined in paragraph 5(f) of this Order.

c. The agreement, contract or transaction is offered or sold pursuant to SPP's Tariff and that Tariff has been approved by the Federal Energy Regulatory Commission (''FERC'').

3. *Applicability to SPP.* Subject to the conditions contained in the Order, the Order applies to SPP with respect to the transactions described in paragraph 2 of this Order.

4. *Conditions.* The exemption provided by this Order is expressly conditioned upon the following:

a. Information sharing: Information sharing arrangements between the Commission and FERC that are acceptable to the Commission continue to be in effect, and SPP's compliance with the Commission's requests through FERC to share, on an as-needed basis and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within SPP's possession for products in SPP's markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data.

b. Notification of requests for information: Neither the Tariff nor any other governing documents of SPP shall include any requirement that SPP notify its members prior to providing information to the Commission in response to a subpoena or other request for information or documentation.

5. *Definitions.* The following definitions shall apply for purposes of this Order:

a. A ''Transmission Congestion Right'' is a transaction, however named, that entitles one party to receive, and obligates another party to pay, an amount based solely on the difference between the price for electric energy, established on an electric energy market administered by SPP, at a specified source (*i.e.,* where electric energy is deemed injected into the grid of SPP) and a specified sink (*i.e.,* where electric energy is deemed withdrawn from the grid of SPP).

b. ''Energy Transactions'' are transactions in a ''Day-Ahead Market'' or ''Real-Time Balancing Market,'' as those terms are defined in paragraphs 5(d) and 5(e) of this Order, for the purchase or sale of a specified quantity of electric energy at a specified location (including virtual bids and offers), where:

(1) The price of the electric energy is established at the time the transaction is executed;

(2) Performance occurs in the Real-Time Balancing Market by either:

(a) Delivery or receipt of the specified electric energy, or

(b) A cash payment or receipt at the price established in the Day-Ahead Market or Real-Time Balancing Market (as permitted by SPP in its Tariff); and

(3) The aggregate cleared volume of both physical and cash-settled energy transactions for any period of time is limited by the physical capability of the electric energy transmission system operated by SPP for that period of time.

c. ''Operating Reserve Transactions'' are transactions:

(1) In which SPP, for the benefit of load-serving entities and resources, purchases, through auction, the right, during a period of time as specified in SPP's Tariff, to require the seller of such right to operate electric energy facilities in a physical state such that the facilities can increase or decrease the rate of injection or withdrawal of a specified quantity of electric energy into or from the electric energy transmission system operated by SPP with:

(a) Physical performance by the seller's facilities within a response time interval specified in SPP's Tariff (Reserve Transaction); or

(b) prompt physical performance by the seller's facilities (Area Control Error Regulation Transaction);

(2) For which the seller receives, in consideration, one or more of the following:

(a) Payment at the price established in SPP's Day-Ahead or Real-Time Balancing Market, as those terms are defined in paragraphs 5(d) and 5(e) of this Order, price for electric energy applicable whenever SPP exercises its right that electric energy be delivered (including ''Demand Response,'' as defined in paragraph 5(g) of this Order);

(b) Compensation for the opportunity cost of not supplying or consuming electric energy or other services during any period during which SPP requires that the seller not supply energy or other services;

(c) An upfront payment determined through the auction administered by SPP for this service;

(d) An additional amount indexed to the frequency, duration, or other attributes of physical performance as specified in SPP's Tariff; and

(3) In which the value, quantity, and specifications of such transactions for SPP for any period of time shall be limited to the physical capability of the electric energy transmission system operated by SPP for that period of time.

d. ''Day-Ahead Market'' means an electric energy market administered by SPP on which the price of electric energy at a specified location is determined, in accordance with SPP's Tariff, for specified time periods, none of which is later than the second operating day following the day on which the Day-Ahead Market clears.

e. ''Real-Time Balancing Market'' means an electric energy market administered by SPP on which the price of electric energy at a specified location is determined, in accordance with SPP's Tariff, for specified time periods within the same 24-hour period.

f. ''Person who actively participates in the generation, transmission, or distribution of electric energy'' means a person that is in the business of: (1) Generating, transmitting, or distributing electric energy; or (2) providing electric energy services that are necessary to support the reliable operation of the transmission system.

g. ''Demand Response'' means the right of SPP to require that certain

sellers of such rights curtail consumption of electric energy from the electric energy transmission system operated by SPP during a future period of time as specified in SPP's Tariff.

h. ''SPP'' means Southwest Power Pool, Inc. or any successor in interest to Southwest Power Pool.

i. ''Tariff.'' Reference to a SPP ''Tariff'' includes a tariff, rate schedule or protocol.

j. ''Exemption Application'' means the application for an exemptive order under 4(c)(6) of the CEA filed by SPP on October 17, 2013, as amended August 1, 2014.

6. *Effective Date.* This Order is effective upon publication in the **Federal Register**.

7. *Delegation of Authority.* The Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight (''Division'') and to such members of the Division's staff acting under his or her direction as he or she may designate, in consultation with the General Counsel or such members of the General Counsel's staff acting under his or her direction as he or she may designate, the authority to request information from SPP pursuant to section 4(a) of this Order.

This Order is based upon the representations made in the Exemption Application for an exemptive order under section 4(c) of the CEA filed by SPP,[298] including those representations with respect to compliance with FERC regulation 35.47. It is also based on supporting materials provided to the Commission by SPP and its counsel, including a legal memorandum that, in the Commission's sole discretion, provides the Commission with assurance that the netting arrangements contained in the approach selected by SPP to satisfy the obligations contained in FERC regulation 35.47(d) will, in fact, provide SPP with enforceable rights of setoff against any of its market participants under title 11 of the United States Code in the event of the bankruptcy of the market participant. Any material change or omission in the facts and circumstances pursuant to which this Order is granted might require the Commission to reconsider its finding that the exemption contained therein is appropriate and/or consistent with the public interest and purposes of the CEA. Further, the Commission reserves the right, in its discretion, to revisit any of the terms and conditions of the relief provided herein, including but not limited to, making a determination that certain entities and transactions described herein should be subject to the Commission's full jurisdiction, and to condition, suspend, terminate or otherwise modify or restrict the exemption granted in this Order, as appropriate, upon its own motion.

[298] In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Southwest Power Pool, Inc., amended Aug. 1, 2014.

VII. Amended RTO–ISO Order

The Preamble to and Paragraph 1 of the RTO–ISO Order are revised to read as follows:

Pursuant to its authority under sections 4(c)(1) and 4(c)(6) of the Commodity Exchange Act (''CEA'') or (''Act'') and in accordance with sections 4(c)(1) and (2) of the Act, the Commodity Futures Trading Commission (''Commission'')

1. Exempts, subject to the conditions and limitations specified herein, the execution of the electric energy-related agreements, contracts, and transactions that are specified in paragraph 2 of this Order and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect thereto, from all provisions of the CEA, except, in each case, the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180. For the avoidance of doubt, this exemption applies to private actions pursuant to CEA section 22 with respect to all provisions of the Act, including the foregoing enumerated provisions, but does not restrict the Commission's enforcement authority pursuant to those provisions.

Issued in Washington, DC, on October 18, 2016 by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

Appendices to Final Order in Response to an Application From Southwest Power Pool, Inc. To Exempt Specified Transactions; Amendment to the Final Order Exempting Specified Transactions of Certain Independent System Operators and Regional Transmission Organizations—Commission Voting Summary, Chairman's Statement, and Commissioner's Statement

Appendix 1—Commission Voting Summary

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman Timothy G. Massad

I support this order, which comes after careful review of the issue, including comments from many market participants.

Our electric markets are subject to regulation by the Federal Energy Regulatory Commission (FERC) and state regulators. Those regulators work to ensure that energy rates remain reasonable, transmission systems function reliably, and the interests of market participants are balanced with the protection of electricity consumers. In light of this, the CFTC exempted certain transactions in the regional transmission organization (RTO) and independent system operator (ISO) markets from most provisions of the Commodity Exchange Act (CEA), other than our own authority to pursue fraud and manipulation in those markets.

One issue was left uncertain, which was whether private rights of action under the CEA could be brought against RTOs, ISOs, and other market participants. As a general matter, private rights of action are important to our regulatory structure. They can deter bad actors and protect market participants. But many market participants expressed concern that private actions could create costs within the markets in ways regulators did not anticipate. For example, several state consumer advocate offices noted that private rights of action could inadvertently introduce regulatory uncertainty and increase costs for consumers. So while private rights of action will remain critical overall in our markets, I am persuaded that, in this limited instance, they could cause instability and adversely affect consumers without necessarily enhancing supervision of markets or consumer protection.

In making this determination, it is important that the CFTC continues to retain the authority to pursue fraud and manipulation within those markets. Aggrieved market participants and consumers also still have the ability to file complaints with the CFTC and our Whistleblower program.

I thank the CFTC staff and my fellow Commissioners for their work on this matter, as well as those who took the time to provide us with feedback.

Appendix 3—Statement of Commissioner J. Christopher Giancarlo

I support this commonsense decision that it is not in the public interest to allow private lawsuits against electric utilities trading in wholesale energy markets.

Two months ago, I visited a construction site for a state-of-the-art electric power plant in my home state of New Jersey. The facility was being built to withstand future weather events like Superstorm Sandy. The power it will produce will serve millions of local residents.

Without today's practical decision, power utilities across the country may have hesitated or delayed building such new power plants because of the regulatory uncertainty and costs associated with private litigation—costs that surely would be passed on to millions of ratepayers throughout the country.

As I have observed, preserving the Section 22 private right of action is not necessary in these heavily regulated markets.[1] Both the CFTC and the FERC have the authority to seek redress for the claims of private persons who raise meritorious allegations of fraud or manipulation.

I am heartened that the Commission now agrees and has concluded, with today's action, that allowing private lawsuits is not in the public interest.

It is just commonsense.

[FR Doc. 2016–25571 Filed 10–21–16; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Department of the Army

Army Education Advisory Subcommittee Meeting Notice

AGENCY: Department of the Army, DoD.

ACTION: Notice of open Subcommittee meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the following Federal advisory committee meeting of the Defense Language Institute Foreign Language Center Board of Visitors, a subcommittee of the Army Education Advisory Committee. This meeting is open to the public.

DATES: The Defense Language Institute Foreign Language Center (DLIFLC) Board of Visitors Subcommittee will meet from 8:00 a.m. to 5:00 p.m. on December 7 and from 09:30 a.m. to 5:00 p.m. on December 8, 2016.

ADDRESSES: Defense Language Institute Foreign Language Center, 891 Elkridge Road, Linthicum Heights, MD 21090.

FOR FURTHER INFORMATION CONTACT: Mr. Detlev Kesten, the Alternate Designated Federal Officer for the subcommittee, in writing at Defense Language Institute Foreign Language Center, ATFL–APAS, Bldg. 634, Presidio of Monterey, CA 93944, by email at *detlev.kesten@dliflc.edu,* or by telephone at (831) 242–6670.

SUPPLEMENTARY INFORMATION: The subcommittee meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150.

Purpose of the Meeting: The purpose of the meeting is to provide the subcommittee with briefings and information focusing on the Institute's plan to implement a comprehensive leadership development plan for its faculty and staff and to present updates to the curriculum. The subcommittee will also receive an update on the Institute's accreditation and will address administrative matters.

Proposed Agenda: December 7—The subcommittee will receive briefings associated with DLIFLC's leadership development goals and curriculum updates and the Institute's actions in supporting said goal. The subcommittee will be updated on the Institute's on going self-study to reaffirm its academic accreditation. The subcommittee will complete administrative procedures and appointment requirements. December 8—The subcommittee will have time to discuss and compile observations pertaining to agenda items. General deliberations leading to provisional findings will be referred to the Army Education Advisory Committee for deliberation by the Committee under the open-meeting rules.

Public Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of space, this meeting is open to the public. Seating is on a first to arrive basis. Attendees are requested to submit their name, affiliation, and daytime phone number fourteen business days prior to the meeting to Mr. Kesten, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public attending the subcommittee meetings will not be permitted to present questions from the floor or speak to any issue under consideration by the subcommittee.

Because the meeting of the subcommittee will be held in a Federal Government facility, security screening is required. A photo ID is required to enter the facility. Please note that security and gate guards have the right to inspect vehicles and persons seeking to enter and exit the installation. The facility is fully handicap accessible. Wheelchair access is available at the main entrance of the building. For additional information about public access procedures, contact Mr. Kesten, the subcommittee's Alternate Designated Federal Officer, at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section.

Written Comments or Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the subcommittee, in response to the stated agenda of the open meeting or in regard to the subcommittee's mission in general. Written comments or statements should be submitted to Mr. Kesten, the subcommittee Alternate Designated Federal Officer, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Each page of the comment or statement must include the author's name, title or affiliation, address, and daytime phone number. The Alternate Designated Federal Official will review all submitted written comments or statements and provide them to members of the subcommittee for their consideration. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the Alternate Designated Federal Official at least seven business days prior to the meeting to be considered by the subcommittee. Written comments or statements received after this date may not be provided to the subcommittee until its next meeting.

Pursuant to 41 CFR 102–3.140d, the Subcommittee is not obligated to allow a member of the public to speak or otherwise address the Subcommittee during the meeting. Members of the public will be permitted to make verbal comments during the Committee meeting only at the time and in the manner described below. If a member of

[1] *See* Notice of Proposed Amendment to and Request for Comment on the Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act, 81 FR 30245, 30254–55 (May 16, 2016) (Statement of Dissent by Commissioner J. Christopher Giancarlo); J. Christopher Giancarlo, Op-Ed, *Unneeded mandate would hurt N.J. consumers,* The Record, Aug. 18, 2016, available at *http://www.northjersey.com/opinion/opinion-guest-writers/unneeded-mandate-would-hurt-n-j-consumers-1.1647129.*

the public is interested in making a verbal comment at the open meeting, that individual must submit a request, with a brief statement of the subject matter to be addressed by the comment, at least seven business days in advance to the subcommittee's Alternate Designated Federal Official, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. The Alternate Designated Federal Official will log each request, in the order received, and in consultation with the Subcommittee Chair, determine whether the subject matter of each comment is relevant to the Subcommittee's mission and/or the topics to be addressed in this public meeting. A 15-minute period near the end of the meeting will be available for verbal public comments. Members of the public who have requested to make a verbal comment and whose comments have been deemed relevant under the process described above, will be allotted no more than three minutes during the period, and will be invited to speak in the order in which their requests were received by the Alternate Designated Federal Official.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2016–25620 Filed 10–21–16; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Department of the Army

Update to the 30 July 2013 Military Freight Traffic Unified Rules Publication (MFTURP) No. 1

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: The Military Surface Deployment and Distribution Command (SDDC) is providing notice that it is releasing an updated MFTURP No. 1.

DATES: The update will be effective on October 24, 2016.

ADDRESSES: Submit comments to SDDC, G35, Transportation Policy, Process and Systems Branch, 1 Soldier Way, Building 1900W, ATTN: SDDC–AMSSD–OPT, Scott AFB 62225. Request for additional information may be sent by email to: *usarmy.scott.sddc.mbx.g3-transportation-rules@mail.mil.*

FOR FURTHER INFORMATION CONTACT: *usarmy.scott.sddc.mbx.g3-transportation-rules@mail.mil.*

SUPPLEMENTARY INFORMATION: Reference: Military Freight Traffic Unified Rules Publications (MFTURP) No. 1. Background: The MFTURP No. 1 governs the purchase of surface freight transportation in the Continental United States (CONUS) by DoD using Federal Acquisition Regulation (FAR) exempt transportation service contracts. Miscellaneous: This publication, as well as the other SDDC publications, can be accessed via the SDDC Web site at: *http://www.sddc.army.mil/GCD/default.aspx.*

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2016–25619 Filed 10–21–16; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2016–OS–0105]

Proposed Collection; Comment Request

AGENCY: Defense Finance and Accounting Service (DFAS), DoD.

ACTION: Notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Finance and Accounting Service (DFAS) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by December 23, 2016.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Finance and Accounting Service (DFAS), 555 E. 88th Street, Bldg 10, Bratenahl, OH 44108–1068. ATTN: Craig Maddox, System Manager, myPay, (216) 204–2744 or *craig.s.maddox.civ@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: DFAS myPay Web Application, 0730–TBD.

Needs and Uses: The information collection requirement is necessary for DFAS to provide financial support to its customer base that opts to use the DFAS myPay Web Application for self-service management of their personnel financial pay accounts.

Affected Public: Individuals and households.

Annual Burden Hours: 300,175 hours.

Number of Respondents: 1,200,698.

Responses per Respondent: 1 (average).

Annual Responses: 1,200,698.

Average Burden per Response: 15 minutes.

Frequency: On occasion—respondents complete as needed.

Respondents are DFAS customers who are military retirees, annuitants of military retirees, and former spouses of military retirees. These customers use the DFAS myPay Web Application as a means of self-service management of their DFAS myPay financial pay account. Online self-service transactions include the following:

- Name Changes
- Correspondence Address Changes
- Payment Address Changes
- Allotment Changes
- Beneficiary for Arrears Changes
- Direct Deposit Changes
- Federal Tax Withholding Changes

- State Tax Withholding Changes
- Report of Existence Submissions
- Email Address Changes
- Security Questions Changes
- Password Changes
- PIN Changes
- Login ID Changes
- Limited Access Account Changes
- Electronic/Hard-Copy Receipt Preference for IRS Form 1099–R Election Changes
- Electronic/Hard-Copy Receipt Preference for IRS Form 1095 Election Changes
- Electronic/Hard-Copy Receipt Preference for Account Alerts Election Changes
- Single Sign-On (SSO) Election Changes

Dated: October 19, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–25643 Filed 10–21–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2016–OS–0106]

Proposed Collection; Comment Request

AGENCY: Defense Media Activity, DoD.

ACTION: Notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of Small Business Programs of Defense Media Activity announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by December 23, 2016.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Office of Small Business Programs, Defense Media Activity ATTN: Kandace Chappell, 6700 Taylor Avenue, Fort Meade, MD 20755 or call OSBP, Defense Media Activity, at 301–222–6262 or email at *Kandace.m.perkins.civ@mail.mil*.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: DMA Small Business Vendor Registry; OMB Control Number 0720–TBD.

Needs and Uses: The information collection requirement is necessary to obtain and record the public information of small businesses interested in doing business with the Defense Media Activity. All information requested from the Small Businesses is already made available through other public databases such as sba.gov. Requested information will include name of company, small business status, and types of products and services the company offers in addition to their CAGE and NAICS codes.

Affected Public: Business or other for profit.

Annual Burden Hours: 8.33.

Number of Respondents: 100.

Responses per Respondent: 1.

Annual Responses: 100.

Average Burden per Response: 5 minutes.

Frequency: On occasion.

Respondents are small businesses looking to learn more information on DMA's Procurement Process in addition to being informed of potential opportunities as they arise. This tool will serve as a Market Research tool that allows all those involved in the procurement process to be able to search and locate small businesses more easily when preparing procurement packages. This tool will serve as an in-house resource that can assist DMA in reaching mandated Small Business Goals.

Dated: October 19, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–25672 Filed 10–21–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

National Board for Education Sciences

AGENCY: Institute of Education Sciences, U.S. Department of Education.

ACTION: Announcement of an open teleconference meeting.

SUMMARY: This notice sets forth the proposed agenda, date, time and dial-in procedures for an upcoming meeting of the National Board for Education Sciences (NBES). The notice also describes the functions of NBES. Notice of this meeting is required by § 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of their opportunity to attend the meeting.

DATES: The NBES meeting will be held on November 8, 2016, from 2:00 p.m. to 3:30 p.m. Eastern Standard Time via telephone conference.

ADDRESSES: The meeting will be conducted via telephone conference. Participants and members of the public should dial: (800) 779–9112 and enter code 8385849 when prompted. Members of the public will attend the meeting in listen-only mode. The meeting will also be hosted via webinar at: *https://educate.webex.com/educate/j.php?MTID=mbb7da2a80e444fb357b3453eae1cc499*. Members of the public wishing to attend the meeting should send an RSVP email to Kenann McKenzie-Thompson, NBES Executive Director, at *Kenann.McKenzie-Thompson@ed.gov*. RSVPs must be received no later than Tuesday, November 1, 2016. The conference line is limited to a first come, first served basis.

FOR FURTHER INFORMATION CONTACT: Ellie Pelaez, Designated Federal Official, NBES, U.S. Department of Education, 550 12th Street SW., Suite 4107, Washington, DC 20202; phone: (202)

245–7274; fax: (202) 245–6752; email: *Ellie.Pelaez@ed.gov.*

SUPPLEMENTARY INFORMATION: NBES's Statutory Authority and Function: NBES is authorized by § 116 of the Education Sciences Reform Act of 2002 (ESRA), *20 U.S.C. 9516.* NBES advises the Director of the Institute of Education Sciences (the Institute) on, among other things, the establishment of activities to be supported by the Institute and the funding for applications for grants, contracts, and cooperative agreements for research after the completion of peer review. NBES also reviews and evaluates the work of the Institute.

Meeting Agenda: NBES members will discuss and propose candidates for the Board to elect a Chairperson of the NBES. Following that process, the newly elected Chairperson will lead the meeting, at which time the Institute Director and Commissioners of the National Education Centers will provide updates on the work of the Institute. A final agenda is available from Ellie Pelaez (see contact information above) and is posted on the NBES Web site *http://ies.ed.gov/director/board/agendas/index.asp.*

Submission of comments regarding the NBES's policy recommendations: There will not be an opportunity for public oral comments. However, members of the public are encouraged to submit any written comments no later than Tuesday, November 1, 2016 to Ellie Pelaez, Designated Federal Official, NBES, U.S. Department of Education, 550 12th Street SW., Suite 4107, Washington, DC 20202; phone: (202) 245–7274; fax: (202) 245–6752; email: *Ellie.Pelaez@ed.gov.*

Access to Records of the Meeting: The Department will post the meeting minutes on the NBES Web site no later than 90 days after the meeting. Pursuant to the Federal Advisory Committee Act, the public may also inspect the meeting minutes at 550 12th Street SW., 4th Floor, Washington, DC, by emailing *Ellie.Pelaez@ed.gov* or by calling (202) 245–7274 to schedule an appointment.

Reasonable Accommodations: If you will need an auxiliary aid or service to participate in the meeting (*e.g.,* interpreting service, assistive listening device, or materials in an alternate format), notify Ellie Pelaez by or before November 1, 2016. Although we will attempt to meet any request(s) received after November 1, 2016, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

Electronic Access to this Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Authority: Section 116 of the Education Sciences Reform Act of 2002 (ESRA), *20 U.S.C. 9516.*

Ruth Neild,

Deputy Director for Policy and Research, Delegated Duties of the Director, Institute of Education Sciences.

[FR Doc. 2016–25680 Filed 10–21–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Staff Attendance at the Southwest Power Pool Regional Entity Trustee, Regional State Committee, Members' Committee and Board of Directors' Meetings

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of its staff may attend the meetings of the Southwest Power Pool, Inc. Regional Entity Trustee (RET), Regional State Committee (RSC), Members' Committee and Board of Directors as noted below. Their attendance is part of the Commission's ongoing outreach efforts.

All meetings will be held at SPP's Headquarters, 201 Worthen Drive, Little Rock, AR 72223–4936. The phone number is (501) 614–3200. All meetings are Central Time.

SPP RET

October 24, 2016 (8:00 a.m.–3:00 p.m.)

SPP RSC

October 24, 2016 (1:00 p.m.–5:00 p.m.)

SPP Members/Board of Directors

October 25, 2016 (8:00 a.m.–3:00 p.m.)

The discussions may address matters at issue in the following proceedings:

Docket No. ER11–1844, *Midcontinent Independent System Operator, Inc.*
Docket No. ER12–1179, *Southwest Power Pool, Inc.*
Docket No. ER14–2850, *Southwest Power Pool, Inc.*
Docket No. ER15–1775, *Southwest Power Pool, Inc.*
Docket No. ER15–1777, *Southwest Power Pool, Inc.*
Docket No. ER15–1976, *Southwest Power Pool, Inc.*
Docket No. ER15–2028, *Southwest Power Pool, Inc.*
Docket No. ER15–2115, *Southwest Power Pool, Inc.*
Docket No. ER15–2324, *Southwest Power Pool, Inc.*
Docket No. ER15–2347, *Southwest Power Pool, Inc.*
Docket No. ER15–2351, *Southwest Power Pool, Inc.*
Docket No. ER15–2356, *Southwest Power Pool, Inc.*
Docket No. EC16–53, *South Central MCN, LLC*
Docket No. EL16–108, *Tilton Energy* v. *Midcontinent Independent System Operator, Inc.*
Docket No. ER16–13, *Southwest Power Pool, Inc.*
Docket No. ER16–204, *Southwest Power Pool, Inc.*
Docket No. ER16–209, *Southwest Power Pool, Inc.*
Docket No. ER16–228, *Southwest Power Pool, Inc.*
Docket No. ER16–791, *Southwest Power Pool, Inc.*
Docket No. ER16–829, *Southwest Power Pool, Inc.*
Docket No. ER16–846, *Southwest Power Pool, Inc.*
Docket No. ER16–862, *Southwest Power Pool, Inc.*
Docket No. ER16–863, *Southwest Power Pool, Inc.*
Docket No. ER16–932, *Southwest Power Pool, Inc.*
Docket No. ER16–1086, *Southwest Power Pool, Inc.*
Docket No. ER16–1211, *Midcontinent Independent System Operator, Inc.*
Docket No. ER16–1286, *Southwest Power Pool, Inc.*
Docket No. ER16–1305, *Southwest Power Pool, Inc.*
Docket No. ER16–1351, *Westar Energy, Inc.*
Docket No. ER16–1314, *Southwest Power Pool, Inc.*
Docket No. ER16–1341, *Southwest Power Pool, Inc.*
Docket No. ER16–1546, *Southwest Power Pool, Inc.*
Docket No. ER16–1772, *Public Service Company of Colorado*
Docket No. ER16–1797, *Midcontinent Independent System Operator, Inc.*

Docket No. ER16–1799, *Southwest Power Pool, Inc.*
Docket No. ER16–1912, *Southwest Power Pool, Inc.*
Docket No. ER16–1945, *Southwest Power Pool, Inc.*
Docket No. ER16–2296, *Southwest Power Pool, Inc.*
Docket No. ER16–2330, *Southwest Power Pool, Inc.*
Docket No. ER16–2486, *Southwest Power Pool, Inc.*
Docket No. ER16–2488, *Southwest Power Pool, Inc.*
Docket No. ER16–2499, *Southwest Power Pool, Inc.*
Docket No. ER16–2513, *Southwest Power Pool, Inc.*
Docket No. ER16–2522, *Southwest Power Pool, Inc.*
Docket No. ER16–2523, *Southwest Power Pool, Inc.*
Docket No. ER16–2530, *Southwest Power Pool, Inc.*
Docket No. ER16–2557, *Southwest Power Pool, Inc.*
Docket No. ER16–2595, *Southwest Power Pool, Inc.*
Docket No. ER16–2596, *Southwest Power Pool, Inc.*
Docket No. ER16–2634, *Southwest Power Pool, Inc.*
Docket No. ER16–2655, *Southwest Power Pool, Inc.*
Docket No. ER16–2660, *Southwest Power Pool, Inc.*
Docket No. ER16–2677, *Southwest Power Pool, Inc.*
Docket No. ER16–2734, *Southwest Power Pool, Inc.*
Docket No. ER17–1, *Southwest Power Pool, Inc.*
Docket No. ER17–31, *Southwest Power Pool, Inc.*

These meetings are open to the public.

For more information, contact Patrick Clarey, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (317) 249–5937 or *patrick.clarey@ferc.gov.*

Dated: October 17, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–25623 Filed 10–21–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP17–23–000.
Applicants: Natural Gas Pipeline Company of America.
Description: § 4(d) Rate Filing: Negotiated Rate Macquarie Energy to be effective 11/1/2016.
Filed Date: 10/13/16.
Accession Number: 20161013–5038.
Comments Due: 5 p.m. ET 10/25/16.

Docket Numbers: RP17–24–000.
Applicants: Natural Gas Pipeline Company of America.
Description: § 4(d) Rate Filing: CNE Gas Negotiated Rate to be effective 11/1/2016.
Filed Date: 10/13/16.
Accession Number: 20161013–5041.
Comments Due: 5 p.m. ET 10/25/16.

Docket Numbers: RP17–25–000.
Applicants: Natural Gas Pipeline Company of America.
Description: § 4(d) Rate Filing: North Shore Negotiated Rate to be effective 11/1/2016.
Filed Date: 10/13/16.
Accession Number: 20161013–5165.
Comments Due: 5 p.m. ET 10/25/16.

Docket Numbers: RP17–26–000.
Applicants: Ozark Gas Transmission, L.L.C.
Description: § 4(d) Rate Filing: Munich Re Trading Negotiated Rate eff 12–1–2016 to be effective 12/1/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5033.
Comments Due: 5 p.m. ET 10/26/16.

Docket Numbers: RP17–27–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: Neg Rate 2016–10–14 Encana to be effective 10/14/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5148.
Comments Due: 5 p.m. ET 10/26/16.

Docket Numbers: RP17–28–000.
Applicants: American Midstream (AlaTenn), LLC.
Description: § 4(d) Rate Filing: Proposed Tariff Changes to be effective 11/14/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5177.
Comments Due: 5 p.m. ET 10/26/16.

Docket Numbers: RP17–29–000.
Applicants: AEP Generation Resources Inc., AEP Generating Company, Lightstone Generation LLC.
Description: Joint Petition for Temporary Waiver and Request for Expedited Action and a Shortened Notice Period of AEP Generation Resources Inc., et al.
Filed Date: 10/14/16.
Accession Number: 20161014–5211.
Comments Due: 5 p.m. ET 10/21/16.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and § 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP16–814–001.
Applicants: Trailblazer Pipeline Company LLC.
Description: Report Filing: Refund Report.
Filed Date: 10/14/16.
Accession Number: 20161014–5088.
Comments Due: 5 p.m. ET 10/26/16.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 17, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–25647 Filed 10–21–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP17–30–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Keyspan to BUG 792110 to be effective 11/1/2016.
Filed Date: 10/17/16.
Accession Number: 20161017–5047.
Comments Due: 5 p.m. ET 10/31/16.

Docket Numbers: RP17–31–000.
Applicants: Questar Overthrust Pipeline, LLC.

Description: § 4(d) Rate Filing: Off-System Services to be effective 11/17/2016.

Filed Date: 10/17/16.

Accession Number: 20161017–5050.

Comments Due: 5 p.m. ET 10/31/16.

Docket Numbers: RP17–32–000.

Applicants: Southern Natural Gas Company, L.L.C.

Description: § 4(d) Rate Filing: MGAG Mini Expansion Filing to be effective 12/1/2016.

Filed Date: 10/17/16.

Accession Number: 20161017–5057.

Comments Due: 5 p.m. ET 10/31/16.

Docket Numbers: RP17–33–000.

Applicants: Equitrans, L.P.

Description: § 4(d) Rate Filing: Equitrans' Clean-Up Filing—October 2016 to be effective 11/17/2016.

Filed Date: 10/17/16.

Accession Number: 20161017–5139.

Comments Due: 5 p.m. ET 10/31/16.

Docket Numbers: RP17–34–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 10/18/16 Negotiated Rates—Consolidated Edison Energy Inc. (RTS) 2275–09 to be effective 11/1/2016.

Filed Date: 10/18/16.

Accession Number: 20161018–5035.

Comments Due: 5 p.m. ET 10/31/16.

Docket Numbers: RP17–35–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 10/18/16 Negotiated Rates—Wells Fargo Commodities, LLC (RTS) 7810–02 to be effective 11/1/2016.

Filed Date: 10/18/16.

Accession Number: 20161018–5036.

Comments Due: 5 p.m. ET 10/31/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and § 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 18, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–25648 Filed 10–21–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC16–14–000]

Commission Information Collection Activities (FERC–604 & FERC–923); Comment Request

AGENCY: Federal Energy Regulatory Commission.

ACTION: Comment request.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is submitting its information collection [FERC–604 (Cash Management Agreements) and FERC–923 (Communication of Operational Information between Natural Gas Pipelines and Electric Transmission Operators)] to the Office of Management and Budget (OMB) for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission previously issued a Notice in the **Federal Register** (81 FR 54574, 8/16/2016) requesting public comments. The Commission received no comments on either the FERC–604 or the FERC–923 and is making this notation in its submittal to OMB.

DATES: Comments on the collection of information are due November 23, 2016.

ADDRESSES: Comments filed with OMB, identified by the OMB Control No. 1902–0267 (FERC–604) or 1902–0265 (FERC–923) should be sent via email to the Office of Information and Regulatory Affairs: *oira_submission@omb.gov*. Attention: Federal Energy Regulatory Commission Desk Officer. The Desk Officer may also be reached via telephone at 202–395–4718.

A copy of the comments should also be sent to the Commission, in Docket No. IC16–14–000, by either of the following methods:

- *eFiling at Commission's Web site: http://www.ferc.gov/docs-filing/efiling.asp.*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp*. For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp*.

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* by telephone at (202) 502–8663, and by fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Type of Request: Three-year extension of the information collection requirements for all collections described below with no changes to the current reporting requirements. Please note that each collection is distinct from the next.

Comments: Comments are invited on: (1) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the burden of the collections of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FERC–604, Cash Management Agreements

OMB Control No.: 1902–0267.

Abstract: Cash management or ''money pool'' programs typically concentrate affiliates' cash assets in joint accounts for the purpose of providing financial flexibility and lowering the cost of borrowing.

In a 2001 investigation, FERC staff found that balances in cash management programs affecting FERC-regulated entities totaled approximately $16 billion. Additionally, other investigations revealed large transfers of funds (amounting to more than $1 billion) between regulated pipeline affiliates and non-regulated parents whose financial conditions were precarious. The Commission found that these and other fund transfers and the

enormous (mostly unregulated) pools of money in cash management programs could detrimentally affect regulated rates.

To protect customers and promote transparency, the Commission issued Order 634–A (2003) requiring entities to formalize in writing and file with the Commission their cash management agreements. At that time, the Commission obtained OMB clearance for this new reporting requirement under the FERC–555 information collection (OMB Control No. 1902–0098). Now, the Commission includes these reporting requirements for cash management agreements under the FERC–604 information collection (OMB Control No. 1902–0267). The Commission implemented these reporting requirements in 18 CFR parts 141.500, 260.400, and 357.5.

Type of Respondent: Public utilities, natural gas companies, and oil pipeline companies.

Estimate of Annual Burden: The Commission estimates the annual public reporting burden for the information collection as:

FERC–604, CASH MANAGEMENT AGREEMENTS

Number of respondents	Annual number of responses per respondent	Total number of responses	Average burden & cost per response [1]	Total annual burden hours & total annual cost	Cost per respondent ($)
(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
25	1	25	1.5 hrs.; $111.75	37.5 hrs.; $2,793.75	$111.75

FERC–923, Communication of Operational Information Between Natural Gas Pipelines and Electric Transmission Operators

OMB Control No.: 1902–0265.

Abstract: In 2013, the Federal Energy Regulatory Commission (FERC or Commission) revised its regulations to provide explicit authority to interstate natural gas pipelines and public utilities that own, operate, or control facilities used for the transmission of electric energy in interstate commerce to voluntarily share non-public, operational information with each other for the purpose of promoting reliable service and operational planning on either the pipeline's or public utility's system. This helps ensure the reliability of natural gas pipeline and public utility transmission service by permitting transmission operators to share the information with each other that they deem necessary to promote the reliability and integrity of their systems. FERC removed actual or perceived prohibitions to the information sharing and communications between industry entities. The communications of information are not and will not be submitted to FERC. Rather, the non-public information is shared voluntarily between industry entities. FERC does not prescribe the content, medium, format, or frequency for the information sharing and communications. Those decisions are made by the industry entities, depending on their needs and the situation.

Type of Respondent: Natural gas pipelines and public utilities.

Estimate of Annual Burden: The Commission estimates the annual public reporting burden for the information collection as:

FERC–923, COMMUNICATION OF OPERATIONAL INFORMATION BETWEEN NATURAL GAS PIPELINES AND ELECTRIC TRANSMISSION OPERATORS

	Number of respondents	Annual number of responses per respondent	Total number of responses	Average burden & cost per response [2]	Total annual burden hours & total annual cost	Cost per respondent ($)
(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)	
Public Utility Transmission Operator, communications.	[3] 164	12	1,968	0.5 hrs.; $37.25	984 hrs.; $73,308	$447
Interstate Natural Gas Pipelines, communications.	155	12	1,860	0.5 hrs.; $37.25	930 hrs.; $69,285	447
Total		3,828		1,914 hrs; $142,593		

[1] The estimates for cost per response are derived using the following formula: Average Burden Hours per Response * $74.50 per Hour = Average Cost per Response. The Commission staff believes that the industry's level and skill set is comparable to FERC's with an average hourly cost (wages plus benefits) of $74.50.

[2] The estimates for cost per response are derived using the following formula: Average Burden Hours per Response * $74.50 per Hour = Average Cost per Response. The Commission staff believes that the industry's level and skill set is comparable to FERC's with an average hourly cost (wages plus benefits) of $74.50.

[3] The estimate for the number of respondents is based on the North American Electric Reliability Corporation (NERC) Compliance Registry as of July 29, 2016, minus the Transmission Operators within ERCOT.

Dated: October 18, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–25622 Filed 10–21–16; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2013–0341; FRL–9951–99–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Plywood and Composite Products (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''NESHAP for Plywood and Composite Products (40 CFR part 63, subpart DDDD) (Renewal)'' (EPA ICR No. 1984.06, OMB Control No. 2060–0552), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through October 31, 2016. Public comments were previously requested via the **Federal Register** (81 FR 26546) on May 3, 2016 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before November 23, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2013–0341, to: (1) EPA online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: Owners and operators of affected facilities are required to comply with reporting and record keeping requirements for the NESHAP General Provisions (40 CFR part 63, subpart A), as well as for the specific requirements at 40 CFR part 63, subpart DDDD. This includes submitting initial notifications, performance tests and periodic reports and results, and maintaining records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These reports are used by EPA to determine compliance with the standards.

Form Numbers: None.

Respondents/affected entities: Plywood and composite wood products (PCWP) facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart DDDD).

Estimated number of respondents: 228 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 11,900 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $1,250,000 (per year), which includes $16,000 in either annualized capital/startup or operation & maintenance costs.

Changes in the Estimates: There is an adjustment increase in the total estimated labor hours as currently identified in the OMB Inventory of Approved Burdens. This increase is not due to any program changes. The change in the labor burden and cost estimates occurred because of a change in assumption. This ICR assumes all existing respondents will have to familiarize with the regulatory requirements each year. In addition, there is a small increase in O&M cost due to rounding of total cost figure to three significant figures.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2016–25630 Filed 10–21–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2012–0679; FRL–9952–96–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''NESHAP for Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units (40 CFR part 63, subpart UUU) (Renewal)'' (EPA ICR No. 1844.08, OMB Control No. 2060–0554), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through October 31, 2016. Public comments were requested previously via the **Federal Register** (81 FR 26546) on May 3, 2016 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before November 23, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2012–0679, to: (1) EPA online using *www.regulations.gov* (our

preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: Owners and operators of three types of affected units at major source petroleum refineries (fluid catalytic cracking units for catalyst regeneration, catalytic reforming units, and sulfur recovery units) are required to comply with reporting and record keeping requirements for the General Provisions (40 CFR part 63, subpart A), as well as the applicable standards in 40 CFR part 63, subpart UUU. This includes submitting initial notifications, performance tests and periodic reports and results, and maintaining records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These reports are used by EPA to determine compliance with these standards.

Form Numbers: None.

Respondents/affected entities: Affected units at major source petroleum refineries: Fluid catalytic cracking units for catalyst regeneration, catalytic reforming units, and sulfur recovery units.

Respondent's obligation to respond: Mandatory (40 CFR part 63 Subparts UUU).

Estimated number of respondents: 142 (total).

Frequency of response: Initially, occasionally and semiannually.

Total estimated burden: 20,200 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $10,900,000 (per year), which includes $8,820,000 in either annualized capital/startup or operation & maintenance costs.

Changes in the Estimates: There is an increase in the total estimated burden as currently identified in the OMB Inventory of Approved Burdens. The increase in burden from the most-recently approved ICR is primarily due to the December 2015 final rule amendments. The changes to 40 CFR part 63 Subpart UUU caused by the rule amendment are summarized in section 1(b). The specific changes that impacted this ICR are (1) the elimination of the SSM exemption, (2) the requirement for FCCUs to do periodic PM performance testing and a one-time HCN performance test, and (3) revisions to requirements for catalytic reforming catalyst regeneration when using active purging. This ICR accounts for the burden presented previously in both EPA ICR Number 1844.06 (existing rule) and EPA ICR Number 1844.07 (2015 amendment).

The elimination of the SSM exemption did not lead to any changes to the time or cost burden estimates, or to the number of responses, because the previous assumption was that all existing respondents have already complied with the initial requirements to prepare and submit the SSM plan, thus the time and cost estimate was already zero. In this supporting statement, we have added a footnote in Table 1 to explain that the SSM exemption has been eliminated and that the burden item can be removed out of future ICR supporting statements.

We have accounted for the additional labor and O&M costs to notify, perform, and prepare and submit the reports for the PM and HCN performance tests for FCCUs. We have also accounted for the additional labor for owners or operators of facilities with FCCUs to update their operating, maintenance, and monitoring plan, to account for the new requirements.

We have also accounted for the additional labor and responses associated with training personnel and performing an engineering assessment for evaluation of the new catalytic reforming unit operational requirements.

Furthermore, we have added a new burden item for performing relative accuracy test audits on units using CEMs, based on industry comments received from API (further discussed in Section 3(c)). This contributed to an increase in the total labor burden, cost and number of annual responses.

In addition, the total number of respondents was revised from 123 to 142, which contributed to the increase in burden and cost.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2016–25628 Filed 10–21–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2013–0336; FRL–9952–02–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Off-Site Waste and Recovery Operations (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), ''NESHAP for Off-Site Waste and Recovery Operations (40 CFR part 63, subpart DD) (Renewal)'' (EPA ICR No. 1717.11, OMB Control No. 2060–0313), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through October 31, 2016. Public comments were previously requested via the **Federal Register** (81 FR 26546) on May 3, 2016 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before November 23, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2013–0336, to: (1) EPA

online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: The NESHAP for Off-Site Waste and Recovery Operations were proposed on October 13, 1994, and promulgated on July 1, 1996. The affected entities are subject to the General Provisions of the NESHAP (40 CFR part 63, subpart A), and any changes, or additions to these provisions are specified at 40 CFR part 63, subpart DD. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Waste management and recovery facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart DD).

Estimated number of respondents: 45 (total).

Frequency of response: Initially, occasionally and semiannually.

Total estimated burden: 40,600 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $5,060,000 (per year), which includes $874,000 in either annualized capital/startup or operation & maintenance costs.

Changes in the Estimates: There is a decrease in the respondent labor hours, labor costs, and the number of responses. The decrease reflects an update in the estimated respondent universe. The previously approved ICR (1717.09) estimated 236 sources. In developing the 2015 amendment, we estimate that only 45 sources are subject to these standards.

There is an increase in the total O&M cost compared to the previously approved ICR. This cost increased because the current ICR incorporates additional requirements associated with the 2015 amendment, including additional O&M cost associated with LDAR and PRD monitoring equipment.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2016–25627 Filed 10–21–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9954–43–OLEM]

Thirtieth Update of the Federal Agency Hazardous Waste Compliance Docket

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Since 1988, the Environmental Protection Agency (EPA) has maintained a Federal Agency Hazardous Waste Compliance Docket (''Docket'') under Section 120(c) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Section 120(c) requires EPA to establish a Docket that contains certain information reported to EPA by Federal facilities that manage hazardous waste or from which a reportable quantity of hazardous substances has been released. As explained further below, the Docket is used to identify Federal facilities that should be evaluated to determine if they pose a threat to public health or welfare and the environment and to provide a mechanism to make this information available to the public.

This notice identifies the Federal facilities not previously listed on the Docket and also identifies Federal facilities reported to EPA since the last update on March 3, 2016. In addition to the list of additions to the Docket, this notice includes a section with revisions of the previous Docket list and a section of Federal facilities that are to be deleted from the Docket. Thus, the revisions in this update include 13 additions, 28 corrections, and 21 deletions to the Docket since the previous update. At the time of publication of this notice, the new total number of Federal facilities listed on the Docket is 2,318.

DATES: This list is current as of October 17, 2016.

FOR FURTHER INFORMATION CONTACT: Electronic versions of the Docket and more information on its implementation can be obtained at *http://www.epa.gov/fedfac/previous-federal-agency-hazardous-waste-compliance-docket-updates* by clicking on the link for *Update #30 to the Federal Agency Hazardous Waste Compliance Docket* or by contacting Benjamin Simes (*Simes.Benjamin@epa.gov*), Federal Agency Hazardous Waste Compliance Docket Coordinator, Federal Facilities Restoration and Reuse Office (Mail Code 5106R), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460. Additional information on the Docket and a complete list of Docket sites can be obtained at: *https://www.epa.gov/fedfac/fedfacts.*

SUPPLEMENTARY INFORMATION:

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1.0 Introduction

Section 120(c) of CERCLA, 42 United States Code (U.S.C.) § 9620(c), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), requires EPA to establish the Federal Agency Hazardous Waste Compliance Docket. The Docket contains information on Federal facilities that manage hazardous waste and such information is submitted by Federal agencies to EPA under Sections 3005, 3010, and 3016 of the Resource

Conservation and Recovery Act (RCRA), 42 U.S.C. § 6925, 6930, and 6937. Additionally, the Docket contains information on Federal facilities with a reportable quantity of hazardous substances that has been released and such information is submitted by Federal agencies to EPA under Section 103 of CERCLA, 42 U.S.C. § 9603. Specifically, RCRA Section 3005 establishes a permitting system for certain hazardous waste treatment, storage, and disposal (TSD) facilities; RCRA Section 3010 requires waste generators, transporters and TSD facilities to notify EPA of their hazardous waste activities; and RCRA Section 3016 requires Federal agencies to submit biennially to EPA an inventory of their Federal hazardous waste facilities. CERCLA Section 103(a) requires the owner or operator of a vessel or onshore or offshore facility to notify the National Response Center (NRC) of any spill or other release of a hazardous substance that equals or exceeds a reportable quantity (RQ), as defined by CERCLA Section 101. Additionally, CERCLA Section 103(c) requires facilities that have ''stored, treated, or disposed of'' hazardous wastes and where there is ''known, suspected, or likely releases'' of hazardous substances to report their activities to EPA.

CERCLA Section 120(d) requires EPA to take steps to assure that a Preliminary Assessment (PA) be completed for those sites identified in the Docket and that the evaluation and listing of sites with a PA be completed within a reasonable time frame. The PA is designed to provide information for EPA to consider when evaluating the site for potential response action or inclusion on the National Priorities List (NPL).

The Docket serves three major purposes: (1) To identify all Federal facilities that must be evaluated to determine whether they pose a threat to human health and the environment sufficient to warrant inclusion on the National Priorities List (NPL); (2) to compile and maintain the information submitted to EPA on such facilities under the provisions listed in Section 120(c) of CERCLA; and (3) to provide a mechanism to make the information available to the public.

The initial list of Federal facilities to be included on the Docket was published in the **Federal Register** on February 12, 1988 (53 FR 4280). Since then, updates to the Docket have been published on November 16, 1988 (53 FR 46364); December 15, 1989 (54 FR 51472); August 22, 1990 (55 FR 34492); September 27, 1991 (56 FR 49328); December 12, 1991 (56 FR 64898); July 17, 1992 (57 FR 31758); February 5, 1993 (58 FR 7298); November 10, 1993 (58 FR 59790); April 11, 1995 (60 FR 18474); June 27, 1997 (62 FR 34779); November 23, 1998 (63 FR 64806); June 12, 2000 (65 FR 36994); December 29, 2000 (65 FR 83222); October 2, 2001 (66 FR 50185); July 1, 2002 (67 FR 44200); January 2, 2003 (68 FR 107); July 11, 2003 (68 FR 41353); December 15, 2003 (68 FR 69685); July 19, 2004 (69 FR 42989); December 20, 2004 (69 FR 75951); October 25, 2005 (70 FR 61616); August 17, 2007 (72 FR 46218); November 25, 2008 (73 FR 71644); October 13, 2010 (75 FR 62810); November 6, 2012 (77 FR 66609); March 18, 2013 (78 FR 16668); January 6, 2014 (79 FR 654), December 31, 2014 (79 FR 78850); August 17, 2015 (80 FR 49223), and March 3, 2016 (81 FR 11212). This notice constitutes the thirtieth update of the Docket.

This notice provides some background information on the Docket. Additional information on the Docket requirements and implementation are found in the Docket Reference Manual, Federal Agency Hazardous Waste Compliance Docket found at *http://www.epa.gov/fedfac/docket-reference-manual-federal-agency-hazardous-waste-compliance-docket-interim-final* or obtained by calling the Regional Docket Coordinators listed below. This notice also provides changes to the list of sites included on the Docket in three areas: (1) Additions, (2) Deletions, and (3) Corrections. Specifically, additions are newly identified Federal facilities that have been reported to EPA since the last update and now are included on the Docket; the deletions section lists Federal facilities that EPA is deleting from the Docket.[1] The information submitted to EPA on each Federal facility is maintained in the Docket repository located in the EPA Regional office of the Region in which the Federal facility is located; for a description of the information required under those provisions, *see* 53 FR 4280 (February 12, 1988). Each repository contains the documents submitted to EPA under the reporting provisions and correspondence relevant to the reporting provisions for each Federal facility.

In prior updates, information was also provided regarding No Further Remedial Action Planned (NFRAP) status changes. However, information on NFRAP and NPL status is no longer being provided separately in the Docket update as it is now available at: *http://www.epa.gov/fedfac/fedfacts* or by contacting the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

[1] See Section 3.2 for the criteria for being deleted from the Docket.

2.0 Regional Docket Coordinators

Contact the following Docket Coordinators for information on Regional Docket repositories: Martha Bosworth (HBS), US EPA Region 1, 5 Post Office Square, Suite 100, Mail Code: OSRR07–2, Boston MA 02109–3912, (617) 918–1407.

Helen Shannon (ERRD), US EPA Region 2, 290 Broadway, New York, NY 10007–1866, (212) 637– 4260.

Joseph Vitello (3HS12), US EPA Region 3, 1650 Arch Street, Philadelphia, PA 19107, (215) 814–3354.

Dawn Taylor (4SF–SRSEB), US EPA Region 4, 61 Forsyth St. SW., Atlanta, GA 30303, (404) 562–8575.

David Brauner (SR–6J), US EPA Region 5, 77 W. Jackson Blvd., Chicago, IL 60604, (312) 353–3705.

Philip Ofosu (6SF–RA), US EPA Region 6, 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–3178.

Paul Roemerman (SUPRERSP), US EPA Region 7, 11201 Renner Blvd., Lenexa, KS 66219, (913) 551–7694.

Ryan Dunham (EPR–F), US EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202, (303) 312–6627.

Leslie Ramirez (SFD–6–1), US EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3978.

Monica Lindeman (ECL, ABU), US EPA Region 10, 1200 Sixth Avenue, Suite 900, ECL–112, Seattle, WA 98101, (206) 553–5113.

3.0 Revisions of the Previous Docket

This section includes a discussion of the additions and deletions to the list of Docket facilities since the previous Docket update.

3.1 Additions

In this notice, 13 Federal facilities are being added to the Docket, primarily because of new information obtained by EPA (for example, recent reporting of a facility pursuant to RCRA Sections 3005, 3010, or 3016 or CERCLA Section 103). CERCLA Section 120, as amended by the Defense Authorization Act of 1997, specifies that EPA take steps to assure that a Preliminary Assessment (PA) be completed within a reasonable time frame for those Federal facilities that are included on the Docket. Among other things, the PA is designed to provide information for EPA to consider when evaluating the site for potential response action or listing on the NPL.

3.2 Deletions

In this notice, 21 Federal facilities are being deleted from the Docket. There are

no statutory or regulatory provisions that address deletion of a facility from the Docket. However, if a facility is incorrectly included on the Docket, it may be deleted from the Docket. The criteria EPA uses in deleting sites from the Docket include: a facility for which there was an incorrect report submitted for hazardous waste activity under RCRA (*e.g.,* 40 CFR § 262.44); a facility that was not Federally-owned or operated at the time of the listing; a facility included more than once (*i.e.,* redundant listings); or when multiple facilities are combined under one listing. (*See* Docket Codes (*Categories for Deletion of Facilities*) for a more refined list of the criteria EPA uses for deleting sites from the Docket. Facilities being deleted no longer will be subject to the requirements of CERCLA Section 120(d).

3.3 Corrections

Changes necessary to correct the previous Docket are identified by both EPA and Federal agencies. The corrections section may include changes in addresses or spelling, and corrections of the recorded name and ownership of a Federal facility. In addition, changes in the names of Federal facilities may be made to establish consistency in the Docket or between the Superfund Enterprise Management System (SEMS) and the Docket. For the Federal facility for which a correction is entered, the original entry is as it appeared in previous Docket updates. The corrected update is shown directly below, for easy comparison. This notice includes 28 corrections.

4.0 Process for Compiling the Updated Docket

In compiling the newly reported Federal facilities for the update being published in this notice, EPA extracted the names, addresses, and identification numbers of facilities from four EPA databases — the WebEOC, the Biennial Inventory of Federal Agency Hazardous Waste Activities, the Resource Conservation and Recovery Act Information System (RCRAInfo), and SEMS— that contain information about Federal facilities submitted under the four provisions listed in CERCLA Section 120(c).

EPA assures the quality of the information on the Docket by conducting extensive evaluation of the current Docket list and contacts the other Federal Agency (OFA) with the information obtained from the databases identified above to determine which Federal facilities were, in fact, newly reported and qualified for inclusion on the update. EPA is also striving to correct errors for Federal facilities that were previously reported. For example, state-owned or privately-owned facilities that are not operated by the Federal government may have been included. Such problems are sometimes caused by procedures historically used to report and track Federal facilities data. Representatives of Federal agencies are asked to contact the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice if revisions of this update information are necessary.

5.0 Facilities Not Included

Certain categories of facilities may not be included on the Docket, such as: (1) Federal facilities formerly owned by a Federal agency that at the time of consideration was not Federally-owned or operated; (2) Federal facilities that are small quantity generators (SQGs) that have never generated more than 1,000 kg of hazardous waste in any month; (3) Federal facilities that are solely hazardous waste transportation facilities, as reported under RCRA Section 3010; and (4) Federal facilities that have mixed mine or mill site ownership.

An EPA policy issued in June 2003 provided guidance for a site-by-site evaluation as to whether ''mixed ownership'' mine or mill sites, typically created as a result of activities conducted pursuant to the General Mining Law of 1872 and never reported under Section 103(a), should be included on the Docket. For purposes of that policy, mixed ownership mine or mill sites are those located partially on private land and partially on public land. This policy is found at *http://www.epa.gov/fedfac/policy-listing-mixed-ownership-mine-or-mill-sites-created-result-general-mining-law-1872.* The policy of not including these facilities may change; facilities now omitted may be added at some point if EPA determines that they should be included.

6.0 Facility NPL Status Reporting, Including NFRAP Status

EPA tracks the NPL status of Federal facilities listed on the Docket. An updated list of the NPL status of all Docket facilities, as well as their NFRAP status, is available at *http://www.epa.gov/fedfac/fedfacts* or by contacting the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice. In prior updates, information regarding NFRAP status changes was provided separately.

7.0 Information Contained on Docket Listing

The information is provided in three tables. The first table is a list of new Federal facilities that are being added to the Docket. The second table is a list of Federal facilities that are being deleted from the Docket. The third table is for corrections.

The Federal facilities listed in each table are organized by the date reported. Under each heading is listed the name and address of the facility, the Federal agency responsible for the facility, the statutory provision(s) under which the facility was reported to EPA, and a code.[2]

The statutory provisions under which a Federal facility is reported are listed in a column titled ''Reporting Mechanism.'' Applicable mechanisms are listed for each Federal facility: for example, Sections 3005, 3010, 3016, 103(c), or Other. ''Other'' has been added as a reporting mechanism to indicate those Federal facilities that otherwise have been identified to have releases or threat of releases of hazardous substances. The National Contingency Plan 40 CFR § 300.405 addresses discovery or notification, outlines what constitutes discovery of a hazardous substance release, and states that a release may be discovered in several ways, including: (1) A report submitted in accordance with Section 103(a) of CERCLA, *i.e.,* reportable quantities codified at 40 CFR part 302; (2) a report submitted to EPA in accordance with Section 103(c) of CERCLA; (3) investigation by government authorities conducted in accordance with Section 104(e) of CERCLA or other statutory authority; (4) notification of a release by a Federal or state permit holder when required by its permit; (5) inventory or survey efforts or random or incidental observation reported by government agencies or the public; (6) submission of a citizen petition to EPA or the appropriate Federal facility requesting a preliminary assessment, in accordance with Section 105(d) of CERCLA; (7) a report submitted in accordance with Section 311(b)(5) of the Clean Water Act; and (8) other sources. As a policy matter, EPA generally believes it is appropriate for Federal facilities identified through the CERCLA discovery and notification process to be included on the Docket.

The complete list of Federal facilities that now make up the Docket and the NPL and NFRAP status are available to

[2] Each Federal facility listed in the update has been assigned a code that indicates a specific reason for the addition or deletion. The code precedes this list.

interested parties and can be obtained at *http://www.epa.gov/fedfac/fedfacts* or by contacting the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice. As of the date of this notice, the total number of Federal facilities that appear on the Docket is 2,318.

Dated: October 17, 2016.

Charlotte Bertrand,

Director, Federal Facilities Restoration and Reuse Office, Office of Land and Emergency Management.

Categories for Deletion of Facilities

(1) Small-Quantity Generator.Show citation box

(2) Never Federally Owned and/or Operated.

(3) Formerly Federally Owned and/or Operated but not at time of listing.

(4) No Hazardous Waste Generated.

(5) (This code is no longer used.)

(6) Redundant Listing/Site on Facility.

(7) Combining Sites Into One Facility/Entries Combined.

(8) Does Not Fit Facility Definition.

Categories for Addition of Facilities

(15) Small-Quantity Generator with either a RCRA 3016 or CERCLA 103 Reporting Mechanism.

(16) One Entry Being Split Into Two (or more)/Federal Agency Responsibility Being Split.

(17) New Information Obtained Showing That Facility Should Be Included.

(18) Facility Was a Site on a Facility That Was Disbanded; Now a Separate Facility.

(19) Sites Were Combined Into One Facility.

(19A) New Currently Federally Owned and/or Operated Facility Site.

Categories for Corrections of Information About Facilities

(20) Reporting Provisions Change.

(20A) Typo Correction/Name Change/Address Change.

(21) Changing Responsible Federal Agency. (If applicable, new responsible Federal agency submits proof of previously performed PA, which is subject to approval by EPA.)

(22) Changing Responsible Federal Agency and Facility Name. (If applicable, new responsible Federal Agency submits proof of previously performed PA, which is subject to approval by EPA.)

(24) Reporting Mechanism Determined To Be Not Applicable After Review of Regional Files.

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #30—ADDITIONS

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
AIR NATIONAL GUARD—NEXT TO BUILDING 100.	200 ROAD SECTOR CENTRAL, JOSE A TONY SANTANA AVE.	CAROLINA	PR	00979–1514	AIR FORCE	CERLCA 103	15	UPDATE #30.
TENNESSEE VALLEY AUTHORITY FONTANA HYDRO.	HIGHWAY 28	FONTANA	NC	28733	TENNESSEE VALLEY AUTHORITY.	RCRA 3010	17	UPDATE #30.
USBR YELLOWTAIL DAM AND POWERPLANT.	YELLOWTAIL FIELD BRANCH 2 AVE. B.	FORT SMITH	MT	59035	INTERIOR	RCRA 3010	17	UPDATE #30.
USPS HUNTINGTON BEACH VMF.	6771 WARNER AVE.	HUNTINGTON BEACH.	CA	92647	USPS	RCRA 3010	17	UPDATE #30.
MARITIME ADMINISTRATION.	2606 HARRISON ROAD, FORT EUSTIS.	NEWPORT NEWS	VA	23604	TRANSPORTATION.	CERCLA 103	17	UPDATE #30.
NPS—FORT DARLING LANDFILL—RICHMOND NATIONAL BATTLEFIELD PARK.	7610 FORT DARLING ROAD.	RICHMOND	VA	23237	INTERIOR	CERLCA 103	17	UPDATE #30.
TVA MAINTENANCE FACILITY HED.	219 RIVER ROAD	MUSCLE SHOALS	AL	35662	TENNESSEE VALLEY AUTHORITY.	RCRA 3010	17	UPDATE #30.
SOUTHAVEN CC	2882 STATELINE ROAD WEST.	SOUTHAVEN	MS	38671	TENNESSEE VALLEY AUTHORITY.	RCRA 3010	17	UPDATE #30.
WATTS BAR HYDRO.	6868 WATTS BAR HWY.	SPRING CITY	TN	37381	TENNESSEE VALLEY AUTHORITY.	RCRA 3010	17	UPDATE #30.
FORT PATRICK HENRY HYDRO.	3657 FT HENRY DRIVE.	KINGSPORT	TN	37664	TENNESSEE VALLEY AUTHORITY.	RCRA 3010	17	UPDATE #30.
GREAT FALLS HYDRO.	1778 GREAT FALLS ROAD.	ROCK ISLAND	TN	38581	TENNESSEE VALLEY AUTHORITY.	RCRA 3010	17	UPDATE #30.
CHICKAMAUGA POWER SERVICE CENTER.	TN HWY 153	CHATTANOOGA	TN	37401	TENNESSEE VALLEY AUTHORITY.	RCRA 3010	17	UPDATE #30.
GALLATIN FOSSIL PLANT (AND CT SITE).	1499 STEAM PLANT ROAD.	GALLATIN	TN	37066	TENNESSEE VALLEY AUTHORITY.	RCRA 3010	17	UPDATE #30.

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #30—DELETIONS

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
ELSON LAGOON ..	EAST OF BARROW.	BARROW	AK	99723	NAVY	CERCLA 103	3	9/27/1991
U.S. POSTAL SERVICE.	600 CHURCH ST	NORFOLK	VA	23501	USPS	RCRA 3010	4	9/27/1991
USDOI BLM IDORA MINE AND MILL SITE.	CARBON CENTER ROAD, 10 MI SE OF PRITCHARD, 10 MI N OF WALLACE, T49N R5E SEC 30.	WALLACE	ID	83873	INTERIOR	OTHER	8	11/25/2008
U.S. GEOLOGICAL SURVEY-MARINE FACILITY (MARFAC).	599 SEAPORT BLVD.	REDWOOD CITY	CA	94063	INTERIOR	RCRA 3010	8	3/18/2013
COMMANDER NAVY REGION SOUTHEAST.	8998 BLOUNT ISLAND BLVD.	JACKSONVILLE ...	FL	32226–4033	NAVY	RCRA 3010	2	10/13/2010
JACHMAN ARMY RESERVE CENTER.	12100 GREENSPRING AVE.	OWLINGS MILL	MD	21117	ARMY	RCRA 3010	6	11/10/1993
SECTION 5 IMPOUNDMENT.	SW ¼ NW ¼ SE ¼ OF SEC 5.	GLENVIL TOWNSHIP.	NE	.....	AGRICULTURE	CERCLA 103	3	9/27/1991
NORTH RIVER WHITE ALICE COMMUNICATIONS.	T18S R10W S36 KRM.	UNALAKLEET	AK	99684	AIR FORCE	RCRA 3016	6	11/10/1993
PALMETTO SITE ..	8400 TATUM RD ..	PALMETTO	GA	30268	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	2	11/23/1998
GENERAL SERVICES ADMINISTRATION.	ROUGH & READY ISLAND BLDG. 414.	STOCKTON	CA	95203	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	3	8/17/2007
WAVERLY WETS	2 MILES SOUTH ..	WAVERLY	IA	50677	ARMY	RCRA 3016	6	6/11/1995
HASTINGS TRAINING SITE.	R.R. 2, P.O. BOX 178.	HASTINGS	NE	68901	CORPS OF ENGINEERS, CIVIL.	RCRA 3016	6	6/11/1995
NA WATTS BAR CENTRAL MAINT FACILITY.	WATTS BAR RESERV-TN HWY 68E.	SPRING CITY	TN	37381	TENNESSEE VALLEY AUTHORITY.	RCRA 3010	6	9/27/1991
JET PROPULSION LABORATORY.	NORTH BASE RD., EDWARDS AFB.	EDWARDS	CA	93523	AIR FORCE	RCRA 3010	6	2/12/1988
NAVAL STATION TREASURE ISLAND.	TREASURE ISLAND.	SAN FRANCISCO	CA	94130	NAVY	RCRA 3005	6	2/12/1988
NAVAL CONSTRUCTION BATTALION CTR.	PORT HUENEME	VENTURA	CA	93043	NAVY	RCRA 3005	6	2/12/1988
NAVAL POSTGRADUATE SCHOOL-ANNEX.	1 GRACE HOPPER AVE.	MONTEREY	CA	93943	NAVY	RCRA 3010	6	6/11/1995
DEFENSE COMMUNICATION AGENCY.	SOUTH COURTHOUSE ROAD.	ARLINGTON	VA	22204	DEFENSE	CERCLA 103	6	2/5/1993
NAVAL AIR STATION NORFOLK.	N/A	NORFOLK	VA	23511	NAVY	RCRA 3005	6, 7	2/12/1988
ANIAK AIRPORT ..	61′34″ N. 159′31″ W..	ANIAK	AK	99557	INTERIOR	CERCLA 103	6	12/12/1991
FWS–SAN DIEGO NATIONAL WILDLIFE REFUGE-SOUTH SAN.	13910 LYONS VALLEY ROAD, SUITE R.	JAMUL	CA	91935–3805	INTERIOR	RCRA 3016	6	7/19/2004

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #30—CORRECTIONS

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
FEDERICO GEGETAU INDOOR FIRING RANGE (GENERAL SERVICE SITE).					GENERAL SERVICES ADMINISTRATION.	RCRA 3010	20A	8/17/2015

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #30—CORRECTIONS—Continued

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
FEDERICO GEGETAU INDOOR FIRING RANGE (GENERAL SERVICE SITE).	150 CARLOS CHANDON AVENUE, ROOM 359.	SAN JUAN	PR	00918	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	.....	8/17/2015
ARMY CORPS OF ENGINEERS, WHITNEY POINT LAKE AND DAM.	10 SOUTH HOWARD STREET.	BALTIMORE ...	MD	21201	CORPS OF ENGINEERS, CIVIL.	RCRA 3010	20A	8/17/2015
ARMY CORPS OF ENGINEERS WHITNEY POINT LAKE AND DAM.	5327 WHITNEY POINT UPPER LISLE RD.	WHITNEY POINT.	NY	13862	CORPS OF ENGINEERS, CIVIL.	RCRA 3010	.....	8/17/2015
FORMER RED ROCKS MINE MERCURY MINE.	37°51′23″ N. 118°14′34″ W..	DYER	NV	89010	AGRICULTURE.	RCRA 3010	20A	12/31/2012
FORMER RED ROCK MERCURY MINE.	37°51′23″ N. 118° 14′ 34 W L..	DYER	NV	89010	AGRICULTURE.	RCRA 3010	.....	12/31/2012
GREENSPRING—CONTROL.	GREENSPRING ROAD.	GREENSPRING.	MD	21117	DEFENSE	CERCLA 103 ..	20, 20A, 21	11/16/1988
JACHMAN RESERVE CENTER.	12100 GREENSPRING AVE., OWINGS MILLS, MD.	GREENSPRING.	MD	21117	ARMY	CERCLA 103, RCRA 3010.	.....	11/16/1988
FDA–KANSAS CITY SITE.	1009 CHERRY ST.	KANSAS CITY	MO	64106	AGRICULTURE.	RCRA 3010	21	11/23/1998
FDA–KANSAS CITY SITE.	1009 CHERRY ST.	KANSAS CITY	MO	64106	HEALTH AND HUMAN SERVICES.	RCRA 3010	.....	11/23/1998
USAF–NORTH RIVER AFS.	MOUTH OF NORTH RIVER.	UNALAKLEET	AK	99684	AIR FORCE	CERCLA 103 ..	20, 20A	11/16/1988
USAF–NORTH RIVER WHITE ALICE COMMUNICATIONS SITE.	T18S R10W S36 KRM, 8 MILES EAST OF CY.	UNALAKLEET	AK	99684	AIR FORCE	CERCLA 103, RCRA 3010.	.....	11/16/1988
DLA–MUKILTEO DEFENSE FUEL SUPPORT POINT.	FRONT ST & LOVELAND AVE.	MUKILTEO	WA	98275	DEFENSE	RCRA 3010	20, 21	2/12/1988
DLA–MUKILTEO DEFENSE FUEL SUPPORT POINT.	FRONT ST & LOVELAND AVE.	MUKILTEO	WA	98275	DEFENSE LOGISTICS AGENCY.	CERCLA 103, RCRA 3010.	.....	2/12/1988
SOMERVILLE DEPOT.	ROUTE 206	SOMERVILLE	NJ	08876	GENERAL SERVICES ADMINISTRATION.	CERCLA 103 ..	21	11/16/1988
SOMERVILLE DEPOT.	ROUTE 206	SOMERVILLE	NJ	08876	DEFENSE LOGISTICS AGENCY.	CERCLA 103 ..	.....	11/16/1988
U.S. DEPT OF DEFENSE DFSP ESCANABA.	U.S. HIGHWAY 41, DELTA COUNTY 001 (ESC).	GLADSTONE ..	MI	49837	DEFENSE LOGISTICS AGENCY.	RCRA 3010	20, 21	2/12/1988

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #30—CORRECTIONS—Continued

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
U.S. DEPT OF DEFENSE DFSP ESCANABA.	U.S. HIGHWAY 41, DELTA COUNTY 001 (ESC).	GLADSTONE ..	MI	49837	AIR FORCE	RCRA 3010	.....	2/12/1988
BELLE MEAD SUPPLY DEPOT.	#1 RT 206	BELLE MEAD	NJ	08502	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	20A	2/12/1988
BELLE MEAD SUPPLY DEPOT.	RT 206 & MOUNTAIN VIEW RD.	HILLSBOROUGH.	NJ	08502	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	.....	2/12/1988
NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY.	QUINCE ORCHARD RD.	GAITHERSBURG.	MD	20760	COMMERCE ...	RCRA 3005	20A	2/12/1988
NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY.	100 BUREAU DRIVE, MS 1730.	GAITHERSBURG.	MD	20899	COMMERCE ...	RCRA 3010	.....	2/12/1988
TRANS SECURITY ADMINISTRATION (CLT).	5501 JOSH BIRMINGHAM PKWY STE.	CHARLOTTE ..	NC	28208	TREASURY	RCRA 3010	21	3/18/2013
TRANS SECURITY ADMINISTRATION (CLT).	5501 JOSH BIRMINGHAM PKWY STE.	CHARLOTTE ..	NC	28208	HOMELAND SECURITY.	RCRA 3010	.....	3/18/2013
TRANSPORTATION SECURITY ADMIN PHIL INTL.	8500 ESSINGTON AVE.	PHILADELPHIA.	PA	19153	TREASURY	RCRA 3010	21	3/18/2013
TRANSPORTATION SECURITY ADMIN PHIL INTL.	8500 ESSINGTON AVE.	PHILADELPHIA.	PA	19153	HOMELAND SECURITY.	RCRA 3010	.....	3/18/2013
GSA RARITAN DEPOT.	4700 WOODBRIDGE AVENUE.	EDISON	NJ	08817	EPA	RCRA 3005	21	11/16/1988
GSA RARITAN DEPOT.	2890 WOODBRIDGE AVENUE.	EDISON	NJ	08817	GENERAL SERVICES ADMINISTRATION.	RCRA 3005	.....	11/16/1988
EPA RARITAN DEPOT.	4700 WOODBRIDGE AVENUE.	EDISON	NJ	08817	GENERAL SERVICES ADMINISTRATION.	RCRA 3005	21	2/12/1988
EPA RARITAN DEPOT.	4700 WOODBRIDGE AVENUE.	EDISON	NJ	08817	EPA	RCRA 3005	.....	2/12/1988
NEW YORK	201 VARICK ST.	NEW YORK	NY	10014	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	20A	2/12/1988
FEDERAL BUILDING NEW YORK.	201 VARICK ST.	NEW YORK	NY	10014	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	.....	2/12/1988
FEDERAL OFFICE BUILDING NO. 2.	ROOM 1090 BUILDING MANAGER'S OFFICE.	ARLINGTON ...	VA	20370	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	21	12/29/2000
FEDERAL OFFICE BUILDING NO. 2.	ROOM 1090 BUILDING MANAGER'S OFFICE.	ARLINGTON ...	VA	20370	ARMY	RCRA 3010	.....	12/29/2000

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #30—CORRECTIONS—Continued

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
PARR WAREHOUSES.	GSA BLDG B ..	SPRINGFIELD	VA	22150	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	20A	6/11/1995
LOGISTICS OPERATIONS CENTER (LOC) PARR WAREHOUSES.	GSA BLDG B ..	SPRINGFIELD	VA	22150	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	.....	6/11/1995
CUSTOMS FIELD OFFICE.	1200 PENNSYLVANIA AVENUE.	WASHINGTON	DC	20004	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	20A	2/12/1988
WILLIAM JEFFERSON CLINTON BLDG.	1200 PENNSYLVANIA AVENUE.	WASHINGTON	DC	20004	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	.....	2/12/1988
HUBERT H. HUMPHREY BUILDING.	200 INDEPENDENCE AVENUE, SW.	WASHINGTON	DC	20201	GENERAL SERVICES ADMINISTRATION.	RCRA 3016	21	2/12/1988
HUBERT H. HUMPHREY BUILDING.	200 INDEPENDENCE AVENUE, SW.	WASHINGTON	DC	20201	HEALTH AND HUMAN SERVICES.	RCRA 3016	.....	2/12/1988
ATLANTA FEDERAL CENTER PROJECT.	45 BROAD ST.	ATLANTA	GA	30303	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	20A	11/23/1998
SAM NUNN ATLANTA FEDERAL CENTER PROJECT.	45 BROAD ST.	ATLANTA	GA	30303	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	.....	11/23/1998
FORT WORTH FEDERAL SUPPLY CENTER.	501 FELIX ST.	FORT WORTH	TX	76101	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	20A	2/12/1988
FORT WORTH FEDERAL SUPPLY CENTER.	501 W FELIX ST..	FORT WORTH	TX	76115	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	.....	2/12/1988
WATER & POWER RESOURCES.	DENVER FEDERAL CENTER, BLDG 56.	DENVER	CO	80225	GENERAL SERVICES ADMINISTRATION.	CERCLA 103 ..	21	6/11/1995
WATER & POWER RESOURCES.	DENVER FEDERAL CENTER, BLDG 56.	DENVER	CO	80225	INTERIOR	CERCLA 103 ..	.....	6/11/1995
MISSISSIPPI RIVER DIVISION.	COLD BROOK DAM.	HOT SPRINGS	SD	57747	CORPS OF ENGINEERS, CIVIL.	CERCLA 103 ..	20A	9/27/1991
NORTHWEST DIVISION.	COLD BROOK DAM.	HOT SPRINGS	SD	57747	CORPS OF ENGINEERS, CIVIL.	CERCLA 103 ..	.....	9/27/1991
U.S. APPRAISERS BUILDING/GSA.	630 SANSOME STREET.	SAN FRANCISCO.	CA	94111	GENERAL SERVICES ADMINISTRATION.	RCRA 3010	21	3/18/2013
U.S. APPRAISERS BUILDING/CBP LABORATORY.	630 SANSOME STREET.	SAN FRANCISCO.	CA	94111	HOMELAND SECURITY.	RCRA 3010	.....	3/18/2013

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #30—CORRECTIONS—Continued

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
GEOLOGICAL SURVEY.	345 MIDDLEFIELD ROAD.	SAN MATEO ...	CA	94025	GENERAL SERVICES ADMINISTRATION.	CERCLA 103 ..	21	2/5/1993
GEOLOGICAL SURVEY.	345 MIDDLEFIELD ROAD.	SAN MATEO ...	CA	94025	INTERIOR	CERCLA 103 ..	.....	2/5/1993
FWS–SWEETWATER MARSH NATIONAL WILDLIFE REFUGE.	.....	CHULA VISTA AND NATIONAL CITY.	CA	.....	INTERIOR	RCRA 3016	20A	7/19/2004
FWS–SAN DIEGO BAY NATIONAL WILDLIFE REFUGE.	1080 GUNPOWDER POINT DR.	CHULA VISTA	CA	91910	INTERIOR	RCRA 3016	.....	7/19/2004
U.S. SECRET SERVICE—ARIEL RIOS BLDG.	PENNSYLVANIA AVENUE NW.	WASHINGTON	DC	20004	HOMELAND SECURITY.	RCRA 3010	20A	12/31/2012
U.S. SECRET SERVICE—WILLIAM JEFFERSON CLINTON BLDG NORTH.	PENNSYLVANIA AVENUE NW.	WASHINGTON	DC	20004	HOMELAND SECURITY.	RCRA 3010	.....	12/31/2012

[FR Doc. 2016–25640 Filed 10–21–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2013–0338; FRL–9952–90–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for the Manufacture of Amino/Phenolic Resins (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''NESHAP for the Manufacture of Amino/Phenolic Resins (40 CFR part 63, subpart OOO) (Renewal)'' (EPA ICR No. 1869.10, OMB Control No. 2060–0434), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through October 31, 2016. Public comments were previously requested via the **Federal Register** (81 FR 26546) on May 3, 2016 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before November 23, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2013–0338, to: (1) EPA online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: Owners and operators of affected facilities are required to comply with reporting and record keeping requirements for the General Provisions (40 CFR part 63, subpart A), as well as for the specific requirements at 40 CFR part 63, subpart OOO. This includes submitting initial notifications, performance tests and periodic reports and results, and maintaining records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These reports are

used by EPA to determine compliance with the standards.

Form Numbers: None.

Respondents/affected entities: Facilities that manufacture amino/phenolic resins.

Respondent's obligation to respond: Mandatory (40 CFR part 63 Subpart OOO).

Estimated number of respondents: 19 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 23,300 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $3,360,000 (per year), includes $958,000 in either annualized capital/startup or operation & maintenance costs.

Changes in the Estimates: There is an adjustment increase in the total estimated burden and capital and O&M costs as currently identified in the OMB Inventory of Approved Burdens. This increase is due to a recent amendment to the standard. The 2014 amendment requires additional reporting, recordkeeping, and equipment monitoring requirements, resulting in an increase in burden and costs for the regulated universe.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2016–25629 Filed 10–21–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9954–41–OAR]

Clean Air Act Advisory Committee; Notice of Charter Renewal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of charter renewal.

Notice is hereby given that the Environmental Protection Agency (EPA) has determined that, in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App.2, the Clean Air Act Advisory Committee (CAAAC) is a necessary committee which is in the public interest. Accordingly, CAAAC will be renewed for an additional two-year period. The purpose of the CAAAC is to provide advice and recommendations to the EPA Administrator on policy issues associated with implementation of the Clean Air Act. Inquiries may be directed to Tamara Saltman, CAAAC Designated Federal Officer, U.S. EPA, 1200 Pennsylvania Avenue NW., (Mail Code 6103A), Washington, DC 20460, or by email to *saltman.tamara@epa.gov.*

Dated: August 29, 2016.

Tamara Saltman,

Designated Federal Officer.

[FR Doc. 2016–25518 Filed 10–21–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2006–0894; FRL–9951–98–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Registration of Fuels and Fuel Additives—Requirements for Manufacturers (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR) ''Registration of Fuels and Fuel Additives—Requirements for Manufacturers (Renewal)'' (EPA ICR No. 0309.15, OMB Control No. 2060–0150) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through October 31, 2016. Public comments were previously requested via the **Federal Register** (81 FR 32326) on May 23, 2016 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before November 23, 2016.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2006–0894, to (1) EPA online using *www.regulations.gov* (our preferred method), by email to *a-and-r-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to *oria_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: James W. Caldwell, Compliance Division, Office of Transportation and Air Quality, Mail Code 6405A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 343–9303; fax number: (202) 343–2801; email address: *caldwell.jim@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: In accordance with the regulations at 40 CFR part 79, subparts A, B, C, and D, Registration of Fuels and Fuel Additives, manufacturers (including importers) of motor-vehicle gasoline, motor-vehicle diesel fuel, and additives for those fuels, are required to have these products registered by EPA prior to their introduction into commerce. Registration involves providing a chemical description of the fuel or additive, and certain technical, marketing, and health-effects information. The development of health-effects data, as required by 40 CFR 79, Subpart F, is covered by a separate information collection. Manufacturers are also required to submit periodic reports (annually for additives, quarterly and annually for fuels) on production volume and related information. The information is used to identify products whose evaporative or combustion emissions may pose an unreasonable risk to public health, thus meriting further investigation and potential regulation. The information is also used to ensure that fuel additives comply with EPA requirements for protecting catalytic converters and other automotive emission controls. The data have been used to construct a comprehensive data base on fuel and additive composition. The Mine Safety and Health Administration of the Department of Labor restricts the use of diesel additives in underground coal mines to those registered by EPA. Most

of the information is business confidential.

Form Numbers: EPA Forms 3520–12, 3520–12A, 3520–12Q, 3520–13, 3520–13A, and 3520–13B.

Respondents/affected entities: Manufacturers and importers of motor-vehicle gasoline, motor-vehicle diesel fuel, and additives to those fuels.

Respondents obligation to respond: Mandatory (40 CFR part 79).

Estimated number of respondents: 2,975.

Frequency of response: On occasion, quarterly, annually.

Total estimated burden: 21,000 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $1,939,250 (per year), includes $49,250 annualized capital or operation & maintenance costs.

Changes in estimates: There is an increase of 400 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due to an increase in the number of registered fuels and fuel additives for which periodic reports are required.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2016–25626 Filed 10–21–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1219]

Information Collection Approved by the Office of the Management and Budget (OMB)

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Federal Communications Commission has received Office of Management and Budget (OMB) approval, for a period of three years, of the information collection requirements under control number 3060–1219, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520). An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it displays a currently valid OMB control number. Comments concerning the accuracy of the burden estimates and any suggestions for reducing the burden should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

FOR FURTHER INFORMATION CONTACT: Nicole Ongele, Office of Managing Director, at (202) 418–2991 or email: *Nicole.Ongele@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1219.

OMB Approval Date: September 20, 2016.

OMB Expiration Date: September 30, 2019.

Title: Connect America Fund-Alternative Connect America Cost Model Support.

Form Numbers: N/A.

Respondents: Business or other for-profit.

Estimated Number of Respondents and Responses: 2,010 respondents; 2,090 responses.

Estimated Time per Response: 0.5–2 hours.

Frequency of Response: On occasion and annual reporting requirement, one-time reporting requirement and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151–154, 155, 201–206, 214, 218–220, 251, 252, 254, 256, 303(r), 332, 403, 405, 410, and 1302.

Estimated Total Annual Burden: 1,780 hours.

Total Annual Cost: No Cost.

Nature and Extent of Confidentiality: We note that USAC must preserve the confidentiality of all data obtained from respondents; must not use the data except for purposes of administering the universal service programs; and must not disclose data in company-specific form unless directed to do so by the Commission.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: The Commission adopted a voluntary path for rate-of-return carriers to receive model-based universal service support in exchange for making a commitment to deploy broadband-capable networks meeting certain service obligation to a pre-determined number of eligible locations by state. The Commission addressed the requirement that carriers electing model-based support must notify the Commission of that election and their commitment to satisfy the specific service obligations associated with the amount of model support. In addition, the Commission adopted reforms to the universal service mechanisms used to determine support for rate-of-return carriers not electing model-based support. Among other such reforms, the Commission adopted an operating expense limitation to improve carriers' incentives to be prudent and efficient in their expenditures, a capital investment allowance to better target support to those areas with less broadband deployment, and broadband deployment obligations to promote ''accountability from companies receiving support to ensure that public investment are used wisely to deliver intended results.'' This information collection addresses the new burdens associated with those reforms.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2016–25593 Filed 10–21–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to all Interested Parties of the Termination of the Receivership of 10484—First Community Bank of Southwest Florida, Also Doing Business as Community Bank of Cape Coral, Fort Meyers, Florida

Notice is hereby given that the Federal Deposit Insurance Corporation (''FDIC'') as Receiver for First Community Bank of Southwest Florida, also doing business as Community Bank of Cape Coral, Fort Meyers, Florida (''the Receiver'') intends to terminate its receivership for said institution. The FDIC was appointed receiver of First Community Bank of Southwest Florida on August 2, 2013. The liquidation of the receivership assets has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receivership will serve no useful purpose. Consequently, notice is given that the receivership shall be terminated, to be effective no sooner than thirty days after the date of this Notice. If any person wishes to comment concerning the termination of the receivership, such comment must be made in writing and sent within thirty days of the date of this Notice to:

Federal Deposit Insurance Corporation
Division of Resolutions and Receiverships
Attention: Receivership Oversight
Department 34.6
1601 Bryan Street
Dallas, TX 75201

No comments concerning the termination of this receivership will be

considered which are not sent within this time frame.

Dated: October 18, 2016.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2016–25594 Filed 10–21–16; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of the Termination of the Receivership of 10197—Old Southern Bank, Orlando, Florida

Notice is hereby given that the Federal Deposit Insurance Corporation (''FDIC'') as Receiver for Old Southern Bank, Orlando, Florida (''the Receiver'') intends to terminate its receivership for said institution. The FDIC was appointed receiver of Old Southern Bank on March 12, 2010. The liquidation of the receivership assets has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receivership will serve no useful purpose. Consequently, notice is given that the receivership shall be terminated, to be effective no sooner than thirty days after the date of this Notice. If any person wishes to comment concerning the termination of the receivership, such comment must be made in writing and sent within thirty days of the date of this Notice to:

Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 34.6, 1601 Bryan Street, Dallas, TX 75201

No comments concerning the termination of this receivership will be considered which are not sent within this time frame.

Dated: October 18, 2016.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2016–25595 Filed 10–21–16; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

AGENCY: Federal Election Commission.

DATE AND TIME: Thursday, October 27, 2016 at 10:00 a.m.

PLACE: 999 E Street NW., Washington, DC (Ninth Floor).

STATUS: This Meeting will be Open to the Public.

ITEMS TO BE DISCUSSED:

Draft Advisory Opinion 2016–12: Citizen Super PAC
Draft Advisory Opinion 2016–11: Plains Cotton Growers, Inc. and Plains Cotton Growers Political Action Committee
Draft Advisory Opinion 2016–14: Libertarian Party of Alabama, Libertarian Party of Arkansas, Arizona Libertarian Party, Libertarian Party of Hawaii, Libertarian Party of Idaho, Libertarian Party of Maryland, Libertarian Party of Mississippi, Missouri State Libertarian Party, Libertarian Party of New Mexico, Libertarian Party of North Dakota, Libertarian Party of Texas
Proposed Amendments to Directive 52
Audit Division Recommendation Memorandum on Conservative Campaign Committee (CCC) (A13–15)
Management and Administrative Matters

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Shawn Woodhead Werth, Secretary and Clerk, at (202) 694–1040, at least 72 hours prior to the meeting date.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shawn Woodhead Werth,

Secretary and Clerk of the Commission.

[FR Doc. 2016–25797 Filed 10–20–16; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 7, 2016.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org:*

1. *The FGB Term Trust, Robert H. Godwin, and Edward E. Haddock, Jr., all of Winter Park, Florida, and Al Thomas,* Fort Lauderdale, Florida; to collectively acquire 25.2 percent of the outstanding shares of First Green Bancorp, Inc., and thereby acquire First Green Bank, both of Mount Dora, Florida.

B. Federal Reserve Bank of Minneapolis (Jacquelyn K. Brunmeier, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Alix E. Behm,* Willmar, Minnesota; to retain 25 percent or more of the shares of Kandiyohi Bancshares, Inc., Willmar, Minnesota, and thereby indirectly retain control of Home State Bank, Litchfield, Minnesota.

Board of Governors of the Federal Reserve System, October 19, 2016.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2016–25665 Filed 10–21–16; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act Meeting; Notice of Board Member Meeting

Federal Retirement Thrift Investment Board

October 31, 2016

77 K Street NE., 10th Floor Board Room, Washington, DC 20002.

Agenda

Federal Retirement Thrift Investment Board Member Meeting

October 31, 2016

In-Person, 8:30 a.m.

Open Session

1. Approval of the minutes for the September 19, 2016 Board Member Meeting
2. Monthly Reports
   (a) Participant Activity Report
   (b) Legislative Report
   (c) Investment Performance and Policy Report
3. Investment Manager Services Review

4. Quarterly Reports
   (d) Budget Review
   (e) Audit Status
5. Internal Audit
   (f) Internal Audit Charter
   (g) Lockbox Operations Audit Report
6. Mid-Year Financial Audit
7. Office of Resource Management Annual Report

Closed Session

Information covered under 5 U.S.C. 552b(c)(4) and (c)(9)(B).

Adjourn

CONTACT PERSON FOR MORE INFORMATION: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

Dated: October 20, 2016.

Megan Grumbine,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2016–25761 Filed 10–20–16; 4:15 pm]

BILLING CODE 6760–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–17–0891; Docket No. CDC–2016–0099]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed revision to the ''World Trade Center Health Program Enrollment, Treatment, Appeals & Reimbursement'' information collection approved under OMB Control Number 0920–0891, which allows the collection of information from Program members and affiliated medical providers for the purpose of determining eligibility and providing treatment services in accordance with the *James Zadroga 9/11 Health and Compensation Act of 2010.*

DATES: Written comments must be received on or before December 23, 2016.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0099 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

Please note: All public comment should be submitted through the Federal eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of proposed revisions to an existing data collection as described below.

Comments are invited on: (a) Whether the proposed revisions to an existing collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed revised collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

World Trade Center Health Program Enrollment, Treatment, Appeals & Reimbursement (OMB Control No. 0920–0891, Expires 09/30/2018)—Revision—National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention (CDC).

Background and Brief Description

NIOSH seeks to request OMB approval to revise the currently approved information collection activities that support the World Trade Center (WTC) Health Program. The *James Zadroga 9/11 Health and Compensation Act of 2010* (Pub. L. 111–347, as amended by Pub. L. 114–113) created the WTC Health Program to provide medical monitoring and treatment benefits to eligible firefighters and related personnel, law enforcement officers, and rescue, recovery, and cleanup workers who responded to the September 11, 2001, terrorist attacks in New York City, at the Pentagon, and in Shanksville, Pennsylvania (responders), and to eligible persons who were present in the dust or dust cloud on September 11, 2001, or who worked, resided, or attended school, childcare, or adult daycare in the New York City disaster area (survivors).

This request also seeks to incorporate the World Trade Center Health Program Petition for the addition of a New WTC-Related Health Condition for Coverage

under the WTC Health Program package (0920–0929) into the existing approval, World Trade Center Health Program Enrollment, Appeals, Reimbursement, & Petitions (OMB Control No. 0920–0891). Upon approval, OMB Control number 0920–0929 will be discontinued.

Since its inception in 2011, the WTC Health Program has been approved to collect information from applicants and Program members (enrolled WTC responders and survivors) concerning eligibility and enrollment, appointment of a designated representative, medical care, travel reimbursement, and appeal of adverse Program decisions. The WTC Health Program is also currently approved to collect information from Program medical providers, including health condition certification requests and pharmaceutical claims. Currently-approved total estimated burden is 13,594 hours annually. See OMB Control No. 0920–0891, exp. September 30, 2018.

The WTC Health Program has determined that some existing forms need to be updated, and new information collections related to a recent rulemaking should be added.

Changes to WTC Health Program regulations in 42 CFR part 88 will require the extension of existing information collections. Specifically, 42 CFR 88.13 establishes procedures for the appeal of Program decisions to disenroll Program members and deny enrollment to applicants. Appeals of enrollment denial decisions, which include the submission of appeal request letters, are currently approved; the Program proposes to extend this information collection to account for the burden of requests for appeal of disenrollment decisions. Of the over 70,000 Program members, we expect that 0.014 percent (10) will be subsequently disenrolled from the Program. Of those, we expect that 30 percent (3) will appeal the disenrollment decisions. We estimate that the disenrollment appeal requests will take no more than 0.5 hours per respondent. The annual burden estimate is 1.5 hours.

Section 42 CFR 88.21 establishes procedures for the appeal of WTC Health Program decisions to decertify a WTC-related health condition, deny certification, and deny treatment authorization. Appeals of health condition certification denials and treatment authorization denials, which include the submission of appeal request letters, are currently approved; the Program proposes to extend this information collection to account for the burden of requests for appeal of decertification decisions. The information collection would also be expanded to allow Program members to provide additional information and/or an oral statement. Of the estimated 51,472 Program members who have at least one health condition certification, we estimate that 0.02 percent (10) will be decertified, and 50 percent (5) of those will appeal a decertification. We estimate that the appeal request letter will take no more than 0.5 hours per respondent. Providing additional information and/or an oral statement will take no more than 1 hour per respondent. The annual burden estimate for decertification appeals is 7.5 hours. We estimate that Program members request certification for 20,000 health conditions each year. Of those 20,000, we estimate that 1 percent (200) of certification requests are denied by the WTC Health Program. We further expect that 30 percent of denied certifications, or 60 individuals, will be appealed. We estimate that the appeals letter takes no more than 30 minutes and providing additional information and/or an oral statement will take no more than 1 hour. The burden estimate for certification denial appeals is 90 hours. Finally, of the projected 51,472 Program members who receive medical care, we estimate that 0.05 percent (26) will appeal a determination by the WTC Health Program that the treatment being sought is not medically necessary. We estimate that the appeals letter will take no more than 30 minutes and providing additional information and/or an oral statement will take no more than 1 hour. The burden estimate for treatment authorization denial appeals is 39 hours.

Finally, 42 CFR 88.23 establishes procedures for the appeal of a WTC Health Program decision to deny reimbursement to a Program medical provider for treatment determined not to be medically necessary. Accordingly, the Program proposes the addition of information collected in the appeal request. We estimate that of the nearly 52,000 Program providers, we estimate that 1.15 percent (600) annually will be denied reimbursement for treatment found to be not medically necessary or in accordance with treatment protocols, and will appeal the decision. We estimate that the appeal letter will take no more than 0.5 hours to compile. The burden estimate for treatment reimbursement denial appeals is 300 hours.

The Program also finds it necessary to add a new form to allow applicants and Program members to grant permission to share information with a third person about an individual's application or case. We estimate that 30 applicants and members will submit a Health Insurance Portability and Accountability Act (HIPAA) Release Form annually. The form is expected to take no longer than 0.25 hours to complete. The burden estimate for the HIPAA Release form is 7.5 hours.

In addition to describing those burden estimates revised by this action, the estimated annualized burden hours for those collection instruments not subject to revision in this action are included in the table below.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
FDNY Responder	World Trade Center Health Program FDNY Responder Eligibility Application.	45	1	30/60	23
General Responder	World Trade Center Health Program Responder Eligibility Application (Other than FDNY).	2,475	1	30/60	1,238
Pentagon/Shanksville Responder	World Trade Center Health Program Pentagon/Shanksville Responder.	630	1	30/60	315
WTC Survivor	World Trade Center Health Program Survivor Eligibility Application (all languages).	1,350	1	30/60	675

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
General responder	Postcard for new general responders in NY/NJ to select a clinic.	2,475	1	15/60	619
Program Medical Provider	Physician Request for Certification	20,000	1	30/60	10,000
Responder (FDNY and General Responder)/Survivor.	Denial Letter and Appeal Notification—Enrollment.	45	1	30/60	23
Responder (FDNY and General Responder)/Survivor.	Disenrollment Letter and Appeal Notification.	3	1	30/60	1.5
Responder (FDNY and General Responder)/Survivor.	Denial Letter and Appeal Notification—Health Condition Certification.	60	1	90/60	90
Responder (FDNY and General Responder)/Survivor.	Decertification Letter and Appeal Notification.	5	1	90/60	7.5
Responder (FDNY and General Responder)/Survivor.	Denial Letter and Appeal Notification—Treatment Authorization.	26	1	90/60	39
Responder (FDNY and General Responder)/Survivor.	WTC Health Program Medical Travel Refund Request.	10	1	10/60	2
Designated Rep Form	Form to designate a representative	10	1	15/60	3
HIPAA Release	Form to share member information	10	1	15/60	3
Pharmacy	Outpatient prescription pharmaceuticals.	150	261	1/60	653
Program Medical Provider	Reimbursement Denial Letter and Appeal Notification.	600	1	30/60	300
Responder/Survivor/Advocate (physician).	Petition for the addition of health conditions.	60	1	60/60	60
Total					14,052

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–25579 Filed 10–21–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–17–17AW; Docket No. CDC–2016–0101]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on the proposed information collection project entitled ''*Assessment of Targeted Training and Technical Assistance (TTA) Efforts on the Implementation of Comprehensive Cancer Control*''. CDC is requesting to collect information about TTA offered under two different cooperative agreements using case studies, a web-based survey, and in-depth interviews in order to document how TTA was provided and identify elements of TTA administered across both cooperative agreements that could inform the development of a viable TTA model for enhancing future tobacco and cancer prevention and control efforts.

DATES: Written comments must be received on or before December 23, 2016.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0101 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road, NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

Please note: All public comment should be submitted through the Federal eRulemaking portal (*Regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the

collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

Assessing the Impact of Targeted Training and Technical Assistance Efforts on the Implementation of Comprehensive Cancer—NEW—National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Cancer is the second leading cause of death in the United States, and health care costs for cancer care are expected to rise to $158 billion by 2020. Addressing this public health problem requires primary prevention, early detection and treatment, support for cancer survivors, and a reduction in health disparities. Providing support to state, tribal, territorial and local organizations to implement evidence-based strategies has the potential to impact population-level cancer outcomes and reduce the burden of cancer.

The Centers for Disease Control and Prevention's (CDC) National Comprehensive Cancer Control Program (NCCCP) has been a primary funder for state and community-based cancer control interventions since its inception in the late 1990s. The program supports states and communities in developing a comprehensive approach to cancer prevention and control that includes supporting an infrastructure for state, local, and population-based interventions and multi-sectoral partnerships and coalitions. Currently, NCCCP supports 65 cancer control program grantees including programs in all 50 states, the District of Columbia, and in a number of tribes, tribal organizations, and U.S. Associated Pacific Islands/territories.

In addition, CDC's Office on Smoking and Health (OSH) also has worked to build state health department infrastructure and capacity to conduct coordinated comprehensive tobacco prevention and control activities which contribute to cancer health outcomes. In fiscal year 2015, OSH provided funding to a number of state health departments and local partners through the National State-Based Tobacco Control Program (NSTB) to support the implementation and evaluation of evidence-based environmental, policy, and systems interventions, strategies, and activities to reduce tobacco use, secondhand smoke exposure, tobacco-related disparities and associated disease, disability, and death.

In striving to build capacity and maximize the impact of CDC's funded programs, CDC has focused on developing and implementing innovative programs to enhance TTA delivered to NCCCP and NSBT grantee programs. CDC funds 10 programs under two cooperative agreements—*Consortium of National Networks to Impact Populations Experiencing Tobacco-Related and Cancer Health Disparities* (DP13–1314) and the *National Support to Enhance Implementation of Comprehensive Cancer Control Activities* (DP13–1315). These cooperative agreements provide funding to organizations to provide TTA to state NCCCP and NSBT grantees to support local implementation of high-impact public health strategies. DP13–1314 awardees are charged with building the capacity of NCCCP and NSBT grantees through the administration of a national network to reduce the burden of cancer- and tobacco-related health disparities among vulnerable populations; DP13–1315 awardees are charged with delivering TTA to NCCCP programs and partners to enhance and facilitate local implementation of comprehensive cancer control (CCC) activities; policy, systems and environmental change strategies; effective public health partnership building; and promotion of CCC program successes and leverage additional resources for cancer control and prevention. These two TTA models aim to impact both short- and long-term outcomes on the awardee, NCCCP program, and population levels.

CDC proposes to conduct an assessment of the DP13–1314 and DP13–1315 cooperative agreements to: (1) Increase CDC's understanding of the TTA provided to NCCCP and NSTB grantees across both cooperative agreements, (2) help identify the extent to which core elements of the TTA were administered, and (3) determine the elements of TTA across both cooperative agreements that show promise for improving NCCCP and NSTB capacity. There are no other data collection efforts currently underway to assess implementation of the two TTA models or their perceived effectiveness among awardee programs.

This information collection request will involve three complementary data collection efforts: (1) Case studies of DP13–1314 and DP13–1315 awardees (consisting of interviews with DP13–1314 and DP13–1315 program managers/directors, evaluators, and partners); (2) a cross-sectional web-based survey administered to NCCCP and NSBT program directors, coalition members, and partners; and (3) in-depth interviews with NCCCP and NSBT program directors, staff, coalition members, and partners who received a high volume of TTA from one or more of the DP13–1314 and DP13–1315 awardees. The case studies will be used to explore how DP13–1314 and DP13–1315 awardees are implementing their respective cooperative agreements and administering TTA to NCCCP and NSBT grantees; the factors that affect the implementation of specific TTA components; and the extent to which each cooperative agreement was able to achieve planned short-term outcomes. The web-based survey will inform CDC's understanding of the reach of DP13–1314 and DP13–1315 TTA efforts; elicit information from NCCCP and/or NSBT programs and coalitions about the TTA received, including type, dosage, frequency and format; and assess the perceptions of the effectiveness of the TTA provided in building capacity to achieve intended outcomes. The in-depth interviews with ''high-volume'' TTA users will facilitate an in-depth exploration of the type and quality of TTA activities received; perceived quality of TTA and its contributions to

NCCCP and NSBT grantee program implementation, and achievement of CDC priorities and goals.

CDC will use findings from the assessment to inform development of future TTA efforts that utilize the core elements across the two models to more effectively and efficiently support NCCCP's partner organizations.

CDC seeks a two-year approval to collect the required information. Participation is voluntary and respondents will not receive incentives for participation. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
DP13–1314 and DP13–1315 Awardee Organizations.	Worksheet for Identifying Case Study Interviewees.	10	1	60/60	10
DP13–1314 Program Directors/Managers.	Case Study Interview Guide for DP13–1314 Program Managers.	16	1	90/60	24
	Case Study Follow-Up Interview Guide for DP13–1314 Program Managers.	16	1	60/60	16
DP13–1315 Program Directors/Managers.	Case Study Interview Guide for DP1–1315 Program Managers.	4	1	90/60	6
	Case Study Follow-Up Interview Guide for DP1–1315 Program Managers.	4	1	60/60	4
DP13–1314 Evaluators	Case Study Interview Guide for DP1–1314 Evaluators.	16	1	60/60	16
DP13–1315 Evaluators	Case Study Interview Guide for DP1–1315 Evaluators.	4	1	60/60	4
DP13–1314 Partners	Case Study Interview Guide for DP1–1314 Partners.	32	1	60/60	32
DP13–1315 Partners	Case Study Interview Guide for DP1–1315 Partners.	8	1	60/60	8
NCCCP and NSBT Program Directors, Staff, Partners, and Coalition Members.	Survey	1560	1	15/60	390
NCCCP and NSBT Program Directors, Staff, Partners, and Coalition Members.	TTA Recipient Interview Guide	10	1	30/60	5
Total					515

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–25671 Filed 10–21–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–17–16AVC]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) Enhance the quality, utility, and clarity of the information to be collected; (d) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

CDC/ATSDR Formative Research and Tool Development—New — Office of the Director, Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention requests approval for a new generic information collection plan entitled *CDC/ATSDR Formative Research and Tool Development.* This

information collection plan is designed to allow CDC to conduct formative research information collection activities for developing new tools and methodologies to support agency research, surveillance, program evaluation, communications, health promotion, and research project development. It helps researchers identify and understand the characteristics of target populations that influence their decisions and actions.

Formative research is integral in developing programs as well as improving existing and ongoing programs. Formative research looks at the community in which a public health intervention is planned or will be implemented and helps the project staff understand the interests, attributes and needs of different populations and persons in that community. Formative research occurs before a program is designed and implemented, or while a program is being conducted.

CDC conducts formative research to develop public-sensitive and effective communication messages and data collection tools. To develop scientifically valid and appropriate methods, interventions, and instruments, cycles of interviews and focus groups are designed to inform the development of a product.

Products from these formative research studies will be used for prevention of illness and disease. Findings from these studies may also be presented as evidence to disease-specific National Advisory Committees, to support revisions to recommended prevention and intervention methods, as well as new recommendations.

Much of CDC's health communication takes place within campaigns that have fairly lengthy planning periods—timeframes that accommodate the standard Federal process for approving data collections. Short term qualitative interviewing and cognitive research techniques have previously proven invaluable in the development process.

This request may include studies investigating the utility and acceptability of proposed sampling and recruitment methods, intervention contents and delivery, questionnaire domains, individual questions, and interactions with project staff or electronic data collection equipment. These activities will also provide information about how respondents answer questions and ways in which question response bias and error can be reduced.

This request may include the collection of information from public health programs to assess needs related to initiation of a new program activity or expansion or changes in scope or implementation of existing program activities to adapt them to current needs. The information collected will be used to advise programs and provide capacity-building assistance tailored to the identified needs.

Overall, these development activities are intended to provide information that will increase the success of surveillance or research projects through increasing response rates and decreasing response error, thereby decreasing future data collection burden to the public. The studies that will be covered under this request will include one or more of the following investigational modalities: (1) Structured and qualitative interviewing for surveillance, research, interventions and material development, (2) cognitive interviewing for development of specific data collection instruments, (3) methodological research (4) usability testing of technology-based instruments and materials, (5) field testing of new methodologies and materials, (6) investigation of mental models for health decision-making, to inform health communication messages, and (7) organizational needs assessments to support development of capacity. Respondents who will participate in individual and group interviews (qualitative, cognitive, and computer assisted development activities) are selected purposively from those who respond to recruitment advertisements.

In addition to utilizing advertisements for recruitment, respondents who will participate in research on survey methods may be selected purposively or systematically from within an ongoing surveillance or research project. Participation of respondents is voluntary. There is no cost to participants other than their time. Annual estimated burden is 18,750 hours.

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average hours per response	Total response burden (Hrs.)
General public and health care providers.	Screener	5,000	1	15/60	1,250
	Interview	5,000	1	1	5,000
	Focus Group Interview	5,000	1	2	10,000
	Survey	5,000	1	30/60	2,500

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–25601 Filed 10–21–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3180–N4]

Food and Drug Administration

[Docket No. FDA–2010–N–0308]

Program for Parallel Review of Medical Devices

AGENCY: Food and Drug Administration; Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) and the Centers for Medicare & Medicaid Services (CMS) (the Agencies) are informing the public that the Parallel Review of medical devices pilot program will be fully implemented and extended indefinitely. The Agencies are soliciting nominations from manufacturers of innovative medical devices to participate in the ''Program for Parallel Review of Medical Devices.'' The Parallel Review program is a collaborative effort that is intended to reduce the time between FDA marketing approval or FDA's granting of a de novo request and Medicare coverage decisions through CMS's National Coverage Determination (NCD)

process. This program is intended to ensure prompt and efficient patient access to safe and effective and appropriate medical devices for the Medicare population.

DATES: The program described in this document for parallel review for medical devices is effective October 24, 2016. The program will be fully implemented as of the date of the publication of this document in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: *For device manufacturers interested in Parallel Review and for general questions:* Murray Sheldon, Center for Devices and Radiological Health, Food and Drug Administration, 301–796–5443, *Parallel-Review@fda.hhs.gov. For questions related to devices reviewed by Center for Biologics Evaluation and Research:* Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993, 240–402–7911. *For general questions about the NCD process:* Tamara Syrek Jensen, Centers for Medicare and Medicaid Services, 410–786–3529, *Tamara.SyrekJensen@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Parallel Review Pilot Program's History

As discussed in the September 17, 2010, **Federal Register** notice (75 FR 57045), the Agencies announced their intention to initiate a Parallel Review pilot program that would establish a process for overlapping evaluation of clinical evidence for premarket, FDA-regulated medical devices in order to reduce the time between FDA marketing approval or FDA's granting of a de novo request and a Medicare NCD. The Agencies piloted the program in an effort to increase quality of patient health care by facilitating earlier access to innovative medical technologies for Medicare beneficiaries.

In the October 11, 2011, **Federal Register** notice (76 FR 62808), the Agencies provided notice of the procedures for voluntary participation in the pilot program as well as the guiding principles they intended to follow during the program. In the December 18, 2013, **Federal Register** notice (78 FR 76628), the Agencies extended the duration of the pilot program for an additional 2 years.

Currently, the Agencies appreciate the full potential of the parallel review program and realize the positive impact of the pilot, and have now decided to transition into a permanent program.

B. Purpose of Parallel Review

Parallel Review allows both Agencies to review information about a medical device concurrently, rather than sequentially, while continuing to make their premarket review and coverage decisions consistent with their respective statutory authority. FDA works to ensure that only safe and effective medical devices are marketed in the United States. CMS makes coverage decisions for medical technologies, which are reasonable and necessary for the Medicare population. Neither FDA's premarket review criteria nor CMS's coverage processes criteria change when a medical device is accepted into the parallel review program.

C. Lessons Learned From the Parallel Review Pilot Program

The Agencies learned two primary lessons from the Parallel Review pilot program. First, they found that manufacturers benefit from engaging both Agencies at the pivotal clinical trial design phase. The feedback that manufacturers receive from both Agencies at the pivotal clinical trial design stage can assist manufacturers in designing pivotal trials that can answer both Agencies' evidentiary questions. Thus, it is more likely that manufacturers will only need to conduct a single pivotal clinical study rather than several pivotal clinical studies to satisfy both Agencies.

Second, concurrent review by the Agencies of clinical evidence can reduce the time from FDA premarket approval or the granting of a de novo request to an NCD. For example, on August 11, 2014, FDA approved a medical device that was part of the Parallel Review Pilot Program. On the same day, CMS initiated its national coverage analysis (NCA). CMS published a favorable final NCD on October 9, 2014, less than 2 months after the medical device received its premarket approval and 7 months before the NCD statutory due date.

II. Parallel Review Program

Based on the positive experience from the Parallel Review Pilot Program, both Agencies have decided to extend the Parallel Review program indefinitely.

A. Parallel Review Process

The program has two stages: (1) The pivotal clinical trial design development stage, and (2) the concurrent evidentiary review stage. The manufacturer should submit a request for parallel review prior to the start of the first stage by sending an email to *Parallel-Review@fda.hhs.gov,* which indicates their interest in the program and includes the following information:

1. Nomination of manufacturer:
- Name of the manufacturer and relevant contact information;
- name of the product;
- succinct description of the technology and disease or condition the device is intended to diagnose or treat; and
- state of development of the technology (that is, in pre-clinical testing, in clinical trials, currently undergoing premarket review by FDA)

2. A statement that the manufacturer intends to meet jointly with FDA and CMS using FDA's Pre-Submission program (Ref. 1), or other mechanisms that allow for meetings of the three parties to gather and incorporate feedback from both Agencies about the design and analysis of their pivotal clinical trial, to support a marketing application and a National Coverage Determination.

3. A statement that the medical device will require an original or supplemental application for premarket approval (PMA) or the granting of an FDA de novo request;

4. The medical device is not excluded by statute from Part A and/or Part B Medicare coverage (and the request for parallel review includes a list of Part A and/or Part B Medicare benefit categories, as applicable, into which the manufacturer believes the medical device falls); and

5. A statement that the medical device addresses the public health needs of the Medicare population (and the request for parallel review includes an explanation of how).

Upon completion of the pivotal trial and submission of an original or supplemental PMA, or a de novo request, the Agencies intend to review the pivotal clinical trial evidence concurrently (''in parallel''). Both Agencies will independently review the data to determine whether it meets their respective Agency's standards and communicate with the manufacturer during their respective reviews.

Manufacturers and each Agency have the option to withdraw from the Parallel Review Program until CMS opens the NCD by posting a tracking sheet. For example, if the manufacturer would like to withdraw from the program after the pivotal trial, but before the NCA tracking sheet is posted, that would be acceptable. More information on the NCD process is set forth in the August 7, 2013 **Federal Register** notice (78 FR 48164). Once a tracking sheet is posted, CMS must complete the statutorily defined NCD process.

B. Candidate Prioritization

The Agencies intend to review Parallel Review requests and respond within 30 days after receipt of the email. The Agencies intend to prioritize innovative medical devices that will benefit from the efficiencies of the Parallel Review. Priority will also be given to medical devices expected to have the most impact on the Medicare population. An FDA marketing approval does not guarantee a favorable coverage decision.

III. Paperwork Reduction Act of 1995

As stated in previous **Federal Register** notices related to the Parallel Review pilot, due to FDA and CMS resource issues, the permanent program will follow the same capacity limit by accepting no more than five candidates per year. As such, like the pilot program, this collection of information does not meet the definition of an information collection, as defined under 44 U.S.C. 3501–3520.

IV. References

The following references are on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *http://www.regulations.gov.* FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

1. FDA Guidance, ''Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff.'' Available at *http://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM311176.pdf.*

Dated: October 18, 2016.

Leslie Kux,

Associate Commissioner for Policy, Food and Drug Administration.

Dated: October 5, 2016.

Andy Slavitt,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2016–25659 Filed 10–21–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0663]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Investigational New Drug Safety Reporting Requirements for Human Drug and Biological Products and Safety Reporting Requirements for Bioavailability and Bioequivalence Studies in Humans

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (the PRA).

DATES: Fax written comments on the collection of information by November 23, 2016.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0672. Also include the FDA docket number found in brackets in the heading of this document.

Investigational New Drug Safety Reporting Requirements for Human Drug and Biological Products and Safety Reporting Requirements for Bioavailability and Bioequivalence Studies in Humans; OMB Control Number 0910–0672—Extension

In the **Federal Register** of October 31, 2013 (78 FR 65338), FDA published a document entitled ''Investigational New Drug Safety Reporting Requirements for Human Drug and Biological Products and Safety Reporting Requirements for Bioavailability and Bioequivalence Studies in Humans.'' The document clarified the Agency's expectations for timely review, evaluation, and submission of relevant and useful safety information and implemented internationally harmonized definitions and reporting standards for IND safety reports. The document also required safety reporting for bioavailability and bioequivalence studies. The document was intended to improve the utility of Investigational New Drug (IND) safety reports, expedite FDA's review of critical safety information, better protect human subjects enrolled in clinical trials, and harmonize safety reporting requirements internationally.

The rulemaking included the following information collection under the PRA that was not already included in 21 CFR 312.32 and approved under OMB control number 0910–0014.

Section 312.32(c)(1)(ii) and (c)(1)(iii) requires reporting to FDA, in an IND safety report, of potential serious risks from clinical trials within 15 calendar days for findings from epidemiological studies, pooled analyses of multiple studies, or other clinical studies that suggest a significant risk in humans exposed to the drug.

Section 312.32(c)(1)(iii) specifies the requirements for reporting to FDA in an IND safety report potential serious risks from clinical trials within 15 calendar days for findings from in vitro testing that suggest a significant risk to humans.

Section 312.32(c)(1)(iv) requires reporting to FDA in an IND safety report within 15 calendar days of any clinically important increase in the rate of occurrence of serious suspected adverse reactions over that listed in the protocol or investigator brochure.

The rulemaking also included new information collection under the PRA by requiring safety reporting for bioavailability and bioequivalence studies (21 CFR 320.31(d)).

In tables 1 and 2 of this document, the estimates for ''No. of Respondents,'' ''No. of Responses per Respondent,'' and ''Total Annual Responses'' were obtained from the Center for Drug Evaluation and Research (CDER) and the Center for Biologics Evaluation and Research (CBER) reports and data management systems for submissions received in 2013, 2014, and 2015, and from other sources familiar with the number of submissions received under the noted 21 CFR section. The estimates the ''Hours per Response'' are unchanged based on information from CDER and CBER individuals familiar with the burden associated with these reports and from prior estimates received from the pharmaceutical industry.

In the **Federal Register** of March 18, 2016 (81 FR 14860), we published a 60-day notice requesting public comment on the proposed extension of this

collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN

[CDER] [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
320.31(d) Bioavailability and Bioequivalence Safety Reports	13	15	195	14	2,730
312.32(c)(1)(ii) and (c)(1)(iii) IND Safety Reports	100	6	600	12	7,200
312.32(c)(1)(iv) IND Safety Reports	10	1	10	12	120
Total (CDER)					10,050

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL REPORTING BURDEN

[CBER] [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
320.31(d) Bioavailability and Bioequivalence Safety Reports	1	1	1	14	14
312.32(c)(1)(ii) and (c)(1)(iii) IND Safety Reports	137	4	548	12	6,576
312.32(c)(1)(iv) IND Safety Reports	5	1.4	7	12	84
Total (CBER)					6,674

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: October 18, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–25606 Filed 10–21–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0882]

Generic Drug User Fees; Notice of Public Meeting; Request for Comments; Extension of Comment Period; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; extension of comment period; correction.

SUMMARY: The Food and Drug Administration (FDA) is announcing the extension of the comment period and correcting a notice that appeared in the **Federal Register** of Monday, September 26, 2016 (81 FR 66035). The document announced a public meeting entitled ''Generic Drug User Fees; Public Meeting; Request for Comments.'' In that **Federal Register** notice, FDA requested comments on the draft recommendations related to the reauthorization of the Generic Drug User Fee Amendments of 2012 (GDUFA). The Agency is taking this action to allow interested persons the statutorily required 30 days to submit comments. Also, the document was published with an error in the **SUPPLEMENTARY INFORMATION** section. This document corrects that error.

DATES: FDA is extending the comment period on the Generic Drug User Fee recommendations published September 26, 2016 (81 FR 66035). Submit either electronic or written comments by November 16, 2016.

FOR FURTHER INFORMATION CONTACT: Derek Griffing, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1673, Silver Spring, MD 20993, 240–402–6980, email: *GenericDrugPolicy@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 26, 2016, FDA published a request for comments on GDUFA reauthorization draft recommendations. The comment period ends on November 7, 2016.

Because the Agency posted the draft recommendations on October 14, 2016, and the statute requires a period of 30 days be provided for the public to provide comments on the draft recommendations, FDA is extending the comment period for the GDUFA reauthorization draft recommendations until November 16, 2016.

In addition, in FR Doc. 2016–23111, appearing on page 66035 in the **Federal Register** of Monday, September 26, 2016, the following correction is made:

On page 66038, in the final paragraph of the first column, the second sentence is corrected to read: ''Specifically, FDA would issue product-specific guidance identifying the methodology for developing drugs and generating evidence needed to support ANDA approval, for 90 percent of new chemical entity new drug applications that are approved on or after October 1, 2017, at least 2 years prior to the earliest lawful filing date.''

Dated: October 18, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–25603 Filed 10–21–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Evaluation of the Maternal and Child Health Bureau's Autism CARES Act Initiative

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects pursuant to the Paperwork Reduction Act of 1995, the Health Resources and Services Administration (HRSA) announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR must be received no later than December 23, 2016.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N–39, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call the HRSA Information Collection Clearance Officer at (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Evaluation of the Maternal and Child Health Bureau's Autism CARES Act Initiative.

OMB No. 0915–0335—Revision

Abstract: In response to the growing need for research and resources devoted to autism spectrum disorder (ASD) and other developmental disabilities (DD), the U.S. Congress passed the Combating Autism Act (CAA) in 2006; reauthorized under the Autism CARES (Collaboration, Accountability, Research, Education, and Support) Act of 2014 (H.R. 4631; Pub L. 113–157). Through Autism CARES, HRSA is tasked with increasing awareness of ASD and other DD, reducing barriers to screening and diagnosis, promoting evidence-based interventions, and training health care professionals in the use of valid and reliable diagnostic tools.

Need and Proposed Use of the Information: The purpose of this information collection is to design and implement an evaluation to assess the effectiveness of MCHB's activities in meeting the goals and objectives of the Autism CARES Act. This ICR is a revision to an existing package; this study is the third evaluation of MCHB's Autism CARES activities and employs similar data collection methodologies to the prior studies. Grantee interviews remain the primary form of data collection, but the research team has made minor adjustments to the data collection processes in order to reduce burden on respondents. Changes include adjusting the interview protocols to improve flow and clarify questions and planning for more than one respondent to attend interviews in instances where the principal investigator requests support.

Likely Respondents: Grantees funded by HRSA under the Autism CARES Act will be the respondents for this data collection activity. The grantees are from these MCHB programs: Leadership Education in Neurodevelopmental Disabilities (LEND) Training Program; Developmental Behavioral Pediatrics (DBP) Training Program; State Implementation Program; State Innovation in Care Integration Program; Research Network Program; Research Program; Interdisciplinary Technical Assistance Center (ITAC); and the State Public Health Autism Center (SPHARC) Resource Center.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Grant program/form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total hour burden
LEND Interview Protocol	43	2	86	1	86
DBP Interview Protocol	10	2	20	1	20
State Implementation Program Interview Protocol	9	2	18	1	18
State Innovation in Care Integration State Grantees	4	1	4	1	4
Research Network Interview Protocol	5	2	10	1	10
Research Program R40 Interview Protocol	10	1	10	1.5	15
Research Network Questionnaire	5	1	5	1	5
Resource Center: ITAC Interview Protocol	1	2	2	1	2
Resource Center: SPHARC Interview Protocol	1	2	2	1	2
Total	88		157		162

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information

technology to minimize the information collection burden.

Amy McNulty,

Deputy Director, Division of the Executive Secretariat.

[FR Doc. 2016–25618 Filed 10–21–16; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Advisory Committee on Blood and Tissue Safety and Availability

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services is hereby giving notice that the Advisory Committee on Blood and Tissue Safety and Availability (ACBTSA) will hold a meeting. The meeting will be open to the public.

DATES: The meeting will take place Monday November 28, 2016, from 9:30 a.m.–4:00 p.m. and Tuesday November 29, 2016, from 8:30 a.m.–4:00 p.m.

ADDRESSES: Veterans' Health Administration National Conference Center, 2011 Crystal Drive, 1st floor Conference Center, Crystal City, VA 22202.

FOR FURTHER INFORMATION CONTACT: Mr. James Berger, Designated Federal Officer for the ACBTSA, Senior Advisor for Blood and Tissue Policy, Office of the Assistant Secretary for Health, Department of Health and Human Services, Mary E. Switzer Building, 330 C Street SW., Suite L100, Washington, DC 20024. Phone: (202)-795–7697; Fax: (202)-691–2102; Email: *ACBTSA@hhs.gov.*

SUPPLEMENTARY INFORMATION: The ACBTSA provides advice to the Secretary through the Assistant Secretary for Health. The Committee advises on a range of policy issues to include: (1) Identification of public health issues through surveillance of blood and tissue safety issues with national biovigilance data tools; (2) identification of public health issues that affect availability of blood, blood products, and tissues; (3) broad public health, ethical, and legal issues related to the safety of blood, blood products, and tissues; (4) the impact of various economic factors (*e.g.,* product cost and supply) on safety and availability of blood, blood products, and tissues; (5) risk communications related to blood transfusion and tissue transplantation; and (6) identification of infectious disease transmission issues for blood, organs, blood stem cells and tissues. The Committee has met regularly since its establishment in 1997.

In December 2013, the Committee made recommendations regarding the blood system. At that time, the Committee expressed concern about the ongoing reductions in blood use, the number of large scale consolidations occurring, the cost recovery issues for blood centers, and the potential effects on safety and innovation due to instability. In November 2015, the Committee made recommendations again, reaffirming the December 2013 recommendations, highlighting the worsening conditions, and suggesting potential initiatives to address the issues in the blood system. Past recommendations made by the ACBTSA may be viewed at *http://www.hhs.gov/ohaidp/initiatives/blood-tissue-safety/advisory-committee/index.html.*

The Committee will meet on November 28–29, 2016 to hear the findings from the HHS sponsored RAND study, ''Toward a Sustainable Blood Supply in the United States: An Analysis of the Current System and Alternatives for the Future.'' The ACBTSA Subcommittee on Blood System Sustainability will present their response to the study, and the full Committee will discuss and develop appropriate recommendations for HHS consideration. Additional topics that are pertinent to the mission of the Committee may be added to the agenda.

The public will have an opportunity to present their views to the Committee during public comment sessions scheduled for both days of the meeting. Comments will be limited to five minutes per speaker and must be pertinent to the discussion. Pre-registration is required for participation in the public comment session. Any member of the public who would like to participate in this session is required to submit their name, email, and comment summary prior to close of business on November 17, 2016. If it is not possible to provide 30 copies of the material to be distributed at the meeting, then individuals are requested to provide a minimum of one (1) copy of the document(s) to be distributed prior to the close of business on November 17, 2016. It is also requested that any member of the public who wishes to provide comments to the Committee utilizing electronic data projection submit the necessary material to the Designated Federal Officer prior to the close of business on November 17, 2016.

Dated: October 18, 2016.

James J. Berger,

Senior Advisor for Blood and Tissue Policy.

[FR Doc. 2016–25650 Filed 10–21–16; 8:45 am]

BILLING CODE 4150–41–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Health Services Organization and Delivery.

Date: November 3, 2016.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Peter J Kozel, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, Bethesda, MD 20892, 301–435–1116, *kozelp@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR 14–260: Health Promotion and Disease Prevention among Native American Populations.

Date: November 4, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Martha L Hare, RN, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3154, MSC 7770, Bethesda, MD 20892, (301) 451–8504, *harem@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing

limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Nursing and Related Clinical Sciences.

Date: November 7, 2016.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Peter J Kozel, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, Bethesda, MD 20892, 301–435–1116, *kozelp@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 18, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–25587 Filed 10–21–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Frederick National Laboratory Advisory Committee to the National Cancer Institute.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting will also be videocast and can be accessed from the NIH Videocasting and Podcasting Web site (*http://videocast.nih.gov/*).

Name of Committee: Frederick National Laboratory Advisory Committee to the National Cancer Institute.

Date: November 16, 2016.

Time: 1:00 p.m. to 5:30 p.m.

Agenda: Ongoing and new activities at the Frederick National Laboratory for Cancer Research.

Place: National Cancer Institute Advanced Technology Research Facility (ATRF) 8560 Progress Drive Auditorium Room E1600 Frederick, MD 21702.

Contact Person: Peter L. Wirth, Ph.D. Executive Secretary National Cancer Institute National Institutes of Health 9609 Medical Center Drive Room 7W–514 Bethesda, MD 20892 240–276–6434 *wirthp@mail.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NCI's Advanced Technology Research Facility (ATRF) has instituted stringent procedures for entrance into the ATRF building. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/fac/facmeetings.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: *October 18, 2016.*

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy

[FR Doc. 2016–25588 Filed 10–21–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: The Influence of Drug Abuse on HIV Prevention, Treatment and Progression.

Date: November 16–17, 2016.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Shalanda A Bynum, Ph.D., M.P.H., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3206, Bethesda, MD 20892, 301–755–4355, *bynumsa@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; AREA R15 Grant Applications.

Date: November 17, 2016.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Michael M. Sveda, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2204, MSC 7890, Bethesda, MD 20892, 301–435–3565, *svedam@csr.nih.gov*.

Name of Committee: AIDS and Related Research Integrated Review Group; NeuroAIDS and other End-Organ Diseases Study Section.

Date: November 18, 2016.

Time: 8:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.

Contact Person: Eduardo A Montalvo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7852, Bethesda, MD 20892, (301) 435–1168, *montalve@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Dermatology, Rheumatology and Inflammation.

Date: November 18, 2016.

Time: 8:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Rajiv Kumar, Ph.D., Chief, MOSS IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4216, MSC 7802, Bethesda, MD 20892, 301–435–1212, *kumarra@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Infectious Diseases, Reproductive Health, Asthma and Pulmonary Conditions: Small Grant Mechanisms.

Date: November 18, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Lisa Steele, Ph.D., Scientific Review Officer, PSE IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, 301–594–6594, *steeleln@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Neuroendocrinology, Sleep, Stress and Alcohol.

Date: November 18, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Jasenka Borzan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 4214 MSC 7814, Bethesda, MD 20892–7814, 301–435–1787, *borzanj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Behavioral Genetics and Epidemiology.

Date: November 18, 2016.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Heidi B Friedman, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1012A, MSC 7770, Bethesda, MD 20892, 301–379–5632, *hfriedman@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Training in Comparative and Veterinary Medicine.

Date: November 18, 2016.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Maria DeBernardi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7892, Bethesda, MD 20892, 301–435–1355, *debernardima@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Anatomy, Imaging and Rehabilitation of Musculoskeletal System.

Date: November 18, 2016.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Yi-Hsin Liu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892, 301–435–1781, *liuyh@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 18, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–25586 Filed 10–21–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4285–DR; Docket ID FEMA–2016–0001]

North Carolina; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Carolina (FEMA–4285–DR), dated October 10, 2016, and related determinations.

DATES: Effective October 11, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of North Carolina is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 10, 2016.

Bertie, Johnston, and Wayne Counties for Individual Assistance (already designated for assistance for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

Wilson County for Individual Assistance and assistance for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25581 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4281–DR; Docket ID FEMA–2016–0001]

Iowa; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Iowa (FEMA–4281–DR), dated September 29, 2016, and related determinations.

DATES: *Effective Date:* September 29, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 29, 2016, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Iowa resulting from severe storms, straight-line winds, and flooding during the period of August 23–27, 2016, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Iowa.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal

assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to section 428 of the Stafford Act.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, David G. Samaniego, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Iowa have been designated as adversely affected by this major disaster:

Allamakee, Chickasaw, Clayton, Fayette, Floyd, Howard, Mitchell, and Winneshiek Counties for Public Assistance.

All areas within the State of Iowa are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25559 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4282–DR; Docket ID FEMA–2016–0001]

Hawaii; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Hawaii (FEMA–4282–DR), dated October 6, 2016, and related determinations.

DATES: *Effective Date:* October 6, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 6, 2016, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Hawaii resulting from severe storms, flooding, landslides, and mudslides during the period of September 11–14, 2016, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Hawaii.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to section 428 of the Stafford Act.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Dr. Ahsha N. Tribble, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Hawaii have been designated as adversely affected by this major disaster:

Maui County for Public Assistance.

All areas within the State of Hawaii are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25557 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4284–DR; Docket ID FEMA–2016–0001]

Georgia; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Georgia (FEMA–4284–DR), dated October 8, 2016, and related determinations.

DATES: *Effective Date:* October 8, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated

October 8, 2016, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Georgia resulting from Hurricane Matthew beginning on October 4, 2016, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Georgia.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide assistance for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs). Direct Federal assistance is authorized.

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to section 428 of the Stafford Act.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Warren J. Riley, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Georgia have been designated as adversely affected by this major disaster:

Bryan, Camden, Chatham, Glynn, Liberty, and McIntosh Counties for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

All areas within the State of Georgia are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25589 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3380–EM; Docket ID FEMA–2016–0001]

North Carolina; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of North Carolina (FEMA–3380–EM), dated October 7, 2016, and related determinations.

DATES: Effective October 7, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 7, 2016, the President issued an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of North Carolina resulting from Hurricane Matthew beginning on October 4, 2016, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (''the Stafford Act''). Therefore, I declare that such an emergency exists in the State of North Carolina.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act, to save lives and to protect property and public health and safety, and to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide assistance for emergency protective measures (Category B), limited to direct Federal assistance, under the Public Assistance program.

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs. In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, Department of Homeland Security, under Executive Order 12148, as amended, Elizabeth Turner, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

The following areas of the State of North Carolina have been designated as adversely affected by this declared emergency:

Alamance, Anson, Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Caswell, Chatham, Chowan, Columbus, Craven, Cumberland, Currituck, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gates, Granville, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Hyde, Johnston, Jones, Lee, Lenoir, Martin, Montgomery, Moore, Nash, New Hanover, Northampton, Onslow, Orange, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Randolph, Richmond, Robeson, Rockingham, Sampson, Scotland, Stokes, Surry, Tyrrell, Vance, Wake, Warren, Washington, Wayne, Wilson, and Yadkin Counties for emergency protective measures (Category B), limited to direct federal assistance, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25564 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4286–DR; Docket ID FEMA–2016–0001]

South Carolina; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of South Carolina (FEMA–4286–DR), dated October 11, 2016, and related determinations.

DATES: *Effective Date:* October 11, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 11, 2016, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of South Carolina resulting from Hurricane Matthew beginning on October 4, 2016, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of South Carolina.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide assistance for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs). Direct Federal assistance is authorized.

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to section 428 of the Stafford Act.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, W. Michael Moore, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of South Carolina have been designated as adversely affected by this major disaster:

Beaufort, Berkeley, Charleston, Colleton, Darlington, Dillon, Dorchester, Florence, Georgetown, Horry, Jasper, Marion, and Williamsburg Counties for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

All areas within the State of South Carolina are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25597 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4285–DR; Docket ID FEMA–2016–0001]

North Carolina; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Carolina (FEMA–4285–DR), dated October 10, 2016, and related determinations.

DATES: Effective October 12, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of North Carolina is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 10, 2016.

Greene County for Individual Assistance (already designated for assistance for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

Harnett and Sampson Counties for Individual Assistance and assistance for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25561 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3378–EM; Docket ID FEMA–2016–0001]

South Carolina; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of South Carolina (FEMA–3378–EM), dated October 6, 2016, and related determinations.

DATES: *Effective Date:* October 6, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 6, 2016, the President issued an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of South Carolina resulting from Hurricane Matthew beginning on October 4, 2016, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (''the Stafford Act''). Therefore, I declare that such an emergency exists in the State of South Carolina.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act, to save lives and to protect property and public health and safety, and to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide assistance for emergency protective measures (Category B), limited to direct Federal assistance, under the Public Assistance program.

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs. In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, Department of Homeland Security, under Executive Order 12148, as amended, W. Michael Moore, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

The following areas of the State of South Carolina have been designated as adversely affected by this declared emergency:

All 46 South Carolina counties and the Catawba Nation for emergency protective measures (Category B), limited to direct federal assistance, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25584 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3377–EM; Docket ID FEMA–2016–0001]

Florida; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Florida (FEMA–3377–EM), dated October 6, 2016, and related determinations.

EFFECTIVE DATE: October 6, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 6, 2016, the President issued an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Florida resulting from Hurricane Matthew beginning on October 3, 2016, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (''the Stafford Act''). Therefore, I declare that such an emergency exists in the State of Florida.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act, to save lives and to protect property and public health and safety, and to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide assistance for emergency protective measures (Category B), limited to direct Federal assistance, under the Public Assistance program.

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs. In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, Department of Homeland Security, under Executive Order 12148, as amended, Terry L. Quarles, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

The following areas of the State of Florida have been designated as adversely affected by this declared emergency:

Baker, Brevard, Broward, Citrus, Clay, Duval, Flagler, Glades, Hendry, Hernando, Highlands, Indian River, Lake, Marion, Martin, Miami-Dade, Monroe, Nassau, Okeechobee, Orange, Osceola, Palm Beach, Polk, Putnam, Seminole, St. Johns, St. Lucie, and Volusia Counties for emergency protective measures (Category B), limited to direct federal assistance, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034,

Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25580 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3379–EM; Docket ID FEMA–2016–0001]

Georgia; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Georgia (FEMA–3379–EM), dated October 6, 2016, and related determinations.

DATES: *Effective Date:* October 6, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 6, 2016, the President issued an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Georgia resulting from Hurricane Matthew beginning on October 4, 2016, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (''the Stafford Act''). Therefore, I declare that such an emergency exists in the State of Georgia.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act, to save lives and to protect property and public health and safety, and to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide assistance for emergency protective measures (Category B), limited to direct Federal assistance, under the Public Assistance program.

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs. In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, Department of Homeland Security, under Executive Order 12148, as amended, Warren J. Riley, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

The following areas of the State of Georgia have been designated as adversely affected by this declared emergency:

Appling, Atkinson, Bacon, Brantley, Bryan, Bulloch, Burke, Camden, Candler, Charlton, Chatham, Clinch, Coffee, Echols, Effingham, Emanuel, Evans, Glynn, Jeff Davis, Jenkins, Liberty, Long, McIntosh, Pierce, Screven, Tattnall, Toombs, Treutlen, Ware, and Wayne Counties for emergency protective measures (Category B), limited to direct federal assistance, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25591 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4283–DR; Docket ID FEMA–2016–0001]

Florida; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Florida (FEMA–4283–DR), dated October 8, 2016, and related determinations.

DATES: Effective Date: October 8, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 8, 2016, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Florida resulting from Hurricane Matthew beginning on October 3, 2016, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Florida.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide assistance for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs). Direct Federal assistance is authorized.

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to section 428 of the Stafford Act.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Terry L. Quarles, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Florida have been designated as adversely affected by this major disaster:

Brevard, Duval, Flagler, Indian River, Nassau,

St. Johns, St. Lucie, and Volusia Counties for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

All areas within the State of Florida are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25590 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2006–24191]

Intent To Request Revision From OMB of One Current Public Collection of Information: Transportation Worker Identification Credential (TWIC®) Program

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0047, abstracted below that we will submit to OMB for revision in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The collection involves the submission of identifying and other information by individuals applying for a TWIC® and a customer satisfaction survey.

DATES: Send your comments by December 23, 2016.

ADDRESSES: Comments may be emailed to *TSAPRA@tsa.dhs.gov* or delivered to the TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh at the above address, or by telephone (571) 227–2062.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

OMB Control Number 1652–0047; Transportation Worker Identification Credential (TWIC®) Program. TSA developed the Transportation Worker Identification Credential (TWIC®) program to mitigate threats and vulnerabilities in the national transportation system. TWIC® is a common credential for all personnel requiring unescorted access to secure areas of facilities and vessels regulated under the Maritime Transportation Security Act (MTSA) and all mariners holding U.S. Coast Guard (Coast Guard) credentials. Before issuing an individual a TWIC®, TSA performs a security threat assessment, which requires TSA to collect certain personal information such as name, address, date of birth and other information. Applicants are also required to provide fingerprints, photograph, and undergo checks for ties to terrorism, applicable immigration status and a criminal history records check. Also, individuals in the field of transportation who are required to undergo a security threat assessment in certain other programs, such as the Chemical Facility Anti-Terrorism (CFATS) program, may apply for a TWIC® and the associated security threat assessment to satisfy CFATS requirements.

The program implements authorities set forth in the Aviation and Transportation Security Act (ATSA) (Pub. L. 107–71; Nov. 19, 2002; sec. 106), the Maritime Transportation Security Act of 2002 (MTSA) (Pub. L. 107–295; Nov. 25, 2002; sec. 102), and the Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59; Aug. 10, 2005; sec. 7105), codified at 49 U.S.C. 5103a(g). TSA and the U.S. Coast Guard issued a joint notice of proposed rulemaking (NPRM) on May 22, 2006, 71 FR 29396. After consideration of public comments on the NPRM, TSA issued a joint final rule with the Coast Guard on January 25, 2007 (72 FR 3492), applicable to the maritime transportation sector that would require this information collection.

TSA collects data from applicants during an optional pre-enrollment step or during the enrollment session at an enrollment center. TSA will use the information collected to conduct a security threat assessment, which includes: (1) A criminal history records check; (2) a check of intelligence databases; and (3) an immigration status check. TSA may also use the information to determine a TWIC holder's eligibility to participate in TSA's expedited screening program for air travel, TSA Pre✓®. TSA invites all TWIC® applicants to complete an optional survey to gather information on the applicants' overall customer satisfaction with the enrollment process. This optional survey is administered by a Trusted Agent (a representative of the TWIC® enrollment service provider, who performs enrollment functions) during the process to activate the TWIC®. These surveys are collected at

each enrollment center and compiled to produce reports that are reviewed by the contractor and TSA.

The collection is being revised to allow TSA to use the information to expand enrollment options and the potential use of biographic and biometric (*e.g.,* fingerprints, iris scans, and/or photo) information. This will allow future use of the information collected for additional comparability or eligibility determinations for other programs or security requirements, such as allowing the TWIC® applicant to participate not only in a program such as the TSA Pre✓® Application Program, TSA's expedited screening program for air travelers, but also in the Hazardous Materials Endorsement (HME) Program without requiring an additional background check.

In addition, the collection is being revised to remove the requirement to collect information about the Extended Expiration Date (EED) TWIC®. In 2012, TSA issued an exemption option that permitted eligible TWIC® cardholders to obtain a replacement card that extended the expiration date of their security threat assessment and TWIC® card by three years on payment of a reduced renewal fee. The EED TWIC® was a one-time temporary option intended to provide convenience and cost-savings to applicants pending U.S. Coast Guard issuance of the Notice to Proposed Rulemaking for the TWIC® Reader Rule. The EED TWIC® renewal option is being discontinued, and applicants will be required to obtain a five-year TWIC® through the standard renewal process.

Also, TSA is re-evaluating its fee collection for the TWIC® Program in light of changes to the fee the FBI charges for fingerprint processing. Effective October 1, 2016, the FBI will reduce its fingerprint-based criminal history records check fee by $2.75 based on recommendations from a required user fee study (81 FR 45535). Section 1572.501(b)(3) of the TWIC® Final Rule (72 FR 3491) states that if the FBI amends its fee for criminal history records checks, TSA will collect the amended FBI fee. As a result of the FBI's fee change, the TWIC® standard enrollment fee ($128.00) will be reduced by $2.75. Effective October 1, 2016, TSA will collect a $125.25 fee for standard enrollments. The FBI fee is one segment of the TWIC® Program's overall fee. The TWIC® fee contains segments for enrollment, full/reduced card production/security threat assessment, and the FBI fee. Reduced rate and replacement TWIC® card enrollment fees will not change.

The current estimated annualized hour burden is 736,670 hours and the estimated annualized cost burden is $90,276,808.

Dated: October 18, 2016.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2016–25667 Filed 10–21–16; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

New Agency Information Collection Activity Under OMB Review: TSA infoBoards

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-day notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the new Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on March 17, 2016, 81 FR 14471. The collection involves the TSA infoBoards, an information-sharing environment designed to serve stakeholders in the transportation security community that is used to disseminate mission-critical information. It provides stakeholders with an online portal that allows authorized users to obtain, post, and exchange information, access common resources, and communicate with similarly situated individuals. Utilizing and inputting information into TSA infoBoards is completely voluntary.

DATES: Send your comments by November 23, 2016. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, OMB. Comments should be addressed to Desk Officer, Department of Homeland Security/TSA, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh, TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011; telephone (571) 227–2062; email *TSAPRA@tsa.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Title: TSA infoBoards.

Type of Request: New collection.

OMB Control Number: Not yet assigned.

Form(s): TSA Form 1427.

Affected Public: Individuals with transportation security responsibilities, such as aircraft operators, airport security coordinators, and international transportation security coordinators.

Abstract: TSA infoBoards was developed by TSA as part of its broad responsibilities and authorities under the Aviation and Transportation Security Act (ATSA),[1] and delegated authority from the Secretary of Homeland Security, for ''security in all modes of transportation . . . including security responsibilities . . . over modes of transportation that are exercised by the Department of Transportation.'' [2] TSA infoBoards

[1] *See* Public Law 107–71 (115 Stat. 597, Nov. 19, 2001).

[2] *See* 49 U.S.C. 114 (d). The TSA Assistant Secretary's current authorities under ATSA have been delegated to him by the Secretary of Homeland Security. Section 403(2) of the Homeland Security Act (HSA) of 2002, Public Law 107–296 (116 Stat. 2315, Nov. 25, 2002), transferred all functions of TSA, including those of the Secretary of

Continued

(formerly WebBoards) is an information-sharing environment designed to serve stakeholders in the transportation security community and is used to disseminate mission-critical information. It provides stakeholders with an online portal which allows authorized users to obtain, post, and exchange information, access common resources, and communicate with similarly situated individuals. This system also integrates other security-related information and communications at the sensitive security information (SSI) level. It is located in a secure online environment and is accessible from the Homeland Security Information Network (HSIN) and TSA (for TSA staff only). Accessing and using TSA infoBoards is completely voluntary; TSA does not require participation.

TSA will collect two types of information through TSA infoBoards: (1) User registration information and (2) user's choice of ''communities.'' TSA infoBoards users are not required to provide all information requested–however, if users choose to withhold information, they will not receive the benefits of TSA infoBoards associated with that information collection.

1. *User registration information.* TSA will collect registration information to ensure only those meeting the requirements for access to SSI information under TSA's regulations (49 CFR part 1520) are given access to the TSA infoBoards. Such registration information will include the user's name, professional contact information, agency/company, job title, employer, airport (optional), citizenship, regulatory category, and employment verification contact information.

2. *User's Choice of TSA infoBoards Communities.* TSA will collect information on the user's choice of TSA infoBoards community(ies). To meet the requirements for access to SSI under TSA's regulations, users are asked to submit their desired requestor type and boards so that TSA may assess the user's qualifications and needs before granting access.

Use of Results

TSA will use this information to assess and improve the capabilities of all transportation modes to prevent, prepare for, mitigate against, respond to, and recover from transportation security incidents. An inability to collect this information will limit TSA's ability to enable modal operators to respond to, and quickly recover after, a transportation security incident. Insufficient awareness, prevention, response, and recovery to a transportation security incident will result in increased vulnerability of the U.S. transportation network.

Number of Respondents: 6,000 users.[3]

Estimated Annual Burden Hours: An estimated 6,000 hours annually.

Dated: October 18, 2016.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2016–25669 Filed 10–21–16; 8:45 am]

BILLING CODE 9110–05–P

Transportation and the Under Secretary of Transportation of Security related to TSA, to the Secretary of Homeland Security. Pursuant to DHS Delegation Number 7060.2, the Secretary delegated to the Assistant Secretary (then referred to as the Administrator of TSA), subject to the Secretary's guidance and control, the authority vested in the Secretary with respect to TSA, including that in section 403(2) of the HSA.

[3] Due to the recalculation of numbers since the publication of the 60-day notice, the number of respondents has decreased from 10,000 to 6,000. Accordingly, the burden hours have decreased from 10,000 to 6,000 hours.

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0130]

Agency Information Collection Activities: Record of Abandonment of Lawful Permanent Resident Status, Form I–407; Extension, Without Change, of a Currently Approved Collection

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day Notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until December 23, 2016.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0130 in the body of the letter, the agency name and Docket ID USCIS–2013–0005. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

(1) *Online.* Submit comments via the Federal eRulemaking Portal Web site at *http://www.regulations.gov* under e-Docket ID number USCIS–2013–0005;

(2) *Mail.* Submit written comments to DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2140.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, 20 Massachusetts Avenue NW., Washington, DC 20529–2140, telephone number 202–272–8377 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Web site at *http://www.uscis.gov,* or call the USCIS National Customer Service Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2013–0005 in the search box. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Record of Abandonment of Lawful Permanent Resident Status.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–407; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Lawful Permanent Residents (LPRs) use Form I–407 to inform USCIS and formally record their abandonment of lawful permanent resident status. U.S. Citizenship and Immigration Services uses the information collected in Form I–407 to record the LPR's abandonment of lawful permanent resident status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 12,527 responses at 15 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 3,132 annual burden hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $30,691.

Dated: October 18, 2016.

Samantha Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2016–25596 Filed 10–21–16; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5173–N–11]

Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants That Receive a Community Development Block Grant of $500,000 or Less

AGENCY: Office of the Assistance Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: This notice advises that HUD is extending the deadline for submission of an Assessment of Fair Housing (AFH) by consolidated plan program participants that received in Fiscal Year (FY) 2015 or receive in a subsequent fiscal year a Community Development Block Grant of $500,000 or less, or in the case of a HOME consortium, whose members collectively received a CDBG grant of $500,000 or less, from the program year that begins on or after January 1, 2018, to the program year that begins on or after January 1, 2019 for which a new consolidated plan is due, the same date that qualified public housing agencies (PHAs) are to submit their AFHs.

DATES: *Effective Date:* October 24, 2016.

FOR FURTHER INFORMATION CONTACT: Adam Norlander, Special Assistant, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7100, Washington, DC 20410; telephone number 202–402–3778 (toll-free). Individuals with hearing or speech impediments may access this number via TTY by calling the toll-free Federal Relay Service during working hours at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On July 16, 2015, at 80 FR 42357, HUD published in the **Federal Register** its Affirmatively Furthering Fair Housing (AFFH) final rule. The AFFH final rule provides HUD program participants with a new approach for planning for fair housing outcomes that will assist them in meeting their statutory obligation to affirmatively further fair housing as required by the Fair Housing Act, 42 U.S.C. 3608. To assist HUD program participants in meeting this obligation, the AFFH rule provides that program participants must conduct an Assessment of Fair Housing (AFH) using an ''Assessment Tool.''

HUD's AFFH regulations codified in 24 CFR part 5 provide, in § 5.160, for a staggered AFH submission deadline for its program participants. For example, § 5.160 provides that for their first AFH, consolidated program participants, except for program participants that received a FY 2015 CDBG grant of $500,000 or less, must submit an AFH no later than 270 calendar days prior to the start of their program year that begins on or after January 1, 2017 for which a new consolidated plan is due. Section 5.160 provides that consolidated program participants that received a FY 2015 CDBG grant of $500,000 or less must submit their first AFH no later than 270 calendar days prior to the start of the program year that begins on or after January 1, 2018 for which a new consolidated plan is due. Section 5.160 provides that qualified public housing agencies (PHAs) [1] must submit their first AFH no later than 270 calendar days prior to the start of the fiscal year that begins on or after January 1, 2019 for which a new 5-year plan is due.

By notice published in the **Federal Register** on January 15, 2015, at 80 FR 2062, prior to publication of the AFFH final rule, HUD announced its intention to provide a later AFH submission deadline for certain program participants that are typically small entities, such as qualified PHAs, or in the case of consolidated program participants that receive a small CDBG grant of $350,000 or less. HUD solicited public comment with the notice for a period of 30 days, on its January 15, 2015, and public feedback was favorable to HUD's proposal to provide later AFH submission deadlines for smaller program participants and program participants that received a smaller CDBG grant. In consideration of public comment received on the January 15, 2015, notice, and, as noted above, in the AFFH final rule, HUD provided a separate submission deadline for QPHAs; that is, their first AFH is due no later than 270 calendar days prior to the start of the fiscal year that begins on or after January 1, 2019 for which a new

[1] ''Qualified PHA,'' is defined in section 2702 of title VII of the Housing and Economic Recovery Act (HERA) (Public Law 110–289, approved July 30, 2008). Section 2702 of HERA defines ''qualified PHA'' as a PHA: (1) for which the sum of (i) the number of public housing dwelling units administered by PHA, and (ii) the number of vouchers under section 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)) administered by the PHA is 550 or fewer; and (2) that is not designated under section 6(j)(2) of the United States Housing Act as a troubled PHA, and does not have a failing score under the Section 8 Management Assessment Program during the prior 12 months. HUD codified this statutory definition in its regulations on Public Housing Agency Plans at 24 CFR part 903, and the definition of ''qualified PHA'' is found at § 903.3(c).

5-year plan is due. For consolidated program participants that received an FY 2015 CDBG grant of $500,000 or less, their first AFH must be submitted not later than 270 days prior to the start of the program year that begins on or after January 1, 2018 for which a new consolidated plan is due. In response to public comment, HUD raised the dollar amount of the CDBG grant from $350,000 to $500,000.

Through this notice, HUD is extending the AFH submission deadline for the first AFH submission for consolidated program participants that received an FY 2015 CDBG grant of $500,000 or less, or in the case of HOME consortia, whose members collectively received an FY 2015 CDBG grant of $500,000 or less, to the same AFH submission deadline as QPHAs. For consolidated program participants that received an FY 2015 CDBG grant of $500,000 or less, their first AFH is due no later than 270 calendar days prior to the start of the program year that begins on or after January 1, 2019, for which a new consolidated plan is due.

Through this notice, HUD also advises that the AFH submission deadline for program participants that received an FY 2015 CDBG grant of $500,000 or less also applies to new consolidated program participants that received a small CDBG grant in FY 2016, or receive a small CDBG grant in FY 2017 or FY 2018.

Consolidated Plan program participants that receive this extension must continue to comply with existing, ongoing obligations to affirmatively further fair housing. Until a consolidated plan program participant has submitted its first AFH, it will continue to provide the AFFH Consolidated Plan certification in accordance with the regulations that existed prior to August 17, 2015. (See 24 CFR 5.160(3).) The prior certification provides that program participants will conduct an analysis to identify impediments (AI) to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions. For Consolidated Plan program participants that are starting a new 3–5 year Consolidated Plan cycle that begins before their due date for an AFH or for Consolidated Plan program participants that otherwise have old or out-of-date AIs, the AI should continue to be updated in accordance with the Fair Housing Planning Guide until those Consolidated Plan program participants convert to the new AFFH process.

Dated: October 13, 2016.

Gustavo Velasquez,

Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 2016–25637 Filed 10–21–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5910–N–18]

60-Day Notice of Proposed Information Collection: 24 CFR Part 55, Floodplain Management and Protection of Wetlands

AGENCY: Office of Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* December 23, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone (202) 402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Liz Zepeda, Environmental Specialist, Office of Environment and Energy, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; telephone (202) 402–3988 (this is not a toll-free number) or email at *elizabeth.g.zepeda@hud.gov.* Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: 24 CFR 55, Floodplain Management and Protection of Wetlands.

OMB Approval Number: 2506–0151.

Type of Request: Extension of currently approved request.

Form Number: None.

Description of the need for the information and proposed use: 24 CFR 55 implements decisionmaking procedures prescribed by Executive Order 11988 with which applicants must comply before HUD financial assistance can be approved for projects that are located within floodplains. Records of compliance must be kept.

Respondents (*i.e.* affected public): Local, state, and tribal governments.

Estimated Number of Respondents: 575.

Estimated Number of Responses: 575.

Frequency of Response: 1.

Average Hours per Response: Varies.

Total Estimated Burdens: 2,500 hours.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
55.20	275	1	275	8	2,200	40	88,000
55.21	300	1	300	1	300	40	12,000
Total	575	1	575	Varies	2,500	40	100,000

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of

the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: October 13, 2016.

Harriet Tregoning,

Principal Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. 2016–25634 Filed 10–21–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5916–N–18]

60-Day Notice of Proposed Information Collection: Housing Choice Voucher (HCV) Family Self-Sufficiency (FSS) Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* December 23, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB Control number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone 202–402–5564 (this is not a toll-free number) or email *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Arlette Mussington, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW., (L'Enfant Plaza, Room 2206), Washington, DC 20410; telephone 202–402–4109 This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Mussington.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Family Self-Sufficiency (FSS) Program.

OMB Control Number: 2577–0178.

Type of Request: Revision of currently approved collection.

Agency Form Numbers: HUD–52650, HUD–52651, HUD–52652, HUD–50058, HUD–2880, HUD–2994–A, HUD–2991, HUD 52752 HUD 52755, SF–424, SF–LLL, HUD–1044.

Description of the Need for the Information and Proposed Use: The FSS program, which was established in the National Affordable Housing Act of 1990, promotes the development of local strategies that coordinate the use of public housing assistance and assistance under the Section 8 rental certificate and voucher programs (now known as the Housing Choice Voucher Program) with public and private resources to enable eligible families to increase earned income and financial literacy, reduce or eliminate the need for welfare assistance, and make progress toward economic independence and self-sufficiency. Public Housing Agencies consult with local officials to develop an Action Plan, enter into a Contract of Participation with each eligible family that opts to participate in the program, compute an escrow credit for the family, report annually to HUD on implementation of the FSS program, and complete a funding application for the salary of an FSS program coordinator.

Respondents (i.e. affected public): Public Housing Agencies, Tribes/Tribally Designated Housing Entities, State or Local Governments.

ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN

Description of information collection	Number of respondents	Responses per year	Total annual responses	Hours per response	Total hours
SF424—Application for Federal Assistance	800	1	800	0.75	600
SF LLL—Disclosure of Lobbying Activities	40	1	40	0.17	7
HUD 2880—Applicant/Recipient/Disclosure/Update Form (OMB No. 2510–0011)	800	1	800	0	0
HUD–2991—Certification of Consistency with the Consolidated Plan (OMB No. 2506–0112)	800	1	800	0	0
HUD 52752—Certification of Consistency with the Indian Housing Plan	15	1	15	0.25	4
HUD–52755—Sample Contract Admin. Partnership Agreement	40	1	40	0.17	7
HUD–2994—A You are Our Client (OMB no: 2535–0116)	50	1	50	0	0
HUD–52651—FSS Application	800	1	800	1.5	1,200
Subtotal (Application)				2.8	1,818
Action Plan	10	1	10	10	100
HUD–52650—Contract of Participation	900	10	9,000	.25	2,250
HUD–52652—Escrow Account Credit Worksheet	750	50	37,500	.85	31,875
HUD–1044—Grant Agreement*	700	1	700	N/A	N/A
Annual Report (Narrative)	700	1	700	1	700

ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN—Continued

Description of information collection	Number of respondents	Responses per year	Total annual responses	Hours per response	Total hours
HUD–50058—Family Report (OMB No. 2577–0083)	900	50	45,000	0	0
Subtotal (Program Reporting/Recordkeeping)				12.1	34,925
Total				14.9	36,743

*HUD–1044, Award/Amendment is completed by HUD staff, signed by the recipient of the grant, and returned to HUD. This form is a certification and HUD ascribes no burden to its use.

Burden hours for forms showing zero burden hours in this collection are reflected in the OMB approval number cited or do not have a reportable burden.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the pubic and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of burden of the proposed collection of information;

(3) Ways to enhance the quality, utility and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: October 11, 2016.

Merrie Nichols-Dixon,

Deputy Director, Office of Policy, Programs, and Legislative Initiatives.

[FR Doc. 2016–25632 Filed 10–21–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5910–N–17]

60-Day Notice of Proposed Information Collection: Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities

AGENCY: Office of Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date: December 23, 2016.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone (202) 402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Liz Zepeda, Environmental Specialist, Office of Environment and Energy, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; telephone (202) 402–3988 (this is not a toll-free number) or email at *elizabeth.g.zepeda@hud.gov.* Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection:

Title of Information Collection: 24 CFR part 58—Environmental Review Procedures for Entities Assuming HUD Environmental Review Responsibilities.

OMB Approval Number: 2506–0087.

Type of Request: Extension.

Form Number: HUD–7015.15.

Description of the need for the information and proposed use: The Request for Release of Funds and Certification is used to document compliance with the National Environmental Policy Act and the related environmental statutes, executive orders, and authorities in accordance with the procedures identified in 24 CFR part 58. Recipients certify compliance and make requests for release of funds.

Respondents (i.e. affected public): State, local, and tribal governments and nonprofit organizations.

Estimated Number of Respondents: 18,785.

Estimated Number of Responses: 18,785.

Frequency of Response: 1.

Average Hours per Response: .6.

Total Estimated Burdens: 11,271.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Total	18,785	1	18,785	.6	11,271	30	338,130

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: October 13, 2016.

Harriet Tregoning,

Principal Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. 2016–25633 Filed 10–21–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5909–N–73]

30-Day Notice of Proposed Information Collection: Request for Withdrawals From Replacements Reserves/ Residual Receipts Funds

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* November 23, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QMAC, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on August 2, 2016 81 FR 50721.

A. Overview of Information Collection

Title of Information Collection: Request for Withdrawals from Replacements Reserves/Residual Receipts Funds.

OMB Approval Number: 2502–0555.

Type of Request: Revision of currently approved collection.

Form Number: HUD–9250.

Description of the need for the information and proposed use: Project owners are required to submit this information and required supporting documentation when requesting a withdrawal for funds from the Reserves for Replacement and/or Residual Receipt Funds. HUD reviews this information to ensure that funds are withdrawn and used in accordance with regulatory and administrative policy.

Respondents: Affected public.

Estimated Number of Respondents: 28,412.

Estimated Number of Responses: 7,671.

Frequency of Response: Various.

Average Hours per Response: 2.25.

Total Estimated Burden: 17,260.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond: Including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: October 14, 2016.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2016–25639 Filed 10–21–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX16CD00B951000]

Agency Information Collection Activities: Request for Comments

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of revision of a currently approved information collection, (1028–0097).

SUMMARY: We (the U.S. Geological Survey) are notifying the public that we have submitted to the Office of Management and Budget (OMB) the information collection request (ICR) described below. To comply with the Paperwork Reduction Act of 1995 (PRA) and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this ICR. This collection is scheduled to expire on October 31, 2016.

DATES: To ensure that your comments on this ICR are considered, OMB must receive them on or before November 23, 2016.

ADDRESSES: Please submit written comments on this information collection directly to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior, via email: (*OIRA_SUBMISSION@omb.eop.gov*); or by fax (202) 395–5806; and identify your submission with 'OMB Control Number

1028–0097 'State Water Resources Research Institute Program Annual Application, National Competitive Grants and Reporting'. Please also forward a copy of your comments and suggestions on this information collection to the Information Collection Clearance Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive MS 807, Reston, VA 20192 (mail); (703) 648–7195 (fax); or *gs-info_collections@usgs.gov* (email). Please reference 'OMB Information Collection 1028–0097: 'State Water Resources Research Institute Program Annual Application, National Competitive Grants and Reporting' in all correspondence.

FOR FURTHER INFORMATION CONTACT: Earl Greene, Chief, Office of External Research, U.S. Geological Survey, 5522 Research Park Drive, Baltimore, MD 21228 (mail); 443–498–5505 (phone); *eagreene@usgs.gov* (email). You may also find information about this ICR at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Water Resources Research Act of 1984, as amended (42 U.S.C. 10301 *et seq.*), authorizes a research institute water resources or center in each of the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, the Federated States of Micronesia, the Commonwealth of the Northern Marina Islands, and American Samoa. There are currently 54 such institutes, one in each state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam. The institute in Guam is a regional institute serving Guam, the Federated States of Micronesia, and the Commonwealth of the Northern Mariana Islands. Each of the 54 institutes submits an annual application for an allotment grant, national competitive grants, and provides an annual report on its activities under the grant. The State Water Resources Research Institute Program issues an annual call for applications from the institutes to support plans to promote research, training, information dissemination, and other activities meeting the needs of the States and Nation. The State Water Resources Research Institute Program also issues a second annual call for competitive grants to focus on water problems and issues of a regional or interstate nature beyond those of concern only to a single State. The U.S. Geological Survey has been designated as the administrator of the provisions of the Act.

II. Data

OMB Control Number: 1028–0097.
Form Number: NA.
Title: State Water Resources Research Institute Program Annual Application, National Competitive Grants and Reporting.
Type of Request: Revision of a currently approved information collection.
Respondent Obligation: Necessary to obtain or retain benefits.
Frequency of Collection: Annually.
Description of Respondents: The state water resources research institutes authorized by the Water Resources Research Act of 1984, as amended, and listed at *http://water.usgs.gov/wrri/index.php*.
Estimated Total Number of Annual Responses: We expect to receive 54 applications and award 54 grants per year from State and local governments for the annual applications. We also expect to receive 65 applications from individuals and award 4 grants per year for the national competitive grants.
Estimated Time per Response: 10,160 hours. This includes 100 hours per government applicant to prepare and submit the annual application; 40 hours per individual applicant to prepare and submit the national competitive grant application and 40 hours (total) per grantee to complete the annual reports.
Estimated Annual Burden Hours: 10,160.
Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: There are no ''non-hour cost'' burdens associated with this IC.
Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number. Until the OMB approves a collection of information, you are not obliged to respond.
Comments: On June 17, 2016, we published a **Federal Register** notice (81 CFR 39710) announcing that we would submit this ICR to OMB for approval and soliciting comments. The comment period closed on August 16, 2016. We received no comments.

III. Request for Comments

We again invite comments concerning this ICR as to: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) how to enhance the quality, usefulness, and clarity of the information to be collected; and (d) how to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this notice are a matter of public record. Before including your personal mailing address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment, including your personally identifiable information, may be made publicly available at any time. While you can ask us and the OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

James Sayer,
Information Collections Clearance Officer.
[FR Doc. 2016–25621 Filed 10–21–16; 8:45 am]
BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[GX16LR000F60100]

Agency Information Collection Activities: Request for Comments

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of a renewal of a currently approved information collection (1028–0059) Comprehensive Test Ban Treaty.

SUMMARY: We (the U.S. Geological Survey) are asking the Office of Management and Budget (OMB) to approve the information collection (IC) described below. This collection consists of 1 form. As required by the Paperwork Reduction Act (PRA) of 1995, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This collection is scheduled to expire on October 31, 2016.

DATES: To ensure that your comments are considered, OMB must receive them on or before November 23, 2016.

ADDRESSES: Please submit your written comments on this IC directly to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior, at *OIRA_SUBMISSION@omb.eop.gov* (email); or (202) 395–5806 (fax). Please also

forward a copy of your comments to the Information Collection Clearance Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive, MS 807, Reston, VA 20192 (mail); 703–648–7197 (fax); or *gs-info_collections@usgs.gov* (email). Reference ''Information Collection 1028–0059, Comprehensive Test Ban Treaty'' in all correspondence.

FOR FURTHER INFORMATION CONTACT: Lori E. Apodaca, National Minerals Information Center, U.S. Geological Survey, 12201 Sunrise Valley Drive, Mail Stop 989, Reston, VA 20192 (mail); 703–648–7724 (phone); or *lapodaca@usgs.gov* (email). You may also find information about this Information Collection Request (ICR) at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The collection of this information is required by the Comprehensive Test Ban Treaty (CTBT), and will, upon request, provide the CTBT Technical Secretariat with geographic locations of sites where chemical explosions greater than 300 tons TNT-equivalent have occurred.

II. Data

OMB Control Number: 1028–0059.

Form Number: USGS Form 9–4040–A.

Title: Comprehensive Test Ban Treaty.

Type of Request: Extension without change of a currently approved collection.

Affected Public: Business or Other-For-Profit Institutions: U.S. nonfuel minerals producers.

Respondent Obligation: Participation is voluntary.

Frequency of Collection: Annually.

Estimated Number of Annual Responses: 2,500.

Estimated Time per Response: 15 minutes.

Annual Burden Hours: 625 hours.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: There are no ''non-hour cost'' burdens associated with this IC.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number and current expiration date.

III. Request for Comments

On May 4, 2016, a 60-day **Federal Register** notice (81 FR 26826) was published announcing this information collection. Public comments were solicited for 60 days ending July 5, 2016. We did not receive any public comments in response to that notice. We again invite comments as to: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden time to the proposed collection of information; (c) how to enhance the quality, usefulness, and clarity of the information to be collected; and (d) how to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. Before including your personal mailing address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment, including your personally identifiable information, may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifiable information from public view, we cannot guarantee that it will be done.

Michael J. Magyar,

Associate Director, National Minerals Information Center, U.S. Geological Survey.

[FR Doc. 2016–25631 Filed 10–21–16; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[16XD4523WS DS64800000 DWSN00000.000000 DP64803]

Privacy Act of 1974; as Amended; Notice To Amend an Existing System of Records

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of amendment to an existing system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of the Interior is issuing a public notice of its intent to amend the Department of the Interior Privacy Act system of records, ''Safety Management Information System—Interior, DOI–60'', to add new routine uses, update existing routine uses, system manager, system location, categories of individuals covered by the system, categories of records in the system, authority for maintenance of the system, storage, safeguards, retention and disposal, system manager and address, notification procedures, records access and contesting procedures, and records source categories.

DATES: Comments must be received by November 23, 2016. This amended system will be effective November 23, 2016.

ADDRESSES: Any person interested in commenting on this amendment may do so by: Submitting comments in writing to Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW., Mail Stop 7456 MIB, Washington, DC 20240; hand-delivering comments to Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW., Mail Stop 7456 MIB, Washington, DC 20240; or emailing comments to *Privacy@ios.doi.gov.*

FOR FURTHER INFORMATION CONTACT: Safety Management Information System Program Manager, Office of Occupational Safety and Health, U.S. Department of the Interior, 1849 C Street NW., Mail Stop 5559 MIB, Washington, DC 20240, or by telephone at (202) 208–5549.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of the Interior (DOI) Office of Occupational Safety and Health manages the ''Safety Management Information System—Interior, DOI–60'' system of records. The purpose of this system is to document and monitor injuries or illnesses incurred by DOI employees, contractors, volunteers and visitors, in accordance with the Department of Labor Occupational Safety and Health Administration regulations and requirements. The Safety Management Information System (SMIS) was developed in response to the DOI Occupational Safety and Health Strategic Plan as a tool for DOI individuals who are injured or who file claims seeking benefits under the Federal Employees' Compensation Act (FECA), and enables oversight of the DOI Worker's Compensation Program. The FECA establishes the system for processing and adjudicated claims that Federal employees and other covered individuals file with the Department of Labor's Office of Worker's Compensation Program (OWCP), seeking monetary, medical and similar benefits for injuries or deaths sustained while in the performance of duty. SMIS maintains information on accidents, injuries, and illnesses that occur on DOI property, and workers' compensation claims; provides summary data of injury, illness and property loss information to DOI bureaus and offices for analytical purposes to improve accident prevention policies, procedure, regulations, standards, and operations;

and provides listings of individual cases to bureaus and offices to ensure that accidents are reported as appropriate. Some records in this system may be covered under government-wide system of records, DOL/GOVT–1, Office of Workers' Compensation Programs, Federal Employees' Compensation Act File, published in the **Federal Register** on January 11, 2012 (77 FR 1738).

DOI is publishing this amended notice to reflect updated information in the system manager, system location, categories of individuals covered by the system, categories of records in the system, authority for maintenance of the system, storage, retrievability, safeguards, retention and disposal, system manager and address, notification procedures, records access and contesting procedures, and records source categories. Additionally, DOI is modifying existing routine uses to reflect updates consistent with standard DOI routine uses, and adding new routine uses to permit sharing of information with: (1) The Executive Office of the President to respond to an inquiry by the individual to whom that record pertains; (2) the Office of Management and Budget (OMB) in relation to legislative affairs mandates by OMB Circular A–19; (2) the Department of the Treasury to recover debts owed to the United States; (3) the National Archives and Records Administration (NARA) to conduct records management inspections; (4) Federal, state, territorial, local, tribal, or foreign agencies when there is an indication of a violation of law; (5) appropriate government agencies and organizations to provide information in response to court orders or for discovery purposes related to litigation; (6) an expert, consultant, or contractor that performs services on DOI's behalf to carry out the purposes of the system; (7) another Federal agency to assist that agency in responding to an inquiry by the individual to whom that record pertains; (8) the Department of Labor, Office of Worker's Compensation Program, to provide injury or illness data to process and adjudicate claims for compensation; (9) the news media and the public, with approval by the Public Affairs Officer and Senior Agency Official for Privacy in consultation with Counsel; (10) to a beneficiary in the event of death following an accident or injury or to an agent in the case of an individual's disability; and (11) to appropriate government agencies or organizations for the purpose of protecting public health and preventing exposure or transmission of communicable or quarantinable disease. DOI last published a system of records notice for SMIS in the **Federal Register** on April 7, 1999 (64 FR 16991) and published an amended notice on February 13, 2008 (73 FR 8342).

The amendments to the system will be effective as proposed at the end of the comment period (the comment period will end 30 days after the publication of this notice in the **Federal Register**), unless comments are received which would require a contrary determination. DOI will publish a revised notice if changes are made based upon a review of the comments received.

II. Privacy Act

The Privacy Act of 1974, as amended, embodies fair information practice principles in a statutory framework governing the means by which Federal agencies collect, maintain, use, and disseminate individuals' personal information. The Privacy Act applies to information about individuals that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. The Privacy Act defines an individual as a U.S. citizen or lawful permanent resident. As a matter of policy, DOI extends administrative Privacy Act protections to all individuals. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DOI by complying with DOI Privacy Act regulations, 43 CFR part 2, subpart K.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, the routine uses of each system to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such records within the agency. The amended ''Safety Management Information System (SMIS), DOI–60'' system of records is published in its entirety below.

In accordance with 5 U.S.C. 552a(r), DOI has provided a report of this system of records to the Office of Management and Budget and to Congress.

III. Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: October 19, 2016.

Teri Barnett,

Departmental Privacy Officer.

SYSTEM NAME:

Safety Management Information System (SMIS), DOI–60.

SYSTEM CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records in this system are centrally managed at the Office of Occupational Safety and Health, U.S. Department of the Interior, 1849 C Street NW., Mail Stop 5559 MIB, Washington, DC 20240. This system is physically located at the National Park Service, National Information Services Center, 12795 West Alameda Parkway, Lakewood, CO 80228.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by the system include DOI employees, contractors, vendors, volunteers, and visitors who have accidents, injuries or illnesses on DOI property, or who file claims seeking benefits under FECA by reason of injuries or illnesses sustained while in the performance of official duty.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains records related to accidents, injuries and illnesses that occur on DOI property, to employees during the performance of their official duties, and the accompanying workers' compensation claim files. Records contain information such as name, Social Security number, date of birth, date of injury, date of death, injury code, gender, home address, personal or work email address, summary of accident, injury, or illness, and other information related to claims processing, reports of accidents or investigations, and remedial actions. Information about workplace accidents, workplace injuries or illness, and workers' compensation claims include occupation code, Office of Workers' Compensation Program (OWCP) case number, OWCP adjudication code, OWCP case status codes, OWCP medical costs, OWCP compensation costs, DOI employee salary information, a summary of the accident, injury or illness related to the worker's

compensation claim for analytical purposes, and a descriptive narrative about the cause of the accident, injury or illness, and worker's compensation claim information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Occupational Safety and Health Act of 1970, Section 19, 29 U.S.C. 668; Health Service Program, 5 U.S.C. 7901; 31 U.S.C. 3721; Basic Program Elements for Federal Employee Occupational Safety and Health Programs and Related Matters, 29 CFR 1960; and Executive Order 12196, Occupational Safety and Health Programs for Federal Employees.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The primary purpose of this system is to record and maintain information on accidents, injuries and illnesses incurred by DOI employees, contractors, volunteers and visitors. SMIS maintains information on workplace injuries, workplace illness, and workers' compensation claims; provides summary data of injury, illness and property loss information for analytical purposes to improve accident prevention policies, procedure, regulations, standards, and operations; provides listings of individual cases to ensure that accidents are reported as appropriate; and assist OWCP in the adjudication of employee worker's compensation claims.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DOI as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

(1)(a) To any of the following entities or individuals, when the circumstances set forth in paragraph (b) are met:

(i) The U.S. Department of Justice (DOJ);

(ii) A court or an adjudicative or other administrative body;

(iii) A party in litigation before a court or an adjudicative or other administrative body; or

(iv) Any DOI employee acting in his or her individual capacity if DOI or DOJ has agreed to represent that employee or pay for private representation of the employee;

(b) When:

(i) One of the following is a party to the proceeding or has an interest in the proceeding:

(A) DOI or any component of DOI;

(B) Any other Federal agency appearing before the Office of Hearings and Appeals;

(C) Any DOI employee acting in his or her official capacity;

(D) Any DOI employee acting in his or her individual capacity if DOI or DOJ has agreed to represent that employee or pay for private representation of the employee;

(E) The United States, when DOJ determines that DOI is likely to be affected by the proceeding; and

(ii) DOI deems the disclosure to be:

(A) Relevant and necessary to the proceeding; and

(B) Compatible with the purpose for which the records were compiled.

(2) To a congressional office in response to a written inquiry that an individual covered by the system, or the heir of such individual if the covered individual is deceased, has made to the office.

(3) To the Executive Office of the President in response to an inquiry from that office made at the request of the subject of a record or a third party on that person's behalf, or for a purpose compatible for which the records are collected or maintained.

(4) To any criminal, civil, or regulatory law enforcement authority (whether Federal, state, territorial, local, tribal or foreign) when a record, either alone or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature, and the disclosure is compatible with the purpose for which the records were compiled.

(5) To an official of another Federal agency to provide information needed in the performance of official duties related to reconciling or reconstructing data files or to enable that agency to respond to an inquiry by the individual to whom the record pertains.

(6) To Federal, state, territorial, local, tribal, or foreign agencies that have requested information relevant or necessary to the hiring, firing or retention of an employee or contractor, or the issuance of a security clearance, license, contract, grant or other benefit, when the disclosure is compatible with the purpose for which the records were compiled.

(7) To representatives of the National Archives and Records Administration to conduct records management inspections under the authority of 44 U.S.C. 2904 and 2906.

(8) To state, territorial and local governments and tribal organizations to provide information needed in response to court order and/or discovery purposes related to litigation, when the disclosure is compatible with the purpose for which the records were compiled.

(9) To an expert, consultant, grantee, or contractor (including employees of the contractor) of DOI that performs services requiring access to these records on DOI's behalf to carry out the purposes of the system.

(10) To appropriate agencies, entities, and persons when:

(a) It is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; and

(b) DOI has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interest, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DOI or another agency or entity) that rely upon the compromised information; and

(c) The disclosure is made to such agencies, entities and persons who are reasonably necessary to assist in connection with DOI's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

(11) To the Office of Management and Budget during the coordination and clearance process in connection with legislative affairs as mandated by OMB Circular A–19.

(12) To the Department of the Treasury to recover debts owed to the United States.

(13) To the news media and the public, with the approval of the Public Affairs Officer in consultation with counsel and the Senior Agency Official for Privacy, where there exists a legitimate public interest in the disclosure of the information, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

(14) To the Department of Labor to provide injury or illness data for processing and adjudicating claims under the Federal Employee's Compensation Act or workers compensation claims.

(15) To another Federal agency to assist that agency in responding to an inquiry by the individual to whom that record pertains.

(16) To a beneficiary in the event of death following an accident or injury or to an agent in the case of an individual's disability.

(17) To appropriate Federal, State, tribal, or local, governmental agencies or organizations for the purpose of protecting the vital interests of persons, including to assist such agencies or organizations in preventing exposure to

or transmission of a communicable or quarantinable disease, to combat other significant public health threats, or identify any public health threat or risk.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records maintained in paper form are stored in file folders in file cabinets at secured DOI facilities. Electronic records are maintained in computer servers, computer hard drives, electronic databases, email, and electronic media such as removable drives, compact disc, magnetic disk, diskette, and computer tapes.

RETRIEVABILITY:

Information is retrieved by name and OWCP case number.

SAFEGUARDS:

The records contained in this system are safeguarded in accordance with 43 CFR 2.226 and other applicable security and privacy rules and policies. During normal hours of operation, paper records are maintained in locked file cabinets under the control of authorized personnel. Computerized records systems follow the National Institute of Standards and Technology privacy and security standards as developed to comply with the Privacy Act of 1974, 5 U.S.C. 552a; Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521; Federal Information Security Modernization Act of 2014, 44 U.S.C. 3551–3558; and the Federal Information Processing Standards 199: Standards for Security Categorization of Federal Information and Information Systems. Computer servers on which electronic records are stored are located in secured DOI facilities with physical, technical and administrative levels of security to prevent unauthorized access to the DOI network and information assets. Security controls include encryption, firewalls, audit logs, and network system security monitoring.

Electronic data is protected through user identification, passwords, database permissions and software controls. Access to records in the system is limited to authorized personnel who have a need to access the records in the performance of their official duties, and each user's access is restricted to only the functions and data necessary to perform that person's job responsibilities. System administrators and authorized users are trained and required to follow established internal security protocols and must complete all security, privacy, and records management training and sign the DOI Rules of Behavior. A privacy impact assessment was conducted for SMIS to ensure appropriate controls and safeguards are in place to protect the information within the system.

RETENTION AND DISPOSAL:

Records in this system are maintained under Departmental Records Schedule (DRS) 1.2A—Short-Term Human Resources, which has been approved by NARA (DAA–0048–2013–0001–0004). DRS–1.2A is a Department-wide records schedule that covers human resources or payroll files, including forms, reports, correspondence, and related medical and investigatory records concerning on-the-job injuries. The disposition for these records is temporary and the records are cut-off on termination of compensation or when the deadline for filing a claim has passed. Records are destroyed three years after cut-off.

Records not covered by DRS–1.2A are maintained under DRS–1.1A, Short-Term Administration Records (DAA–0048–2013–0001–0001), and include investigative case files of fires, explosions, and accidents submitted for review and filing in other agencies or organizational elements, and reports and related papers concerning occurrences of such a minor nature that they are settled locally without referral to other organizational elements. The disposition for these records is temporary and the records are cut-off at the end of the fiscal year in which the records are created. Records are destroyed three years after cut-off.

Records may be maintained under DRS–1.1B, Long-Term Administration Records (DAA–0048–2013–0001–0002), and include records related to motor vehicle accidents maintained by transportation offices that may be reported in SMIS. The disposition for these records is temporary and the records are cut-off at the end of the fiscal year in which files are closed. Records are destroyed seven years after cut-off. SMIS hardcopy data containing personal information must be disposed of in a manner that complies with the Privacy Act of 1974.

Paper records are disposed of by shredding or pulping, and records contained on electronic media are degaussed or erased in accordance with the applicable records retention schedule, DOI 384 Departmental Manual 1 and NARA guidelines.

SYSTEM MANAGER AND ADDRESS:

SMIS Program Manager, Office of Occupational Safety and Health, U.S. Department of the Interior, 1849 C Street NW., Mail Stop 5559, Washington, DC 20240.

NOTIFICATION PROCEDURES:

An individual requesting notification of the existence of records on himself or herself should send a signed, written inquiry to the System Manager identified above. The request envelope and letter should both be clearly marked ''PRIVACY ACT INQUIRY.'' A request for notification must meet the requirements of 43 CFR 2.235.

RECORDS ACCESS PROCEDURES:

An individual who is requesting records about himself or herself should send a signed, written inquiry to the System Manager identified above. The request should describe the records sought as specifically as possible. The request envelope and letter should both be clearly marked ''PRIVACY ACT REQUEST FOR ACCESS.'' A request for access must meet the requirements of 43 CFR 2.238.

CONTESTING RECORDS PROCEDURES:

An individual requesting corrections or the removal of material from his or her records should send a signed, written request to the System Manager identified above. A request for corrections or removal must meet the requirements of 43 CFR 2.246.

RECORD SOURCE CATEGORIES:

Information is provided by an employee, contractor, volunteer, or visitor who have been injured while performing official duties or while on DOI property, supervisors of injured employees, DOI safety managers, family members of an injured party, personnel records from the DOI Federal Personnel Payroll System, and the Department of Labor during the course of processing workers' compensation claims.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2016–25649 Filed 10–21–16; 8:45 am]

BILLING CODE 4334–63–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR957000–L14400000–BJ0000–17XL1109AF: HAG 17–0]

Filing of Plats of Survey: Oregon/Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management, Oregon State Office, Portland, Oregon, 30 days from the date of this publication.

Willamette Meridian

Washington

T. 28 N., R. 39 E., accepted September 13, 2016

ADDRESSES: A copy of the plats may be obtained from the Public Room at the Bureau of Land Management, Oregon State Office, 1220 S.W. 3rd Avenue, Portland, Oregon 97204, upon required payment.

FOR FURTHER INFORMATION CONTACT: Kyle Hensley, (503) 808–6124, Branch of Geographic Sciences, Bureau of Land Management, 1220 S.W. 3rd Avenue, Portland, Oregon 97204. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: A person or party who wishes to protest against this survey must file a written notice with the Oregon State Director, Bureau of Land Management, stating that they wish to protest. A statement of reasons for a protest may be filed with the notice of protest and must be filed with the Oregon State Director within thirty days after the protest is filed. If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed or otherwise resolved. Before including your address, phone number, email address, or other personally identifying information in your comment, you should be aware that your entire comment—including your personally identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifying information from public review, we cannot guarantee that we will be able to do so.

Mary J.M. Hartel,

Chief Cadastral Surveyor of Oregon/Washington.

[FR Doc. 2016–25658 Filed 10–21–16; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR02050400, 16XR0687NA, RX.18527901.3000000]

Central Valley Project Improvement Act Water Management Plans

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Reclamation has made available to the public the Water Management Plans for four entities. For the purpose of this announcement, Water Management Plans (Plans) are considered the same as Water Conservation Plans. Reclamation is publishing this notice in order to allow the public an opportunity to review the Plans and comment on the preliminary determinations.

DATES: Submit written comments on the preliminary determinations on or before November 23, 2016.

ADDRESSES: Send written comments to Ms. Charlene Stemen, Bureau of Reclamation, 2800 Cottage Way, MP–410, Sacramento, CA 95825; or via email at *cstemen@usbr.gov.*

FOR FURTHER INFORMATION CONTACT: To be placed on a mailing list for any subsequent information, please contact Ms. Charlene Stemen at the email address above or at 916–978–5281 (TDD 978–5608).

SUPPLEMENTARY INFORMATION: To meet the requirements of the Central Valley Project Improvement Act of 1992 and the Reclamation Reform Act of 1982, the Bureau of Reclamation developed and published the Criteria for Evaluating Water Management Plans (Criteria). Each of the four entities listed below has developed a Plan that has been evaluated and preliminarily determined to meet the requirements of these Criteria. The following Plans are available for review:

- Colusa County Water District
- James Irrigation District
- Lindmore Irrigation District
- Sycamore Mutual Water Company

We are inviting the public to comment on our preliminary (*i.e.,* draft) determination of Plan adequacy. Section 3405(e) of the Central Valley Project Improvement Act (Title 34 Public Law 102–575), requires the Secretary of the Interior to establish and administer an office on Central Valley Project water conservation best management practices that shall ''develop criteria for evaluating the adequacy of all water conservation plans developed by project contractors, including those plans required by Section 210 of the Reclamation Reform Act of 1982.'' Also, according to Section 3405(e)(1), these criteria must be developed ''with the purpose of promoting the highest level of water use efficiency reasonably achievable by project contractors using best available cost-effective technology and best management practices.'' These criteria state that all parties (Contractors) that contract with Reclamation for water supplies (municipal and industrial contracts over 2,000 acre-feet and agricultural contracts over 2,000 irrigable acres) must prepare a Plan that contains the following information:

1. Description of the District;
2. Inventory of Water Resources;
3. Best Management Practices (BMPs) for Agricultural Contractors;
4. BMPs for Urban Contractors;
5. Plan Implementation;
6. Exemption Process;
7. Regional Criteria; and
8. Five-Year Revisions.

Reclamation evaluates Plans based on these criteria. A copy of these Plans will be available for review at Reclamation's Mid-Pacific Regional Office, 2800 Cottage Way, MP–410, Sacramento, CA 95825. Our practice is to make comments, including names and home addresses of respondents, available for public review. If you wish to review a copy of these Plans, please contact Ms. Stemen.

Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Richard J. Woodley,

Regional Resources Manager, Mid-Pacific Region, Bureau of Reclamation.

[FR Doc. 2016–25666 Filed 10–21–16; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0012]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Notice of Firearms Manufactured or Imported (ATF Form 2 (5320.2)

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until December 23, 2016.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, particularly with respect to the estimated public burden or associated response time, have suggestions, need a copy of the proposed information collection instrument with instructions, or desire any additional information, please contact Gary Schaible, Office of Enforcement Programs and Services, National Firearms Act Division, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) either by mail at 99 New York Ave. NE., Washington, DC 20226, by email at *nfaombcomments@atf.gov*, or by telephone 202–648–7165.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

1 *Type of Information Collection* (check justification or form 83–I): Revision of a currently approved collection.

2 *The Title of the Form/Collection:* Notice of Firearms Manufactured or Imported.

3 *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number (if applicable): ATF Form 2 (5320.2).

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4 *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other (if applicable): None.

Abstract: The ATF Form 2 (5320.2) is required of (1) a person who is qualified to manufacture National Firearms Act (NFA) firearms, or (2) a person who is qualified to import NFA firearms to register manufactured or imported NFA firearm(s).

5 *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 4,552 respondents will utilize the form, and it will take each respondent approximately 30 minutes to complete the form.

6 *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 7,773 hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 3E–405B, Washington, DC 20530.

Dated: October 18, 2016.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016–25566 Filed 10–21–16; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; OMB Approvals; Workforce Innovation and Opportunity Act-Related Information Collection Requests

ACTION: Notice.

SUMMARY: This notice announces Office of Management and Budget (OMB) approval and effective date for the Workforce Innovation and Opportunity Act-related Information Collection Requests (ICRs) pursuant to the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520).

DATES: The information collections referenced in this notice will take effect on October 18, 2016, the same date as for all other aspects of the Final Rules published August 19, 2016 (81 FR 56071 and 81 FR 55791).

ADDRESSES: A copy of these ICRs with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain.*

On an ongoing basis, ETA welcomes comments on its information collections. Submit comments about these information collections by mail or courier to Walter Parker, ETA PRA Liaison, Office of Management & Administrative Services, Employment & Training Administration, U.S. Department of Labor, Room N–4711, 200 Constitution Avenue NW., Washington, DC 20210; by Fax: 202–693–2726 (this is not a toll-free number); or by email: *Parker.Walter@dol.gov.*

SUPPLEMENTARY INFORMATION: OMB issued formal *Notices of Approval* for the information collection requirements under the PRA contained in the *Workforce Innovation and Opportunity Act* Final Rule and the *Workforce Innovation and Opportunity Act; Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions* Final Rule published in the **Federal Register** on August 19, 2016 (81 FR 56071 and 81 FR 55791). The OMB control number and expiration date for OMB authorization for each information collection is reflected in table 1 below.

TABLE 1—LIST OF OMB APPROVED ICRS

Title of collection	OMB control No.	Expiration date
State Training Provider Eligibility Collection	1205–0523	September 30, 2019.
ETA Workforce Innovation and Opportunity Act Performance Accountability, Information, and Reporting System.	1205–0521	August 31, 2019.
Work Application and Job Order Recordkeeping	1205–0001	September 30, 2019.
Migrant and Seasonal Farmworker Monitoring Report and Complaint/Apparent Violation Form	1205–0039	September 30, 2019.
Standard Job Corps Contractor Gathering Information	1205–0219	August 31, 2019.
Placement Verification and Follow-up of Job Corps Participants	1205–0426	August 31, 2019.
National Dislocated Workers Emergency Grant Application and Reporting Procedures	1205–0439	September 30, 2019.
Employment and Training Administration Financial Report Form ETA–9130	1205–0461	September 30, 2019.
Workforce Innovation and Opportunity Act Common Performance Reporting	1205–0526	August 31, 2019.
Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act, Wagner-Peyser WIOA Title I Programs and Vocational Rehabilitation Adult Education.	1205–0522	September 30, 2019.

Dated: October 17, 2016.

Portia Wu,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2016–25585 Filed 10–21–16; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Hazardous Conditions Complaints

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine Safety and Health Administration sponsored information collection request (ICR) titled, ''Hazardous Condition Complaints,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq*. Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before November 23, 2016.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201609-1219-001* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Hazardous Conditions Complaints information collection. Federal Mine Safety and Health Act of 1977, as amended (Mine Act) section 103(g)—30 U.S.C. 813(g)—provides that a representative of miners, or any individual miner where there is no representative of miners, may submit to the MSHA a written or oral notification of an alleged Mine Act or mandatory health or safety standard violation or of an imminent danger. The person making the notification also has the right to obtain an immediate MSHA inspection. A copy of the notice must be provided to the operator, with individual miner names redacted. Regulations 30 CFR part 43 implements Mine Act section 103(g). These regulations provide the procedures for submitting a complaint and the actions the MSHA must take after receiving the notice. Mine Act sections 101(a) and 103(h) authorize this information collection. *See* 30 U.S.C. 811(a) and 813(h).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219–0014.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on December 31, 2016. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 30, 2016 (81 FR 42733).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219–0014. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the

functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–MSHA.

Title of Collection: Hazardous Conditions Complaints.

OMB Control Number: 1219–0014.

Affected Public: Individuals or Households and Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 2,511.

Total Estimated Number of Responses: 2,511.

Total Estimated Annual Time Burden: 502 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: October 18, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–25608 Filed 10–21–16; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Bureau of Labor Statistics Technical Advisory Committee; Notice of Meeting and Agenda

The Bureau of Labor Statistics Technical Advisory Committee will meet on Friday, November 18, 2016. The meeting will be held from 8:30 a.m. to 4:00 p.m. in the Postal Square Building, 2 Massachusetts Avenue NE., Washington, DC.

The Committee provides advice and makes recommendations to the Bureau of Labor Statistics (BLS) on technical aspects of the collection and formulation of economic measures. The BLS presents issues and then draws on the expertise of Committee members representing specialized fields within the academic disciplines of economics, statistics and survey design.

The meeting will be held in rooms 1–3 of the Postal Square Building Janet Norwood Conference Center. The schedule and agenda for the meeting are as follows:

8:30 a.m. Commissioner's welcome and review of agency developments

9:00 a.m. Identifying factoryless goods producers in the U.S. statistical system

10:45 a.m. Comparing producer and import price indexes

2:00 p.m. Matching establishment databases at BLS

4:00 p.m. Approximate conclusion

The meeting is open to the public. Any questions concerning the meeting should be directed to Sarah Dale, Bureau of Labor Statistics Technical Advisory Committee, at 202–691–5643 or *dale.sarah@bls.gov.* Individuals who require special accommodations should contact Ms. Dale at least two days prior to the meeting date.

Signed at Washington, DC, this 18th day of October 2016.

Kimberley D. Hill,

Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 2016–25609 Filed 10–21–16; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Proposed Extension of the Approval of Information Collection Requirements

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed collection: Medical Travel Refund Request (OWCP–957). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before December 23, 2016.

ADDRESSES: Ms Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW., Room S–3223, Washington, DC 20210, telephone/fax (202) 354–9647, Email *ferguson.yoon@dol.gov.* Please use only one method of transmission for comments (mail, fax, or Email).

SUPPLEMENTARY INFORMATION:

I. *Background:* The Office of Workers' Compensation Programs (OWCP) is the agency responsible for administration of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.,* the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.,* and the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. 7384 *et seq.* All three of these statutes require that OWCP reimburse beneficiaries for travel expenses for covered medical treatment. In order to determine whether amounts requested as travel expenses are appropriate, OWCP must receive certain data elements, including the signature of the physician for medical expenses claimed under the BLBA. Form OWCP–957 is the standard format for the collection of these data elements. The regulations implementing these three statutes allow for the collection of information needed to enable OWCP to determine if reimbursement requests for travel expenses should be paid. This information collection is currently approved for use through December 31, 2016.

II. *Review Focus:* The Department of Labor is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• enhance the quality, utility and clarity of the information to be collected; and

• minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology,

e.g., permitting electronic submissions of responses.

III. *Current Actions:* The Department of Labor seeks approval for the extension of this information collection in order to carry out its responsibility to determine if requests for reimbursement for out-of-pocket expenses incurred when traveling to medical providers for covered medical testing or treatment should be paid.

Type of Review: Extension.

Agency: Office of Workers' Compensation Programs.

Title: Medical Travel Refund Request.

OMB Number: 1240–0037.

Agency Number: OWCP–957.

Affected Public: Individual or households.

Total Respondents: 342,462.

Total Responses: 342,462.

Time per Response: 10 minutes.

Estimated Total Burden Hours: 56,849.

Total Burden Cost (Capital/Startup): $0.

Total Burden Cost (Operating/Maintenance): $171,123.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: October 14, 2016.

Yoon Ferguson,

Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.

[FR Doc. 2016–25396 Filed 10–21–16; 8:45 am]

BILLING CODE 4510–CR–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (16–075)]

NASA Advisory Council; Human Exploration and Operations Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Human Exploration and Operations (HEO) Committee of the NASA Advisory Council (NAC). This Committee reports to the NAC.

DATES: Monday, November 14, 2016, 9:30 a.m.–5:30 p.m., Local Time.

ADDRESSES: NASA Johnson Space Center, Gilruth Center, Lone Star Room, 2101 East NASA Parkway, Houston, TX 77058.

FOR FURTHER INFORMATION CONTACT: Dr. Bette Siegel, Executive Secretary for the NAC HEO Committee, Human Exploration and Operations Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2245, or *bette.siegel@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. This meeting is also available telephonically and by WebEx. You must use a touch-tone phone to participate in this meeting. Any interested person must call 800–369–1956, and then the numeric passcode: 1504860 followed by then # sign. If dialing in, please ''mute'' your telephone. The WebEx link is *https://nasa.webex.com/,* the meeting number is 993 965 652 and the password is 1114Welcome! (case sensitive). The agenda for the meeting includes the following topics:

- Status of NASA Human Exploration and Operations Mission Directorate
- Status of Exploration Systems Development
- Status of International Space Station
- Status of Commercial Crew Program
- Status of Human Research Program

Attendees will be required to sign a register. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Carol J. Hamilton,

Acting Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2016–25614 Filed 10–21–16; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (16–076)]

NASA Advisory Council; Ad Hoc Task Force on STEM Education; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the Ad Hoc Task Force on Science, Technology, Engineering and Mathematics (STEM) of the NASA Advisory Council (NAC). This Task Force reports to the NAC.

DATES: Thursday, November 17, 2016, 9:30 a.m. to 12:00 noon, Eastern Time.

FOR FURTHER INFORMATION CONTACT: Dr. Beverly Girten, Executive Secretary for the NAC Ad Hoc Task Force on STEM Education, NASA Headquarters, Washington, DC 20546, 202–358–0212, or *beverly.e.girten@nasa.gov*.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public telephonically and by WebEx only. You must use a touch tone-phone to participate in this meeting. Any interested person may dial the toll-free access number 844–467–6272 or toll access number 720–259–6462, and then the numeric participant passcode: 329152 followed by the # sign. To join via WebEx on November 17, the link is *https://nasa.webex.com/,* the meeting number is 992 815 115 and the password is november172016! (Password is case sensitive.) NOTE: If dialing in, please ''mute'' your telephone. The agenda for the meeting will include the following:

- Opening Remarks by Chair
- Update on Business Service Assessment
- Finalizing/Rewording Findings and Recommendations
- Other Related Topics

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2016–25563 Filed 10–21–16; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meeting

TIME AND DATE: 9:00 a.m., Thursday, October 27, 2016.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street (All visitors must use Diagonal Road Entrance), Alexandria, VA 22314–3428.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. NCUA's Rules and Regulations, Statutory Inflation Adjustment of Civil Money Penalties.
2. NCUA's Rules and Regulations, Loans in Areas Having Special Flood Hazards.
3. NCUA's Rules and Regulations, Name Change for Office of Consumer Protection.
4. NCUA's Rules and Regulations, Chartering and Fields of Membership.
5. NCUA's Rules and Regulations, Chartering and Fields of Membership.

6. Board Briefing, Supplemental Capital.

RECESS: 12:00 p.m.

TIME AND DATE: 2:00 p.m., Thursday, October 27, 2016.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street (All visitors must use Diagonal Road Entrance), Alexandria, VA 22314–3428.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Board Briefing, NCUA's 2017–2018 Budget.

FOR FURTHER INFORMATION CONTACT: Gerard Poliquin, Secretary of the Board, Telephone: 703–518–6304

Gerard Poliquin,

Secretary of the Board.

[FR Doc. 2016–25778 Filed 10–20–16; 4:15 pm]

BILLING CODE 7535–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 03038199; EA–15–230; NRC–2016–0212]

In the Matter of Tetra Tech EC, Inc.

AGENCY: Nuclear Regulatory Commission.

ACTION: Confirmatory order; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a Confirmatory Order (CO) to Tetra Tech EC, Inc. (TtEC) to memorialize the agreements reached during an alternative dispute resolution mediation session held on September 7, 2016. This Order will resolve the issue that was identified during an NRC Investigation of TtEC employees at Hunters Point Naval Shipyard site in San Francisco, California. The Confirmatory Order is effective upon issuance.

DATES: This Confirmatory Order was issued on Tuesday, October 11, 2016.

ADDRESSES: Please refer to Docket ID NRC–2016–0212 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0212. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; e-mail: *Carol.Gallagher@nrc.gov.* For questions about this Confirmatory Order, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Cherie J. Crisden, Region I, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 1–610–337–5061, e-mail: *Cherie.Crisden@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the Confirmatory Order is attached.

Dated at King of Prussia, Pennsylvania, this 11th day of October 2016.

For the Nuclear Regulatory Commission.

Daniel H. Dorman,

Regional Administrator.

United States of America

Nuclear Regulatory Commission

[Docket No. 03038199; EA–15–230; License No. 29–31396–01; NRC–2016–0212]

In the Matter of Tetra Tech EC, Inc.

Confirmatory Order

(Effective Immediately)

I

Tetra Tech EC, Inc. (TtEC) is the holder of service provider License No. 29–31396–01 issued by the U.S. Nuclear Regulatory Commission (NRC) pursuant to Parts 30, 40, and 70 of Title 10 of the *Code of Federal Regulations* (10 CFR) on March 2, 2010, and amended on January 28, 2015. The license authorizes the operation of Tetra Tech EC, Inc. in accordance with conditions specified therein. TtEC is headquartered in Morris Plains, New Jersey.

This Confirmatory Order is the result of an agreement reached during an Alternative Dispute Resolution (ADR) mediation session conducted on September 7, 2016. The violation as documented in the NRC letter dated July 28, 2016 (ML16210A228),[1] to TtEC occurred sometime between November 11, 2011, and June 4, 2012. As of the date of the issuance of this Confirmatory Order, the NRC is not aware of any subsequent willful violations of NRC regulations by TtEC employees since June 4, 2012. TtEC remains in good standing with respect to the terms and conditions of its NRC license.

II

On April 29, 2014, the NRC Office of Investigations (OI) began an investigation (OI Case No. 1-2014-018) of TtEC activities at the U.S. Navy's Hunters Point Naval Shipyard (HPNS). The investigation was conducted to determine whether employees of TtEC deliberately falsified soil sample surveys from the area referred to as 'Parcel C' at HPNS in San Francisco, California. Based on the evidence developed during its investigation, OI substantiated that a Radiation Control Technician (RCT) and a Radiation Task Supervisor (RTS) deliberately falsified soil sample records by taking soil samples from areas not designated as part of the target sample area and by completing chain-of-custody forms with inaccurate information. The NRC completed its investigation on September 15, 2015.

In a letter to TtEC dated February 11, 2016, (ML16042A074) the NRC concluded that based on the evidence developed during the investigation, one apparent violation was identified and was being considered for escalated enforcement action in accordance with the NRC Enforcement Policy. The apparent violation involved TtEC's failure to make or cause to be made, surveys of areas that were reasonable to evaluate concentrations and potential radiological hazards of residual radioactivity in accordance with 10 CFR 20.1501(a). In response to the NRC's letter, TtEC provided two written responses in letters dated March 15, 2016 (ML16090A220) and March 22, 2016, (ADAMS Accession No. ML16090A318).

In the July 28, 2016, letter, the NRC issued a Severity Level III Notice of Violation (NOV) and a $7,000 Proposed Civil Penalty to TtEC. In response to the NRC's letter, TtEC requested the use of the NRC's ADR process to resolve the issue.

On September 7, 2016, the NRC and TtEC met in an ADR session mediated by a professional mediator, arranged through Cornell University's Institute on Conflict Resolution. ADR is a process in

[1] Designation in parentheses refers to an Agency-wide Documents Access and Management System (ADAMS) accession number. Unless otherwise noted, documents referenced in this letter are publicly-available using the accession number in ADAMS.

which a neutral mediator with no decision-making authority assists the parties in reaching an agreement on resolving any differences regarding the dispute. This Confirmatory Order is issued pursuant to the agreement reached during the ADR process.

III

During the ADR mediation session, TtEC and the NRC reached a preliminary settlement agreement. The elements of the agreement, as signed by both parties, consisted of the following:

1. In consideration of the following actions, the NRC agrees not to issue the proposed civil penalty ($7,000) relating to the NOV (Case No. EA–15–230, Office of Investigations Report No. 1–2014–018), dated July 28, 2016.

2. Within 180 days of the effective date of the Confirmatory Order, TtEC will discuss during one of its quarterly calls with its employees the facts and lessons-learned from the event that gave rise to the Confirmatory Order.

a. This discussion will emphasize the importance of TtEC employees not engaging in willful activities in violation of NRC rules and regulations.

b. As part of this discussion, TtEC employees will be allowed to ask follow-up questions and to provide feedback.

c. Within 210 days of the effective date of the Confirmatory Order, TtEC will affirm in writing to the NRC Region I Director, Division of Nuclear Materials Safety that said discussion occurred. TtEC will make available for one year after the date of this affirmation for NRC inspection any materials distributed to employees as part of said discussion.

3. Within 270 days of the effective date of the Confirmatory Order, TtEC will conduct refresher training regarding NRC requirements for all TtEC employees engaged in licensed activities. Thereafter, TtEC will conduct initial training of any new TtEC employees prior to engagement in licensed activities.

a. Within 300 days of the effective date of the Confirmatory Order, TtEC shall provide a copy of the refresher training documentation to the NRC Region I Director, Division of Nuclear Materials Safety.

b. The training must, at a minimum, include the following:

i. Awareness and understanding of NRC regulatory requirements, including the deliberate misconduct rule;

ii. Compliance with licensee procedures as they relate to NRC-licensed activities; and

iii. Understanding of signature authority.

c. Within 30 days following the completion of the refresher training, TtEC will affirm in writing to the NRC Region I Director, Division of Nuclear Materials Safety, that all TtEC employees then engaged in licensed activities have been trained.

d. For a period of five years following the effective date of the Confirmatory Order, TtEC will conduct on an annual basis the refresher training for all individuals engaged in licensed activities.

e. TtEC will maintain documentation for each refresher training session conducted. The training documentation will include a summary of the contents of the training and the employees in attendance. The training documentation will be maintained for one year after each refresher training session and will be made available for NRC inspection upon request.

4. Within 360 days of the effective date of the Confirmatory Order, TtEC will conduct an independent, third-party assessment of all areas involving NRC-licensed activities to assess TtEC's safety culture.

a. Within 180 days of the effective date of the Confirmatory Order, the independent assessor and his or her qualifications will be submitted by TtEC to the NRC Region I Director, Division of Nuclear Materials Safety.

b. The assessment shall include a large enough sample size of TtEC employees potentially involved in NRC-licensed activities so as to yield statistically-significant results.

c. Within 120 days following the completion of the independent assessment, TtEC will:

i. Communicate to the NRC Region I Director, Division of Nuclear Materials Safety, the availability of the assessment for NRC inspection.

ii. Communicate to all TtEC employees the results of the assessment.

iii. Evaluate the results of the assessment and initiate corrective actions as appropriate.

d. All documentation related to the independent assessment, including any documentation related to TtEC's evaluation of the assessment, will be kept for a period of three years following the completion of the independent assessment and will, for that duration, be made available to the NRC for inspection upon request.

5. Within 180 days of the effective date of the Confirmatory Order, TtEC will send a letter to the Navy that contains a copy of the NOV and a copy of the Confirmatory Order so that the Navy is fully informed of the NRC actions.

a. TtEC will also send a copy of this letter to the State of California Department of Public Health and to the NRC Region I Director, Division of Nuclear Materials Safety.

6. For a period of three years following the effective date of the Confirmatory Order, TtEC will commit to using a third party to perform quality control on any future projects at Hunters Point.

a. In those circumstances, TtEC will notify the NRC of the identity of the third party that will perform quality control.

7. In the event of the transfer of the NRC license by TtEC to another entity, the commitments hereunder shall survive any transfer of ownership and will be binding on the new licensee.

On September 26, 2016, TtEC consented to issuing this Confirmatory Order with the commitments, as described in Section V below. TtEC further agreed that this Confirmatory Order is to be effective upon issuance and that it has waived its right to a hearing.

IV

Since TtEC has agreed to take additional actions to address NRC concerns, as set forth in Item III above, the NRC has concluded that its concerns can be resolved through issuance of this Confirmatory Order.

I find that TtEC's commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments the public health and safety are reasonably assured. In view of the foregoing, I have determined that public health and safety require that TtEC's commitments be confirmed by this Confirmatory Order. Based on the above and TtEC's consent, this Confirmatory Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 81, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, IT IS HEREBY ORDERED, EFFECTIVE IMMEDIATELY, THAT:

1. Within 180 days of the effective date of the Confirmatory Order, TtEC will discuss during one of its quarterly calls with its employees engaged in licensed activities the facts and lessons learned from the event that gave rise to this Confirmatory Order.

a. TtEC will emphasize the importance of TtEC employees not engaging in willful activities in violation of NRC rules and regulations and will allow TtEC employees to ask

follow-up questions and to provide feedback.

2. Within 210 days of the effective date of the Confirmatory Order, TtEC will affirm in writing to the NRC Region I Director, Division of Nuclear Materials Safety, that the quarterly call and discussion occurred.

3. TtEC will make available, for one year after the date of the affirmation that the quarterly call was completed, for NRC inspection any materials distributed to employees as part of the quarterly call and discussion.

4. Within 270 days of the effective date of the Confirmatory Order, TtEC will conduct refresher training regarding NRC requirements for all TtEC employees engaged in licensed activities.

a. TtEC will conduct initial training for any new TtEC employees prior to engagement in licensed activities.

b. Within 300 days of the effective date of the Confirmatory Order, TtEC will provide a copy of the refresher training documentation to the NRC Region I Director, Division of Nuclear Materials Safety.

c. TtEC will, at a minimum, include the following:

i. Awareness and understanding of NRC regulatory requirements, including the deliberate misconduct rule;

ii. Compliance with licensee procedures as they relate to NRC-licensed activities; and

iii. Understanding of signature authority.

d. Within 30 days following the completion of the refresher training, TtEC will affirm in writing to the NRC Region I Director, Division of Materials Safety, that all TtEC employees engaged in licensed activities have been trained.

e. For a period of five years following the effective date of the Confirmatory Order, TtEC will conduct annual refresher training for all individuals engaged in licensed activities.

f. TtEC will maintain documentation for each refresher training session conducted. The training documentation will include a summary of the contents of the training and the employees in attendance. The training documentation will be maintained for one year after each refresher training session and will be made available for NRC inspection upon request.

5. Within 360 days of the effective date of the Confirmatory Order, TtEC will conduct an independent, third-party assessment of all areas involving NRC-licensed activities to assess TtEC's safety culture.

a. Within 180 days of the effective date of the Confirmatory Order, the name of the independent assessor and his or her qualifications will be submitted by TtEC to the NRC Region I Director, Division of Nuclear Materials Safety.

b. TtEC will ensure that the assessment includes a large enough sample size of TtEC employees potentially involved in NRC-licensed activities so as to yield statistically-significant results.

c. Within 120 days following the completion of the independent assessment, TtEC will: (1) communicate to the NRC Region I Director, Division of Nuclear Materials Safety, the availability of the assessment for NRC inspection; (2) communicate to all TtEC employees the results of the assessment; and (3) evaluate the results of the assessment and initiate corrective actions as appropriate.

d. All documentation (excluding privileged attorney-client communications and attorney work product) related to the independent assessment, including any documentation related to TtEC's evaluation of the assessment, will be kept for a period of three years following the completion of the independent assessment and will, for that duration, be made available to the NRC for inspection upon request.

6. Within 180 days of the effective date of the Confirmatory Order, TtEC will send a letter to the Navy that contains a copy of the NOV and a copy of the Confirmatory Order so that the Navy is fully informed of the NRC actions.

a. Within 180 days of the effective date of the Confirmatory Order, TtEC will also send a copy of the letter referenced above to the State of California Department of Public Health and to the NRC Region I Director, Division of Nuclear Materials Safety.

7. For a period of three years following the effective date of the Confirmatory Order, TtEC will commit to using a third party to perform quality control on any future projects at HPNS.

a. In those circumstances when TtEC performs work at HPNS, TtEC will notify the NRC of the identity of the third party that will perform quality control.

8. In the event of the transfer of NRC License No. 29–31396–01 by TtEC to another entity, the commitments hereunder will survive any transfer of ownership and will be binding on the new licensee.

The Director, Office of Enforcement, may, in writing, relax or rescind any of the above conditions upon demonstration by TtEC of good cause.

VI

In accordance with 10 CFR 2.202 and 10 CFR 2.309, any person adversely affected by this Confirmatory Order, other than Tetra Tech EC, Inc., may request a hearing within 30 days of the issuance date of this Confirmatory Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, and include a statement of good cause for the extension.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139; August 28, 2007), as amended by 77 FR 46562; August 3, 2012 (codified in pertinent part at 10 CFR part 2, subpart C). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* System requirements for accessing the E-Submittal server are

detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange (EIE), users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene through the EIE. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, Any others who wish to participate in the proceeding (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, participants are requested not to include copyrighted materials in their submission, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application.

If a person requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Confirmatory Order and shall address the criteria set forth in 10 C.F.R. 2.309(d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue a separate Confirmatory Order designating the time and place of any hearing, as appropriate. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 30 days after issuance of this Confirmatory Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received.

Dated at King of Prussia, Pennsylvania, this 11th day of October 2016.

For the Nuclear Regulatory Commission.

Daniel H. Dorman

Regional Administrator

[FR Doc. 2016–25661 Filed 10–21–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0001]

Sunshine Act Meeting

DATE: Week of October 17, 2016.

PLACE: OWFN SCIF, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Closed.

Week of October 17, 2016

Thursday, October 20, 2016

3:00 p.m. Briefing on Security Issues (Closed Ex. 1)

* * * * *

The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0681 or via email at *Denise.McGovern@nrc.gov.*

* * * * *

Additional Information

By a vote of 3–0 on October 20, 2016, the Commission determined pursuant to U.S.C. 552b(e) and '9.107(a) of the Commission's rules that the above referenced Affirmation Session be held with less than one week notice to the

public. The meeting is scheduled on October 20, 2016.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0739, by videophone at 240–428–3217, or by email at *Kimberly.Meyer-Chambers@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301–415–1969), or email *Brenda.Akstulewicz@nrc.gov* or *Patricia.Jimenez@nrc.gov.*

Dated: October 20, 2016.

Glenn Ellmers,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2016–25749 Filed 10–20–16; 11:15 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–193; NRC–2016–0213]

Rhode Island Atomic Energy Commission; Rhode Island Nuclear Science Center Reactor

AGENCY: Nuclear Regulatory Commission.

ACTION: License renewal application; opportunity to request a hearing and to petition for leave to intervene, order imposing procedures.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering an application for the renewal of Facility Operating License No. R–95, which currently authorizes the Rhode Island Atomic Energy Commission (RIAEC or the licensee) to operate the Rhode Island Nuclear Science Center (RINSC) reactor at a maximum steady-state thermal power of 2 megawatts (MW). The RINSC reactor is a plate type fueled research reactor located at the University of Rhode Island Narragansett Bay Campus, in Narragansett, Rhode Island. If approved, the renewed license would authorize the licensee to operate the RINSC reactor up to a steady-state thermal power of 2 MW for an additional 20 years from the date of issuance of the renewed license. Because the license renewal application contains sensitive unclassified non-safeguards information (SUNSI), an order imposes procedures to obtain access to SUNSI for contention preparation.

DATES: A request for a hearing or petition for leave to intervene must be filed by December 23, 2016. Any potential party as defined in § 2.4 of title 10 of the *Code of Federal Regulations* (10 CFR), who believes access to SUNSI is necessary to respond to this notice must request document access by November 3, 2016.

ADDRESSES: Please refer to Docket ID NRC–2016–0213 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods

- Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0213. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- NRC's Agencywide Documents Access and Management System (ADAMS): You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* For the convenience of the reader, the ADAMS accession numbers are provided in a table in the ''Availability of Documents'' section of this document.
- NRC's PDR: You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852

FOR FURTHER INFORMATION CONTACT: Patrick Boyle, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3936; email: *Patrick.Boyle@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering an application for the renewal of Facility Operating License No. R–95, which authorizes the licensee to operate the RINSC reactor, located at the University of Rhode Island Narragansett Bay Campus, at a maximum steady-state thermal power of 2 MW. The renewed license would authorize the licensee to operate the RINSC reactor up to a steady-state thermal power of 2 MW for an additional 20 years from the date of issuance of the renewed license.

By letter dated May 3, 2004, and as supplemented by various letters referenced in Section IV, ''Availability of Documents'' of this notice, the NRC received an application from the licensee filed pursuant to § 50.51(a) to renew Facility Operating License No. R–95 for the RINSC reactor. The application contains SUNSI.

Based on its initial review of the application, the NRC staff determined that the licensee submitted sufficient information in accordance with §§ 50.33 and 50.34 and that the application is acceptable for docketing. The current docket, Docket No. 50–193, for Facility Operating License No. R–95 will be retained. The docketing of the renewal application does not preclude requests for additional information as the review proceeds, nor does it predict whether the Commission will grant or deny the requested renewed license. Prior to a decision to renew the license, the Commission will make findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations.

II. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by this action may file a request for a hearing and a petition to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC's regulations are accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a petition is filed

within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will rule on the petition, and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.309, a petition shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest. The petition must also set forth the specific contentions which the petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and request permission to cross-examine witnesses, consistent with the NRC's regulations, policies, and procedures.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Requests for hearing, petitions for leave to intervene, and motions for leave to file new or amended contentions that are filed after the 60-day deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i)-(iii).

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1).

The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by December 23, 2016. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may also have the opportunity to participate under 10 CFR 2.315(c).

If a hearing is granted, any person who does not wish, or is not qualified, to become a party to the proceeding may, in the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

III. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene (hereinafter ''petition''), and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/getting-started.html.* System requirements for accessing the E-Submittal server are available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/adjudicatory-sub.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Electronic Filing Help Desk will not be able to offer assistance in using unlisted software.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a petition. Submissions should be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public Web site at *http://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the documents are submitted through

the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 7 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. However, in some instances, a petition will require including information on local residence in order to demonstrate a proximity assertion of interest in the proceeding. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

IV. Availability of Documents

Documents related to this action, including the license renewal application and other supporting documentation are available to interested persons as indicated.

Document	ADAMS Accession No.
''Rhode Island Atomic Energy Commission—'Requesting Renewal of Operating License R–095 (Enclosure 2)' [REDACTED Safety Analysis Report],'' May 3, 2004.	ML14038A386
''Rhode Island Atomic Energy Commission, Requesting Renewal of Operating License R–095,'' May 3, 2004	ML041270519
''Rhode Island Atomic Energy Commission, Request for Additional Information Re: The Rhode Island Nuclear Science Center Reactor License Renewal (Tac ME1598),'' November 24, 2009.	ML093270017
''Response to Request for Additional Information Concerning Plans for Decommissioning Facility at the End of Useful Life Ref Item 3 Parts a, b, and c,'' January 19, 2010.	ML100270176
''Rhode Island Nuclear Science Center Reactor Submittal of Response to Request for Additional Information Re License Renewal,'' August 6, 2010.	ML102240257
''Responding to Requests for Additional Information (RAI) regarding our Analysis of the Maximum Hypothetical Accident (MHA) for Renewal of License R–95,'' August 18, 2010.	ML102360440
''Memorandum Steady-State Thermal-Hydraulic Analysis for Forced-Convective Flow in the Rhode Island Nuclear Science (RINSC) Reactor,'' September 3, 2010.	ML16062A376
''Rhode Island Atomic Energy Commission, Fourth Response to Request for Additional Information dated April 23, 2010 (Redacted),'' September 8, 2010.	ML16279A516
''Rhode Island Atomic Energy Commission Fifth Response to April 13, 2010 Request for Additional Information (Regarding License Renewal redacted),'' November 26, 2010.	ML16279A518
''Rhode Island Atomic Energy Commission—Response to Requests for Additional Information Regarding Aging Issues Raised in RAIs,'' December 7, 2010.	ML103490242
''Rhode Island Atomic Energy Commission Response to April 13, 2010, Request for Additional Information Regarding License Renewal Technical Specifications (Redacted),'' December 14, 2010.	ML16279A519
''Reply to your Request for Additional Information (RAI) dated April 13, 2010, regarding License Renewal for the Rhode Island Nuclear Science Center Reactor (RINSC),'' January 24, 2011.	ML110320416
''Letter re: Request for Additional Information dated April 13, 2010 Regarding License Renewal for the Rhode Island Nuclear Science Center Reactor (RINSC),'' February 24, 2011.	ML110600699
''Rhode Island Atomic Energy Commission Response to Request for Additional Information Regarding License Renewal,'' July 15, 2011.	ML11202A287
''Rhode Island Atomic Energy Commission Tenth Response to the April 13, 2010, Request for Additional Information Regarding License Renewal (Redacted),'' July 15, 2011.	ML16279A520

Document	ADAMS Accession No.
''Rhode Island Atomic Energy Commission Responses to Request for Additional Information Regarding License Renewal (Redacted),'' July 15, 2011.	ML16279A521
''Rhode Island Nuclear Science Center Tenth Response to NRC Request for Additional Information dated April 13, 2010, Pages 126 Through 204,'' July 15, 2011.	ML11202A290
''Rhode Island Atomic Energy Commission—Request for Additional Information Regarding the Rhode Island Nuclear Sciences Center Reactor License Renewal (TAC No. ME1598),'' December 17, 2012.	ML121350815
''Response to NRC's Request for Additional Information Regarding Rhode Island Nuclear Science Center Reactor License Renewal,'' March 15, 2013.	ML13080A361
''Response to NRC's Request for Additional Information Regarding Rhode Island Nuclear Science Center Reactor License Renewal,'' March 15, 2013.	ML13080A362
''Response to NRC's Request for Additional Information Regarding Rhode Island Nuclear Science Center Reactor License Renewal, Proposed Technical Specification 130314,'' March 15, 2013.	ML13080A364
''Response to Request for Additional Information Regarding Financial Qualifications for the RINSC Reactor License Renewal,'' September 16, 2013.	ML13260A474
''Rhode Island Atomic Energy Commission License Renewal Historical Resource Impact Response Letter,'' December 19, 2013.	ML14006A420
''Rhode Island Atomic Energy Commission—Request For Additional Information Regarding Financial Qualifications For The Rhode Island Nuclear Science Center Reactor License Renewal,'' January 9, 2014.	ML14007A728
''Response to Request for Additional Information Regarding Requalification Plan for the RINSC Reactor License Renewal,'' February 24, 2014.	ML14057A639
''Compilation of All Submitted Requests for Additional Information for the Rhode Island Nuclear Science Center Reactor License Renewal. Part 1 of 3,'' April 28, 2014.	ML14126A192
''Rhode Island Atomic Energy Commission Consolidated Responses to Request for Additional Information Regarding License Renewal. Part 2 of 3 (Redacted),'' April 28, 2014.	ML16279A523
''Compilation of All Submitted Requests for Additional Information for the Rhode Island Nuclear Science Center Reactor License Renewal. Part 3 of 3,'' April 28, 2014.	ML14126A195
''Rhode Island Nuclear Science Center Reactor—Updated Proposed Technical Specifications,'' June 30, 2014	ML14184B361
''Rhode Island Nuclear Science Center Updated Technical Specifications,'' August 7, 2015	ML15223A953
''Rhode Island Nuclear Science Center Submittal of Updated Proposed Technical Specification,'' August 11, 2015	ML15223A952
''Summary of Changes to the Proposed Technical Specifications,'' August 11, 2015	ML15223A954
''Contractor Comments and Responses,'' August 11, 2015	ML15223A955
''Rhode Island, Request for Additional Information,'' September 3, 2015	ML15243A011
''Rhode Island Nuclear Science Center Transient Analyses Revised January 20, 2016,'' January 20, 2016	ML16062A378
''Rhode Island Nuclear Science Center Technical Specifications,'' February 26, 2016	ML16062A380
''Rhode Island Atomic Energy Commission—Response to Requests for Additional Information dated September 3, 2015,'' March 1, 2016.	ML16062A373
''Fuel Failure Addendum 160229,'' March 1, 2016	ML16062A381
''New Transient Analysis Results 160226,'' March 1, 2016	ML16062A379
''150903 RAI Responses 160301,'' March 1, 2016	ML16062A374
''Core Change Summary for Conversion from RINSC LEU Core #5 to LEU Core #6,'' March 1, 2016	ML16062A375
''[RINSC] Fuel Failure Analysis [Dose Table],'' March 1, 2016	ML16062A382

Portions of the license renewal application and its supporting documents contain SUNSI. These portions will not be available to the public. Any person requesting access to SUNSI must follow the procedures described in the Order below.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing SUNSI.

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request such access. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication of this notice will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requester shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The email address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCmailcenter@nrc.gov,* respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1); and

(3) The identity of the individual or entity requesting access to SUNSI and the requester's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly-available versions of the information requested would not be sufficient to provide the

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

basis and specificity for a proffered contention.

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order [2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. *Filing of Contentions.* Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline. This provision does not extend the time for filing a request for a hearing and petition to intervene, which must comply with the requirements of 10 CFR 2.309.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff after a determination on standing and need for access, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) officer if that officer has been designated to rule on information access issues.

H. *Review of Grants of Access.* A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have proposed contentions meeting the specificity and basis requirements in 10 CFR part 2. Attachment 1 to the Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated at Rockville, Maryland, this 19th day of October, 2016.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING

Day	Event/Activity
0	Publication of FEDERAL REGISTER notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; and (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	U.S. Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information). If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no ''need'' or no likelihood of standing, the deadline for petitioner/requestor to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds ''need'' for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requesters should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING—Continued

Day	Event/Activity
A	If access granted: issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. 2016–25607 Filed 10–21–16; 8:45 am]
BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–274; NRC–2015–0284]

United States Department of the Interior; United States Geological Survey TRIGA Research Reactor

AGENCY: Nuclear Regulatory Commission.

ACTION: License renewal; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) issued a renewal of Facility Operating License No. R–113, held by the United States Geological Survey (USGS or the licensee), for the continued operation of its USGS Training, Research, Isotope Production, General Atomics (TRIGA) research reactor (GSTR or the reactor) at a steady-state power level of 1.0 megawatt (MW) and a pulse power level as provided in the licensee's Technical Specifications, for an additional 20 years. The GSTR facility is located on the property of the Denver Federal Center in Lakewood, Colorado.

DATES: The operating license renewal No. R–113 is effective on October 14, 2016.

ADDRESSES: Please refer to Docket ID NRC–2015–0284 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2015–0284. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it available in ADAMS) is provided the first time that a document is referenced. In addition, for the convenience of the reader, the ADAMS accession numbers are provided in a table in the ''Availability of Documents'' section of this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Geoffrey A. Wertz, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–0893; email: *Geoffrey.Wertz@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Discussion

The NRC has issued renewed Facility Operating License No. R–113, held by the USGS, which authorizes continued operation of the USGS GSTR, located in the Denver Federal Center in Lakewood, Colorado. The GSTR is heterogeneous pool-type, natural convection, light-water cooled, and shielded TRIGA reactor. The GSTR is licensed to operate at a steady-state power level of 1,000 kilowatts thermal power and to pulse the reactor with a maximum reactivity insertion of $3.00. The renewed Facility Operating License No. R–113 will expire 20 years from its date of issuance.

The renewed facility operating license complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's regulations in chapter I of title 10 of the *Code of Federal Regulations,* and sets forth those findings in the renewed facility operating license. The NRC afforded an opportunity for hearing in the Notice of Opportunity for Hearing published in the **Federal Register** on February 5, 2016 (81 FR 6302). The NRC received no request for a hearing or petition for leave to intervene following the notice.

The NRC staff prepared a safety evaluation report for the renewal of Facility Operating License No. R–113 and concluded, based on that evaluation, that the licensee can continue to operate the facility without endangering the health and safety of the public. The NRC staff also prepared an Environmental Assessment and Finding of No Significant Impact for the renewal of the facility operating license, noticed in the **Federal Register** on June 14, 2016 (81 FR 38739), and concluded that renewal of the facility operating license will not have a significant impact on the quality of the human environment.

II. Availability of Documents

The documents identified in the following table are available to interested persons as indicated.

Document	ADAMS Accession No.
U.S. Geological Survey—Revised Safety Analysis Report, Technical Specifications, and Environmental Report to Support License Renewal (redacted version), dated January 5, 2009 (redacted version)	ML092120136
U.S. Geological Survey—TRIGA Reactor Response to the RAI Concerning R–113 License Renewal, dated November 24, 2010	ML103340090
U.S. Geological Survey—Response to Letter of February 1, 2011 Concerning R–113 License Renewal, dated February 11, 2011	ML110480046
U.S. Geological Survey—Response to Questions 23.1, 23.2, and 23.3 of the Referenced RAI, dated March 28, 2011	ML110950059
U.S. Geological Survey—Response to Questions 22.1, 22,2, 25.1, 25.2, 25.3, 25.4, and 25.6 of the Referenced RAI, dated May 12, 2011	ML11138A027
U.S. Geological Survey—Response to Request for Additional Information for Questions 17.1 and 17.2, dated June 29, 2011	ML11181A305
U.S. Geological Survey—Response to Question 2 of the Referenced RAI, dated July 27, 2011	ML11214A091
U.S. Geological Survey—Response to Question 1 of the Referenced RAI, dated August 30, 2011	ML112500522
U.S. Geological Survey—Response to Request for Additional Information to Question 20, dated September 26, 2011	ML11277A013
U.S. Geological Survey TRIGA Reactor—Response to Question 6 of the Referenced RAI, dated October 31, 2011	ML11314A106
U.S. Geological Survey—Response to NRC Request for Additional Information Questions 7 and 8, License Renewal, dated November 30, 2011 (redacted version)	ML113460014
U.S. Geological Survey—Licensee Response to NRC Request for Additional Information Question 15.3, dated January 3, 2012 (redacted version)	ML120240003
U.S. Geological Survey TRIGA Reactor—Response to Question 15.2 of the Request for Additional Information from September 29, 2010, letter, dated January 27, 2012	ML12068A138
U.S. Geological Survey TRIGA Reactor (GSTR)—Response to Question 18 of a Request for Additional Information dated September 29, 2010, letter, dated January 27, 2012	ML12039A173
U.S. Geological Survey TRIGA Reactor—Response to Request for Additional Information to Question 14, dated March 28, 2012	ML12100A097
U.S. Geological Survey TRIGA Reactor—Response to Question 16 of the Referenced RAI, dated April 27, 2012	ML12128A429
U.S. Geological Survey—Responses to Questions 26 and 27 of the Referenced RAI, dated May 18, 2012	ML12151A407
U.S. Geological Survey—Response to Request for Additional Information (RAI) Question 14, dated May 31, 2012	ML12160A064
U.S. Geological Survey TRIGA Reactor—Response to Question 3 of the Referenced RAI, dated June 29, 2012	ML12200A055
U.S. Geological Survey TRIGA Reactor—Response to Question 21 of the Referenced RAI dated September 29, 2010, letter, dated July 31, 2012	ML12220A525
U.S. Geological Survey—Responses to Questions 9, 10, 11, 12, 15.1, 23.4, 24, and 25.5; Along with a Corrected Copy of the Proposed Technical Specifications (Chapter 14) of the SAR, dated August 30, 2012	ML12251A231
U.S. Geological Survey—Redacted—Response to NRC Request for Additional Information dated October 2, 2012, letter, dated November 16, 2012	ML12334A001
U.S. Geological Survey—Responses to NRC Request for Additional Information dated October 2, 2012 and Telephone Conference, dated December 20, 2012, letter, dated February 8, 2013 (redacted version)	ML13052A179
U.S. Geological Survey—Responses to RAIs, Follow-up Safety Analysis responses from questions of phone conference conducted on March 21, 2013, dated May 17, 2013 (redacted version)	ML13162A662
Follow-up Safety Analysis Responses dated July 15, 2013, letter, dated October 31, 2013	ML13311A047
U.S. Geological Survey TRIGA Reactor (GSTR), Responses to Reactor Operator Requalification Questions, dated February 19, 2014	ML14070A040
Submission of Revised Technical Specifications, Chapter 14, November 3, 2014	ML14325A646
U.S. Geological Survey TRIGA Reactor—Responses to RAI Questions 15.3 and 28, dated November 24, 2014 (redacted version)	ML14338A196
Revision of Proposed Technical Specifications, September 8, 2015	ML15261A042
U.S. Geological Survey—Responses to RAI Questions 1a, 1b, and 1c, dated January 22, 2016	ML16042A575
U.S. Geological Survey—Response to Request for Additional Information for License Renewal, dated April 1, 2016 (redacted version)	ML16110A008
U.S. Geological Survey—Responses to RAI questions, dated September 12, 2016	ML16277A216
U.S. Geological Survey—Responses to Email Questions from Mr. Wertz date September 10, 2016, dated September 22, 2016	ML16273A304

Dated at Rockville, Maryland, this 17th day of October, 2016.

For the Nuclear Regulatory Commission.

Alexander Adams, Jr.,

Chief, Research and Test Reactors Licensing Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

[FR Doc. 2016–25646 Filed 10–21–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0217]

Performance Review Boards for Senior Executive Service

AGENCY: Nuclear Regulatory Commission.

ACTION: Appointments.

SUMMARY: The Nuclear Regulatory Commission (NRC) has announced appointments to the NRC Performance Review Board (PRB) responsible for making recommendations on performance appraisal ratings and performance awards for NRC Senior Executives and Senior Level System employees and appointments to the NRC PRB Panel responsible for making recommendations to the appointing and awarding authorities for NRC PRB members.

DATES: October 24, 2016.

ADDRESSES: Please refer to Docket ID NRC–2016–0217 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0217. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Miriam L. Cohen, Secretary, Executive Resources Board, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–287–0747, email: *Miriam.Cohen@nrc.gov.*

SUPPLEMENTARY INFORMATION: The following individuals appointed as members of the NRC PRB are responsible for making recommendations to the appointing and awarding authorities on performance appraisal ratings and performance awards for Senior Executives and Senior Level System employees:

Victor M. McCree, Executive Director for Operations
Margaret M. Doane, General Counsel
Cynthia A. Carpenter, Director, Office of Administration
Marc L. Dapas, Director, Office of Nuclear Material Safety and Safeguards
William M. Dean, Director, Office of Nuclear Reactor Regulation
Michael R. Johnson, Deputy Executive Director for Reactor and Preparedness Programs, Office of the Executive Director for Operations
Nader L. Mamish, Director, Office of International Programs
Cynthia D. Pederson, Regional Administrator, Region III
Glenn M. Tracy, Deputy Executive Director for Materials, Waste, Research, State, Tribal, Compliance, Administration, and Human Capital Programs, Office of the Executive Director for Operations
Michael F. Weber, Director, Office of Nuclear Regulatory Research
Maureen E. Wylie, Chief Financial Officer

The following individuals will serve as members of the NRC PRB Panel that was established to review appraisals and make recommendations to the appointing and awarding authorities for NRC PRB members:

Brian E. Holian, Director, Office of Nuclear Security and Incident Response
Patricia K. Holahan, Director, Office of Enforcement
Marian L. Zobler, Office of the General Counsel

All appointments are made pursuant to Section 4314 of Chapter 43 of Title 5 of the United States Code.

Dated at Rockville, Maryland, this 7th day of October 2016.

For the Nuclear Regulatory Commission.

Miriam L. Cohen, Secretary,

Executive Resources Board.

[FR Doc. 2016–25656 Filed 10–21–16; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2017–18 and CP2017–19]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 26, 2016 (Comment due date applies to all Docket Nos. listed above).

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2017–18; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 17, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Curtis E. Kidd; *Comments Due:* October 26, 2016.

2. *Docket No(s).:* CP2017–19; *Filing Title:* Notice of United States Postal

Service of Filing a Functionally Equivalent Global Reseller Expedited Package 2 Negotiated Service Agreement; *Filing Acceptance Date:* October 17, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Jennaca D. Upperman; *Comments Due:* October 26, 2016.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–25562 Filed 10–21–16; 8:45 am]

BILLING CODE 7710–FW–P

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review, Request for Comments

Summary: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board (RRB) is forwarding an Information Collection Request (ICR) to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB). Our ICR describes the information we seek to collect from the public. Review and approval by OIRA ensures that we impose appropriate paperwork burdens.

The RRB invites comments on the proposed collections of information to determine (1) the practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of the information that is the subject of collection; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology. Comments to the RRB or OIRA must contain the OMB control number of the ICR. For proper consideration of your comments, it is best if the RRB and OIRA receive them within 30 days of the publication date.

1. *Title and purpose of information collection:* Application to Act as Representative Payee; OMB 3220–0052.

Under Section 12 of the Railroad Retirement Act, the Railroad Retirement Board (RRB) may pay benefits to a representative payee when an employee, spouse or survivor annuitant is incompetent or is a minor. A representative payee may be a court-appointed guardian, a statutory conservator or an individual selected by the RRB. The procedures pertaining to the appointment and responsibilities of a representative payee are prescribed in 20 CFR 266.

The forms furnished by the RRB to apply for representative payee status, and for securing the information needed to support the application follow. RRB Form AA–5, *Application for Substitution of Payee,* obtains information needed to determine the selection of a representative payee who will serve in the best interest of the beneficiary. RRB Form G–478, *Statement Regarding Patient's Capability to Manage Benefits,* obtains information about an annuitant's capability to manage their own benefits. The form is completed by the annuitant's personal physician or by a medical officer, if the annuitant is in an institution. It is not required when a court has appointed an individual or institution to manage the annuitant's funds or, in the absence of such appointment, when the annuitant is a minor. The RRB also provides representative payees with a booklet at the time of their appointment. The booklet, RRB Form RB–5, *Your Duties as Representative Payee-Representative Payee's Record,* advises representative payees of their responsibilities under 20 CFR 266.9 and provides a means for the representative payee to maintain records pertaining to the receipt and use of RRB benefits. The booklet is provided for the representative payee's convenience. The RRB also accepts records that are kept by representative payees as part of a common business practice. Completion is voluntary. One response is requested of each respondent.

Previous Requests for Comments: The RRB has already published the initial 60-day notice (81 FR 54856 on August 17, 2016) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

Information Collection Request (ICR)

Title: Application to Act as Representative Payee.

OMB Control Number: 3220–0052.

Forms submitted: AA–5, G–478, and RB–5.

Type of request: Revision of a currently approved collection.

Affected public: Individuals or Households; Business or other for Profit.

Abstract: Under Section 12 of the Railroad Retirement Act, the Railroad Retirement Board (RRB) may pay benefits to a representative payee when an employee, spouse or survivor annuitant is incompetent or is a minor. The collection obtains information related to the representative payee application, supporting documentation and the maintenance of records pertaining to the receipt and use of benefits.

Changes proposed: The RRB is proposing non-burden impacting editorial changes to Forms AA–5, G–478, and the RB–5 booklet.

The burden estimate for the ICR is as follows:

Form No.	Annual responses	Time (minutes)	Burden (hours)
AA–5	3,000		850
Individuals	2,250	17	637.5
Institutions	750		212.5
G–478	2,000	6	200.0
RB–5	15,300		15,300
Individuals	11,475	60	11,475
Institutions	3,825		3,825
Total	20,300		16,350

2. Employer Service and Compensation Reports; OMB 3220–0070.

Section 2(c) of the Railroad Unemployment Insurance Act (RUIA) specifies the maximum normal unemployment and sickness benefits that may be paid in a benefit year. Section 2(c) further provides for extended benefits for certain employees and for beginning a benefit year early for other employees. The conditions for these actions are prescribed in 20 CFR 302.

All information about creditable railroad service and compensation needed by the RRB to administer Section 2(c) is not always available from annual reports filed by railroad employers with the RRB (OMB 3220–0008). When this occurs, the RRB must

obtain supplemental information about service and compensation.

The RRB utilizes Form UI–41, *Supplemental Report of Service and Compensation,* and Form UI–41a, *Supplemental Report of Compensation,* to obtain the additional information about service and compensation from railroad employers. Completion of the forms is mandatory. One response is required of each respondent.

Previous Requests for Comments: The RRB has already published the initial 60-day notice (81 FR 54857 on August 17, 2016) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

Information Collection Request (ICR)

Title: Employer Service and Compensation Reports.

OMB Control Number: 3220–0070.

Forms submitted: UI–41 and UI–41a.

Type of request: Extension without change of a currently approved collection.

Affected public: Private Sector; Businesses or other for profits.

Abstract: The reports obtain the employee's service and compensation for a period subsequent to those already on file and the employee's base year compensation. The information is used to determine the entitlement to and the amount of benefits payable.

Changes proposed: The RRB proposes no changes to Form UI–41 and UI–41a.

The burden estimate for the ICR is as follows:

Form No.	Annual responses	Time (minutes)	Burden (hours)
UI–41	100	8	13
UI–41a	50	8	7
Total	150		20

Additional Information or Comments: Copies of the forms and supporting documents can be obtained from Dana Hickman at (312) 751–4981 or *Dana.Hickman@RRB.GOV.*

Comments regarding the information collection should be addressed to Charles Mierzwa, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–1275 or *Charles.Mierzwa@RRB.GOV* and to the OMB Desk Officer for the RRB, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

Charles Mierzwa,

Associate Chief Information Officer for Policy and Compliance.

[FR Doc. 2016–25673 Filed 10–21–16; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79119; File No. SR–NASDAQ–2016–138]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Nasdaq Rule 7046

October 19, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 11, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend Nasdaq Rule 7046 (Nasdaq Trading Insights) to delay the availability of one of the components of that product.

The Exchange is requesting that the Commission waive the five-day pre-filing requirement and the 30-day operative delay period contained in SEC Rule 19b–4(f)(6)(iii).[3]

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange recently added Nasdaq Rule 7046 (Nasdaq Trading Insights) to the Nasdaq rule book.[4] Nasdaq Trading Insights is an optional market data service available to market participants for a corresponding fee[5] and comprised of four distinct market data components. Specifically, as described in greater detail in the filing to establish Nasdaq Trading Insights, the market data components include: (a) Missed Opportunity—Liquidity; (b) Missed Opportunity—Latency; (c) Peer Benchmarking; and (d) Liquidity Dynamics Analysis. The purpose of this proposed rule change is to announce that Nasdaq is delaying the availability of the fourth component, Liquidity Dynamics Analysis, while analyzing the possibility of modifying that component and/or introducing adding [sic] additional data elements to Nasdaq Trading Insights. Nasdaq will submit a proposed rule change in the near future to confirm the availability of the Liquidity Dynamics Analysis component and/or to effectuate any additional changes to Nasdaq Trading Insights.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6)(iii).

[4] Securities Exchange Act Release No. 78886 (September 20, 2016), 81 FR 66113 (September 26, 2016) (SR–NASDAQ–2016–101).

[5] SR–NASDAQ–2016–124 (September 23, 2016).

[6] 15 U.S.C. 78f.

in general and with Sections [sic] 6(b)(5) of the Act,[7] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. This proposal is in keeping with those principles in that it is designed to ensure that Rule 7046 accurately reflects the components of Nasdaq Trading Insights that Nasdaq intends to make available at this time.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, Nasdaq believes that the proposed rule change will not affect competition in any respect because designed [sic] to ensure that Rule 7046 accurately reflects the components of Nasdaq Trading Insights that Nasdaq intends to make available at this time.

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

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[8] and Rule 19b–4(f)(6) thereunder.[9]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[10] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[11] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. The Exchange stated that although the Nasdaq Trading Insights product has been approved and is available to customers, the Exchange intends to delay the availability of one of its components in order to allow time to analyze the possibility of modifying it. The Exchange believes that waiver of the operative delay would ensure that Rule 7046 accurately reflects the components of Nasdaq Trading Insights that the Exchange intends to make available at this time. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2016–138 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–138. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2016–138, and should be submitted on or before November 14, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Brent J. Fields,

Secretary.

[FR Doc. 2016–25616 Filed 10–21–16; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived the five-day prefiling requirement in this case.

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79107; File No. SR–NYSEArca–2016–130]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Amending NYSE Arca Equities Rules 7.35 (Auctions), 7.10 (Clearly Erroneous Executions), 7.31 (Orders and Modifiers), and 7.11 (Limit Up—Limit Down Plan and Trading Pauses in Individual Securities Due to Extraordinary Market Volatility)

October 18, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on October 4, 2016, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Equities Rule 7.35 (Auctions) to enhance the information available before an auction and revise its procedures for Trading Halt Auctions, NYSE Arca Equities Rule 7.10 (Clearly Erroneous Executions) to exclude Trading Halt Auctions from being reviewed as clearly erroneous, NYSE Arca Equities Rule 7.31 (Orders and Modifiers) to add a new Imbalance Only Order, and NYSE Arca Equities Rule 7.11.

The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Equities Rule 7.35 (Auctions) (''Rule 7.35'') to enhance the information available before an auction and revise its procedures for Trading Halt Auctions, NYSE Arca Equities Rule 7.10 (''Rule 7.10'') to exclude Trading Halt Auctions from being reviewed as a clearly erroneous execution, NYSE Arca Equities Rule 7.31 (Orders and Modifiers) (''Rule 7.31'') to add a new Imbalance Only Order, and NYSE Arca Equities Rule 7.11 (Limit Up—Limit Down Plan and Trading Pauses in Individual Securities Due to Extraordinary Market Volatility) (''Rule 7.11'') to conform the rule to proposed changes to the Regulation NMS Plan to Address Extraordinary Market Volatility (''Plan'').[4]

Overview

The Operating Committee for the Plan with input from the Advisory Committee to the Plan and staff of the Securities and Exchange Commission (''SEC'' or ''Commission''), has identified a number of enhancements to the reopening process following a Trading Pause that will be addressed in a combination of a proposed amendment to the Plan and amendments to the rules of the Primary Listing Exchanges.[5] The Exchange is a Participant of the Plan and a member of the Operating Committee.

With respect to the Plan, the Participants submitted a proposal to amend the Plan to provide that a Trading Pause will continue until the Primary Listing Exchange reopens trading using its established reopening procedures and reports a Reopening Price.[6] The Participants further proposed to eliminate the current allowance for a trading center to resume trading in an NMS Stock following a Trading Pause if the Primary Listing Exchange has not reported a Reopening Price within ten minutes after the declaration of a Trading Pause and has not declared a Regulatory Halt. In addition, to close any gaps of potential scenarios when trading may resume without Price Bands, the Participants proposed to amend the Plan to provide that a trading center may not resume trading in an NMS Stock following a Trading Pause without Price Bands in such NMS Stock. To address potential scenarios of when there may not be a Reopening Price from the Primary Listing Exchange from which to calculate Price Bands, the Participants proposed to make related amendments to the Plan to address when trading may resume if the Primary Listing Exchange is unable to reopen due to a systems or technology issue and how the Reference Price would be determined either under such circumstances or if the Primary Listing Exchange reopens trading on a zero bid or zero quote, or both.

In connection with the proposed Plan amendments, the Participants have agreed on a standardized approach for how the Primary Listing Exchanges should conduct certain aspects of an automated reopening following a Trading Pause. Specifically, because trading centers would not be permitted to resume trading in an NMS Stock until there is a Reopening Price, the Participants believe it is appropriate for the Primary Listing Exchanges to adopt uniform standards for determining whether and when to conduct such automated reopenings, including what price collar thresholds would be applicable to such automated reopenings and how to provide for extensions of when a reopening auction would be conducted. The goal of such changes would be to ensure that all Market Order interest could be satisfied in an automated reopening auction.

More specifically, the Participants have agreed that if there is an imbalance of market orders, or if the Reopening Price would be outside of specified price collar thresholds, the Trading Pause would be extended an additional five minutes in order to provide additional time to attract offsetting liquidity. If at the end of such extension, Market Orders still cannot be satisfied within price collar thresholds or if the reopening auction would be priced outside of the applicable price collar thresholds, the Primary Listing Exchange would extend the Trading Pause an additional five minutes. With each such extension, the Participants have agreed that it would be appropriate to widen the price collar threshold on the side of the market on which there is buying or selling pressure.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 77679 (April 21, 2016), 81 FR 24908 (April 27, 2016) (File No. 4–631) (Order approving 10th Amendment to the LULD Plan).

[5] Unless otherwise specified, capitalized terms used herein have the same meaning as set forth in the Plan or in Exchange rules.

[6] On September 19, 2016, the Participants filed with the Commission the twelfth amendment to the Plan.

With respect to price collar thresholds, the Participants have agreed that the reference price for calculating price collar thresholds would be the price of the limit state that preceded the Trading Pause, *i.e.,* either the Lower or Upper Price Band price. For NMS Stocks priced more than $3.00,

- If there is selling pressure, the lower collar for the auction would be the Lower Price Band minus five percent and the upper collar would be the Upper Price Band;
- if there is buying pressure, the upper collar for the auction would be the Upper Price Band plus five percent and the lower collar would be the Lower Price Band.

For each extension, the collars would be widened an additional five percent, but only on the side of the imbalance.[7] The Participants believe that widening collars only in the direction of the imbalance would address issues relating to the concept of mean reversion.

Finally, the Participants have agreed that the proposed new procedures for reopening trading following a Trading Pause reduces the potential that an order or orders entered by one or more ETP Holders caused such execution to be clearly erroneous. Specifically, the Participants believe that the proposed standardized procedures for reopening trading following a Trading Pause incorporates a methodology that allows for widened collars, which may result in a reopening price away from prior trading prices, but which reopening price would be a result of a measured and transparent process that eliminates the potential that such trade would be considered erroneous.

As a Primary Listing Exchange, the Exchange proposes to amend Rule 7.35 to implement the proposed uniform trading practices with respect to reopening a security following a Trading Pause, as described above. In addition, the Exchange proposes to implement changes for automated reopenings following a market-wide circuit breaker under Rule 7.12 and any regulatory halts triggered in an Exchange-listed security. The Exchange further proposes to amend Rule 7.10 to preclude ETP Holders from requesting a review of a Trading Halt Auction as a clearly erroneous execution. Finally, in connection with these proposed changes, the Exchange proposes additional enhancements to its auction processes, including adding a new Imbalance Only Order, an Auction Freeze period before a Trading Halt Auction, and enhanced information to be disseminated before an auction.

Uniform Primary Listing Exchange Proposed Rule Changes

To effect the proposed enhancements that would be implemented by all Primary Listing Exchanges, the Exchange proposes to add new sub-paragraphs (5)–(10) to Rule 7.35(e), which governs Trading Halt Auctions, re-number current Rule 7.35(e)(5) as new Rule 7.35(e)(11), and amend Rule 7.35(e)(2). The Exchange proposes to implement these changes for all Trading Halt Auctions. The proposed standardized trading practices agreed upon by the Operating Committee are intended for Trading Halt Auctions following a trading pause under Rule 7.11. However, the Exchange believes that these proposed procedures would be beneficial following all halts, including regulatory halts and halts due to extraordinary market volatility.

Rule 7.35(e)(2) currently provides that after trading in a security has been halted or paused, the NYSE Arca Marketplace will disseminate the estimated time at which trading in that security will re-open (''Re-Opening Time''). The Exchange proposes to add to this rule that the initial Re-Opening Time for a Trading Halt Auction following a trading pause under Rule 7.11 (''Trading Pause'') or trading halt due to extraordinary market volatility under Rule 7.12 (''MWCB Halt'') will be at the scheduled end of the Trading Pause or MWCB Halt. This proposed rule text clarifies that for Trading Pauses and MWCB Halts, the length of the initial pause or halt period is as specified in those rules. As specified in the LULD Plan, the scheduled end of the Trading Pause is five minutes after a Trading Pause has been declared. As specified in Rule 7.12(b), the scheduled end of a Level 1 or Level 2 Market Decline is 15 minutes. If there is a Level 3 Market Decline, the Exchange will not re-open.

Proposed Rule 7.35(e)(5) would provide that a Trading Halt Auction would not be conducted if the Indicative Match Price, before being adjusted based on Auction Collars, is below (above) the Lower (Upper) Auction Collar or if there is a sell (buy) Market Imbalance, either of which would be defined as an ''Impermissible Price.'' [8] This proposed rule text would implement the proposed standardized enhancement that the Exchange would not conduct a Trading Halt Auction if there are either unsatisfied Market Orders, or if the Indicative Match Price would be outside the applicable Auction Collars.

Extensions: Proposed Rule 7.35(e)(6) would specify the circumstances when the Exchange would extend the Re-Opening Time for a Trading Halt Auction, as follows:

- Proposed Rule 7.35(e)(6)(A) would provide that, if there is an Impermissible Price at the initial Re-Opening Time, the pause or halt would be extended an additional five minutes and a new Re-Opening Time would be disseminated, which would be referred to as the ''First Extension.'' The proposed rule would further provide that the Exchange would not conduct a Trading Halt Auction before the Re-Opening Time for the First Extension. As such, if the Exchange disseminates a First Extension, consistent with the current Plan, which provides that if the Primary Listing Exchange does not reopen, trading centers may not resume trading until ten minutes after the beginning of the Trading Pause, the Trading Pause would continue for ten minutes and trading would not resume before that ten-minute marker.
- Proposed Rule 7.35(e)(6)(B) would provide that if there is an Impermissible Price at the end of the First Extension, the pause or halt would be extended an additional five minutes and a new Re-Opening Time would be disseminated (''Subsequent Extension''). As further proposed, the Exchange would conduct a Trading Halt Auction before the Re-Opening Time for a Subsequent Extension if the Indicative Match Price, before being adjusted based on Auction Collars, would be within the applicable Auction Collars and there is no Market Imbalance. This proposed change would implement the Participant's proposal that for Subsequent Extensions, if equilibrium of prices is reached, the Exchange would conduct the Trading Halt Auction immediately and would not extend the Trading Pause any further.
- Proposed Rule 7.35(e)(6)(C) would provide that the trading pause or halt would continue to be extended if there is an Impermissible Price at the Re-

[7] For NMS Stocks that are priced $3.00 and under, the price collar threshold would be $0.15.

[8] The term ''Indicative Match Price'' is defined in Rule 7.35(a)(8) to mean the best price at which the maximum volume of shares, including the non-displayed quantity of Reserve Orders, is tradable in the applicable auction, subject to Auction Collars. For purposes of proposed Rule 7.35(e)(5), the Indicative Match Price would not be calculated subject to Auction Collars. The term ''Auction Collars'' is defined in Rule 7.35(a)(10) to mean the price collar thresholds for the Indicative Match Price for the Core Open Auction, Trading Halt Auction, or Closing Auction. The term ''Market Imbalance'' is defined in Rule 7.35(a)(7)(B) means the imbalance of any buy (sell) Market Orders that are not matched for trading in the applicable auction.

Opening Time for a Subsequent Extension. This proposed rule text makes clear that a halt or pause would continue to be extended until a Trading Halt Auction can be conducted, as provided for in proposed Rule 7.35(e)(5).

Auction Collars: Proposed Rule 7.35(e)(7) would describe how Auction Collars would function for Trading Halt Auctions. As provided for in Rule 7.35(a)(10), Auction Collars mean the price collar thresholds for the Indicative Match Price for the Core Open Auction, Trading Halt Auction, or Closing Auction. Currently, the price collar thresholds for the Trading Halt Auction are 10% for securities with an Auction Reference Price of $25.00 or less, 5% for securities with an Auction Reference Price of greater than $25.00 and less than or equal to $50.00, or 3% for securities with an Auction Reference Price greater than $50.00. These price collar thresholds are based on the percentage parameters for determining a clearly erroneous execution under Rule 7.10(c) and are in effect until January 31, 2017.

The Exchange proposes that the price collar threshold for Auction Collars for securities with an Auction Reference Price above $3.00 would be the Auction Reference Price multiplied by five percent. The price collar threshold for securities with an Auction Reference Price $3.00 and below would be $0.15. This value would be defined as the ''Price Collar Threshold.'' For securities priced above $3.00, once calculated, the Price Collar Threshold would be applicable for each Subsequent Extension, described below. For securities with an Auction Reference Price of $3.00 and under, the Price Collar Threshold would be a static $0.15 for each Subsequent Extension. The Exchange believes that using a 5 percent multiplier for stocks priced $3.00 or less would result in too narrow of an Auction Collar. Similar to the LULD Plan, which provides for wider percentage parameters for stocks priced $3.00 or less, the Exchange proposes a wider Price Collar Threshold for stocks with an Auction Reference Price of $3.00 or less.

The Exchange believes that the proposed Price Collar Thresholds are designed to align the Auction Collars with the existing percentage parameters as specified in the LULD Plan. The Exchange proposes to use the single 5% threshold for all securities priced above $3.00 and $0.15 for all securities priced $3.00 or less, and not apply separate a [sic] percentage parameter based on the tiers specified in the LULD Plan, because the Exchange believes it would be simpler and more transparent. Moreover, the Exchange believes that because the proposed rule changes would provide for the widening of collars, and would prevent trades at an Impermissible Price, the specific size of the Price Collar Threshold becomes less meaningful. For example, if the Market Imbalance is so large that the proposed five percent price collar threshold is too narrow to permit a Trading Halt Auction, the proposed extensions and widening of Auction Collars, as described below, would provide for a measured manner by which the collars would be widened either to permit a trade at a permissible price or to attract additional offsetting interest. If, at a later date, the LULD Plan is amended and the applicable tiers and percentage parameters are adjusted, the Exchange will reevaluate the Price Collar Thresholds for Trading Halt Auctions and if they should be changed, will file a separate proposed rule change.

Because the Price Collar Thresholds for Auction Collars applicable to a Trading Halt Auction would be specified in proposed Rule 7.35(e)(7), the Exchange proposes to amend Rule 7.35(a)(10)(A) to delete the reference to Trading Halt Auctions. The Exchange further proposes to delete the following text: ''* The price collar thresholds specified in this paragraph applicable to Trading Halt Auctions are in effect until January 31, 2017.'' The Exchange believes that proposed Rule 7.35(e)(7) obviates the current price collar thresholds specified for Trading Halt Auctions, which were adopted on an interim basis pending the outcome of the review that resulted in the proposed amendments to the Plan and standardized trading practices among the Primary Listing Exchange for how to resume trading following a Trading Pause.

Trading Halt Auction Reference Price: Proposed Rule 7.35(e)(7)(A) would specify the Auction Reference Price that would be used for a Trading Halt Auction following a Trading Pause. As provided for in Rule 7.35(a)(8)(A), the Auction Reference Price for the Trading Halt Auction is the last consolidated round-lot price of that trade day, and if none, the prior day's Official Closing Price. As proposed, the Auction Reference Price for a Trading Halt Auction following a Trading Pause would be determined as follows: if the Limit State that preceded the Trading Pause was at the Lower (Upper) Price Band, the Auction Reference Price would be the Lower (Upper) Price Band. This proposed change implements the standardized enhancement to use the Limit State price as the Auction Reference Price for a Trading Halt Auction following a Trading Pause.

The Exchange proposes to make a related change to Rule 7.35(a)(8)(A) to amend the chart that specifies Auction Reference Prices for the Trading Halt Auction. As proposed, the Exchange would add the clause ''except as provided for in Rule 7.35(e)(7)(A)'' to specify that the Auction Reference Price would be determined under that subparagraph of the rule instead of the Auction Reference Price specified in Rule 7.35(a)(8)(A). For a Trading Halt Auction following a MWCB Halt or regulatory halt, the Auction Reference Price would continue to be as specified in Rule 7.35(a)(8)(A).

Initial Auction Collars: Proposed Rule 7.35(e)(7)(B) would specify the Auction Collars if a Trading Halt Auction is conducted at the initial Re-Opening Time. Currently, as provided for in Rule 7.35(a)(10)(A), the upper (lower) boundary of Auction Collars is the Auction Reference Price increased (decreased) by the specified percentage. As such, the price collar thresholds are applied on both sides of the Auction Reference Price. The Exchange proposes to modify how Auction Collars are calculated as proposed:

- Proposed Rule 7.35(e)(7)(B)(i) would specify how Auction Collars would be determined for a Trading Halt Auction following a Trading Pause. As proposed, if the Auction Reference Price is the Lower (Upper) Price Band, the lower (upper) Auction Collar would be the Auction Reference Price decreased (increased) by the Price Collar Threshold, rounded down to the nearest MPV,[9] and the upper (lower) Auction Collar would be the Upper (Lower) Price Band. This proposed rule implements the proposed standardized trading practice that, for Trading Halt Auctions following a Trading Pause, the Auction Collars should be widened only in the direction of the trading that invoked the Trading Pause. For example, if a Trading Pause is triggered following a Limit State at the Lower Price Band, this would indicate selling pressure in that NMS Stock. Accordingly, the proposed lower boundary Auction Collar would be widened by subtracting the Price Collar Threshold from the Auction Reference Price, *i.e.,* the Lower Price Band. To address the concept of mean reversion, *i.e.,* that prices may revert back to the mean or average price of the NMS Stock, and to avoid a security from trading outside of where it would have been permitted to trade before the

[9] *See* Rules 7.6 and 7.46 (specifying the minimum price variation (''MPV'') for quoting and entry of orders).

Trading Pause, the Exchange proposes that the Auction Collar on the opposite side of the trading pressure should be the Price Band in place before the Trading Pause was triggered. Taking the above example, the Upper Auction Collar would therefore be the Upper Price Band. This way, if during the trading pause, the selling pressure reverses and becomes buying pressure, the Auction Collars would not permit a trade higher than would have been permitted under the Price Bands before the Trading Pause.

• Proposed Rule 7.35(e)(7)(B)(ii) would specify how Auction Collars would be determined for a Trading Halt Auction following a MWCB Halt or regulatory halt. In this case, because there would not be a security-specific pricing direction reason for the halt, the Exchange proposes that the Price Collar Threshold would be applied on both sides of the Auction Reference Price. Accordingly, for stocks priced above $3.00, the upper (lower) boundary of the Auction Collar would be the Auction Reference Price (as defined in Rule 7.35(a)(8)(A)), plus (minus) the Auction Reference Price multiplied by 5%. For stocks priced $3.00 and under, the upper (lower) boundary of the Auction Collar would be the Auction Reference Price (as defined in Rule 7.35(a)(8)(A)), plus (minus) $0.15. For Trading Halt Auctions following a MWCB Halt or regulatory halt, if the Price Collar Threshold calculation results in a price that is not in the applicable MPV for the security, the Exchange proposes to round down to the nearest price in the applicable MPV.

Auction Collar for Extensions: Proposed Rule 7.35(e)(7)(C) would specify how the Exchange would adjust Auction Collars for each Extension. As proposed, the Auction Collar on the side of the Impermissible Price would be widened for each Extension. In other words, if the Indicative Match Price is below the lower Auction Collar for the initial Re-Opening Time or there is a sell Market Imbalance, the Exchange would widen only the lower Auction Collar. As further proposed, the Auction Collar on the opposite side of the Impermissible Price would remain the same as the last-calculated Auction Collar on that side. Thus, in the case of selling pressure that would result in an Auction Extension, the upper Auction Collar would remain as the last Upper Price Band.

• Proposed Rule 7.35(e)(7)(C)(i) would further provide that if the Impermissible Price is on the side of the Lower (Upper) Auction Collar, the last-calculated Lower (Upper) Auction Collar would be decreased (increased) by a Price Collar Threshold and the Upper (Lower) Auction Collar would stay the same.

• To address the concept of mean reversion, proposed Rule 7.35(e)(7)(C)(ii) would provide that if the side of the Impermissible Price changes from the Lower (Upper) Auction Collar to the Upper (Lower) Auction Collar, the last-calculated Upper (Lower) Auction Collar would be widened for that Extension and the last-calculated Lower (Upper) Auction Collar will remain the same. Therefore, if, during an Extension, the directional trading pressure switches from sell to buy, the upper Auction Collar would be widened, and the last-Lower Auction Collar would remain the same.

Proposed Rules 7.35(e)(8) and (9) would specify the Exchange's proposed handling of orders for a Trading Halt Auction, which are discussed in greater detail below.

Proposed Rule 7.35(e)(10) would specify what the Exchange would do if a Re-Opening Time would be in the last ten minutes of trading before the end of Core Trading Hours. The Participants are proposing to amend the Plan to provide that if an NMS Stock is in a Trading Pause during the last ten minutes of trading before the end of Regular Trading Hours, the Primary Listing Exchange would not reopen trading and would attempt to execute a closing transaction using its established closing procedures.[10] To implement this proposed amendment to the Plan, proposed Rule 7.35(e)(10) would provide that, if the Re-Opening Time for a Trading Halt Auction is in the last ten minutes of trading before the end of Core Trading Hours, the Exchange would not conduct a Trading Halt Auction in that security and would not transition to continuous trading.[11] Instead, the Exchange would remain paused or halted and would conduct a Closing Auction in such security as provided for in Rule 7.35(d).

In such circumstances, as specified in proposed Rule 7.35(e)(10)(A), MOO Orders, LOO Orders, and IO Orders (described below) entered during the pause or halt would not participate in the Closing Auction and would expire at the end of the Core Trading Session. The Exchange proposes to add this rule text to provide transparency to ETP Holders of how orders that are designated to participate in a Trading Halt Auction only would be handled if the Exchange transitions to a Closing Auction without conducting that Trading Halt Auction. The Exchange believes this proposed rule text would provide notice for ETP Holders to enter closing-only interest, *i.e.,* MOC or LOC Orders, to participate in the Closing Auction.

In addition, as specified in proposed Rule 7.35(e)(10)(B), the Auction Collars for the Closing Auction for such security would be the most recently widened Auction Collars for the Trading Halt Auction that did not occur. Currently, the Auction Collars for Closing Auctions are 5% for securities with an Auction Reference Price of $25.00 or less, 2% for securities with an Auction Reference Price of greater than $25.00 and less than or equal to $50.00, or 1% for securities with an Auction Reference Price greater than $50.00. The Exchange believes that if the Exchange goes directly from an unresolved Trading Pause, MWCB Halt, or regulatory halt in an NMS Stock to a Closing Auction, the narrower price collar thresholds applicable to the Closing Auction would result in Auction Collars that do not correlate to the trading condition for that NMS Stock.

The Exchange proposes to make a related amendment to Rule 7.35(a)(10)(A) to add the clause ''except as provided for in Rule 7.35(e)(10)(B)''. This proposed rule text makes clear that the price collar thresholds for a Closing Auction are defined in Rule 7.35(a)(10)(A), except as provided for in proposed Rule 7.35(e)(10)(B).

The Exchange proposes to amend Rule 7.10(a) to provide that ETP Holders may not request a review of a Trading Halt Auction under Rule 7.10(b), which specifies the procedures for an ETP Holder to request a review of an execution, as clearly erroneous. The Exchange believes that this proposed rule text would implement the proposed standardized trading practice that reopening auctions would not be eligible for review by ETP Holders as a clearly erroneous execution.[12]

Finally, the Exchange proposes to amend Rule 7.11 to delete obsolete rule text and conform the remaining rule text to the proposed amendments to the

[10] *See supra* note 6.

[11] Rule 7.12 provides that a MWCB Halt following a Level 1 Decline or Level 2 Decline will not be declared after 3:25 p.m. Eastern Time. However, if, as proposed, a MWCB Halt in an NMS Stock that was triggered at or before 3:25 p.m. Eastern Time is extended pursuant to proposed Rule 7.35(e)(5) to after 3:50 p.m. Eastern Time (or 12:50 p.m. Eastern Time in the case of an early scheduled close), the Exchange would not conduct a Trading Halt Auction in that NMS Stock.

[12] The Participants will be engaging in a more comprehensive review of Rule 7.10 in connection with amendments to the Plan relating to tiering of securities and applicable percentage parameters. The Exchange proposes to make this limited amendment to Rule 7.10 as an initial step to eliminating its clearly erroneous executions rules in their current form.

Plan, as described above. First, the Exchange proposes to amend Rule 7.11(b) to delete the text following the heading of Rule 7.11(b) and delete Rules 7.11(b)(1), (b)(1)(A)–(C), and (b)(3). This rule text governed how trading pauses were triggered before the Plan was implemented and is now obsolete. Second, the Exchange proposes that the text currently set forth in Rule 7.11(b)(2) would be moved to be the rule text for Rule 7.11(b). In moving this rule text, the Exchange proposes to delete the second substantive sentence of current Rule 7.11(b)(2) as inconsistent with the proposed amendments to the Plan, described above.[13] Third, the Exchange proposes to renumber current Rule 7.11(b)(4) as proposed Rule 7.11(b)(1) and amend this paragraph to add that the Exchange would notify the single plan processor if the Exchange is unable to reopen trading at the end of the Trading Pause due to a systems or technology issue, which is consistent with the proposed amendments to the Plan. Finally, the Exchange proposes to renumber current Rule 7.11(b)(5) as proposed Rule 7.11(b)(2) and amend the text to provide that if a primary listing market issues an Trading Pause, the Exchange would resume trading as provided for in Rule 7.18(a).[14] This proposed amendment is consistent with the proposed amendments to the Plan, described above.

Other Proposed Rule Changes

IO Order: The Exchange proposes to add a new order type, an Imbalance Only (''IO'') Order, that would be eligible to participate in Trading Halt Auctions only. The Exchange proposes to amend Rule 7.31(c), which specifies the Exchange's Auction-Only Order types, to add new subsection (5) to describe an IO Order. As proposed, an IO Order would be a Limit Order to buy (sell) that is to be traded only in a Trading Halt Auction.

Proposed Rule 7.31(c)(5)(A) would provide that an IO Order would be accepted only during a halt or pause, including any extensions. This proposed rule text is consistent with the Exchange's current rules that MOO or LOO Orders designated to participate in a Trading Halt Auction will be accepted only during the trading halt that precedes such Trading Halt Auction.[15]

Proposed Rule 7.31(c)(5)(B) would provide that an IO Order would participate in a Trading Halt Auction only if: (i) There is an imbalance in the security on the opposite side of the market from the IO Order after taking into account all other orders eligible to trade at the Indicative Match Price; and (ii) the limit price of the IO Order to buy (sell) would be at or above (below) the Indicative Match Price. Proposed Rule 7.31(c)(5)(C) would provide that the working price of an IO Order to buy (sell) would be adjusted to be equal to the Indicative Match Price, provided that the working price of the IO Order would not be higher (lower) than its limit price. Finally, proposed Rule 7.31(c)(5)(D) would provide that an IO Order that participates in a Trading Halt Auction would be ranked in time priority among IO Orders after all other orders eligible to participate in the auction have been allocated. The Exchange notes that the proposed IO Order is based in part on the Closing Offset (''CO'') Order offered by the New York Stock Exchange LLC (''NYSE'').[16]

For example, assume for a Trading Halt Auction that the lower boundary of an Auction Collar is $10.00. Assume further that after allocating all other orders eligible to participate in the Trading Halt Auction, there is a sell Total Imbalance of 10,000 shares and absent Auction Collars, the Indicative Match Price would be below $10.00. As provided for in Rule 7.35(a)(10)(B), once the Auction Collars are applied, the Indicative Match Price for that Trading Halt Auction would be $10.01 (*i.e.,* one MPV above the lower Auction Collar). Assume now there are seven IO Orders to buy, each for 2,000 shares, with limit prices of $10.00, $10.01, $10.02, $10.03, $10.04, $10.05 and $10.06, and they are entered in that order. In this scenario, the IO Order to buy with a limit price of $10.00 would not be eligible to participate, because the $10.01 Indicative Match Price is higher than the limit price of the order. The remaining six IO Orders to buy would be assigned a working price of $10.01. However, because the IO Order with a limit price of $10.06 was entered last in time, it would not participate in the Trading Halt Auction.

Auction Imbalance Freeze: The Exchange proposes to add an Auction Imbalance Freeze before a Trading Halt Auction. As defined in Rule 7.35(a)(3), the Auction Imbalance Freeze means the period that begins before the scheduled time for the Early Open Auction, Core Open Auction, or Closing Auction, as specified in paragraphs (b), (c), and (d) of Rule 7.35, and that ends once the Auction Processing Period begins. To effect the proposed rule change, the Exchange proposes to add a reference to Trading Halt Auction and Rule 7.35(e) to Rule 7.35(a)(3).

Proposed Rule 7.35(e)(8) would describe how the Trading Halt Auction Imbalance Freeze would function. As proposed, the Trading Halt Auction Imbalance Freeze would begin five seconds before the Re-Opening Time, including Re-Opening Times for each Extension. The Exchange proposes to use the same period of time for the Trading Halt Auction Imbalance Freeze, five seconds, as provided for in Rule 7.35(c)(3) for the Core Open Auction. Specifically, the Exchange believes that the proposed five-second time period strikes the appropriate balance for providing sufficient time for market participants to enter and cancel orders before the Trading Halt Auction while at the same time having a short period for any imbalance to stabilize before the auction is conducted. The rule would further provide that if a pause or halt is extended, the Trading Halt Auction Imbalance Freeze for the prior period would end, new orders and order instructions received during the prior period's Trading Halt Auction Imbalance Freeze would be processed, and the Exchange would accept new order entry and cancellation as provided for in Rule 7.18(c) until the next Trading Halt Auction Imbalance Freeze. In other words, if at the Re-Opening Time, the Exchange extends the Trading Pause for five minutes, the restrictions on order

[13] The sentence that the Exchange would delete provides that ''[i]n the event of a significant imbalance at the end of a Trading Pause, the Corporation may delay the re-opening of a security. The Exchange will issue a notification if it cannot resume trading for a reason other than a significant imbalance.''

[14] Rule 7.18(a) provides that if the UTP Listing Market declares a UTP Regulatory Halt, which includes a Trading Pause, the Exchange will halt trading until it receives the first Price Band in that security. Accordingly, following a Trading Pause declared by another Primary Listing Market, the Exchange already waits to receive Price Bands before it resumes trading in that UTP Security. The Exchange proposes to delete the current rule text in Rule 7.11(b)(5) that provides that the Exchange ''will pause trading in that security until trading has resumed on the primary listing market or notice has been received from the primary listing market that trading may resume. If the primary listing market does not reopen the security within 10 minutes of notification of a Trading Pause, the Corporation may resume trading the security.''

[15] *See* Rule 7.31(c)(1) and (2).

[16] *See* NYSE Rule 13(c)(1) (defining a CO Order as a day Limit Order to buy or sell as part of the closing transaction where the eligibility to participate in the closing transaction is contingent upon: (i) an imbalance in the security on the opposite side of the market from the CO Order; (ii) after taking into account all other types of interest eligible for execution at the closing price, there is still an imbalance in the security on the opposite side of the market from the CO Order; and (iii) the limit price of the CO Order being at or within the price of the closing transaction. CO Orders eligible to participate in the closing transaction are executed in time priority of receipt by NYSE systems, up to the size of the imbalance in the security, on the opposite side of the market from the CO Order. Any eligible CO Orders not executed due to trading halt (as defined in Rule NYSE 123D) or insufficient volume of the contra side imbalance will be cancelled.)

entry and cancellation from the prior freeze would no longer be in effect, and any order instructions that were not processed will be processed.

The proposed rule would further provide how order entry and cancellation during the Trading Halt Auction Imbalance Freeze would be processed:

• As proposed in Rule 7.35(e)(8)(A), MOO Orders and LOO Orders that are on the same side as the Imbalance, would flip the Imbalance, or would create a new Imbalance would be rejected. This proposed rule text is based on how MOC Orders and LOC Orders are processed during the Closing Auction Imbalance Freeze, as described in Rule 7.35(d)(2)(A).

• As proposed in Rule 7.35(e)(8)(B), Market Orders (other than MOO Orders) and Limit Orders would be accepted but would not be included in the calculation of the Indicative Match Price or the Trading Halt Auction Imbalance Information. Such orders would participate in the Trading Halt Auction only to offset the Imbalance that would be remaining after all orders entered before the Trading Halt Auction Imbalance Freeze, including the non-display quantity of Reserve Orders, are allocated in the Trading Halt Auction, and would be allocated in price-time priority under Rule 7.36(c)–(g) consistent with the priority ranking associated with each order and ahead of any IO Orders. This proposed rule text is based on how [sic] Market Orders (other than MOO Orders) and Limit Orders that are entered during the Core Open Auction Imbalance Freeze, as described in Rule 7.35(c)(3)(B). As such, these orders would participate in the Trading Halt Auction only to offset the final Imbalance for the auction. Such orders would be ranked in price-time priority after all other orders, except for IO Orders, have been allocated. Because the Exchange would be accepting IO Orders for the Trading Halt Auction and because IO Orders do not participate until all other eligible interest has been allocated, the Exchange proposes a substantive difference from the rule governing the Core Open Auction to address how IO Orders would be processed relative to Market Orders (other than MOO Orders) or Limit Orders entered during the Trading Halt Auction Imbalance Freeze. As proposed, IO Orders would not be allocated until Market Orders (other than MOO Orders) and Limit Orders entered during the Trading Halt Auction Imbalance Freeze have been allocated.

• Proposed Rule 7.35(e)(8)(C) would provide that requests to cancel and requests to cancel and replace Market Orders, LOO Orders, Limit Orders, and IO Orders would be accepted but not processed until after the Trading Halt Auction concludes, as provided for in Rule 7.35(h). This proposed rule text is based on Rule 7.35(c)(3)(C) governing which order instructions will be accepted but not processed during the Core Open Auction Imbalance Freeze. The Exchange proposes a substantive difference to reference how requests to cancel IO Orders would be processed if received during the freeze period.

• Finally, proposed Rule 7.35(e)(8)(D) would provide that all other order instructions would be accepted. This proposed rule text is based on Rules 7.35(c)(3)(D) and (d)(2)(C), without any differences.

Unexecuted Limit Orders: The Exchange proposes to specify how it would process Limit Orders that do not participate in the Trading Halt Auction. As discussed above, an Impermissible Price would occur if there is a Market Imbalance or if the Indicative Match Price were outside the specified Price Collar Thresholds. However, if the Indicative Match Price were within the specified Price Collar Thresholds and there is no Market Imbalance, it is still possible to have an imbalance of Limit Orders within the Auction Collars. In such case, the Exchange proposes to transition such unexecuted Limit Orders to continuous trading. The Exchange believes that because such Limit Orders would have a limit price within the Auction Collars, having such Limit Orders transition to continuous trading would not have significant pricing impact on post-Trading Halt Auction trading. Accordingly, proposed Rule 7.35(e)(9) would provide that any Limit Orders that were eligible to participate in the Trading Halt Auction, but did not participate, would transition to continuous trading as provided for in paragraph (h) of this Rule.

Auction Imbalance Information: The Exchange proposes to enhance the Auction Imbalance Information. Rule 7.35(a)(4) defines Auction Imbalance Information as the information that is disseminated by the Exchange for an auction and includes, if applicable, the Total Imbalance, Market Imbalance, Indicative Match Price, and Matched Volume.[17] The Exchange proposes to enhance the Auction Imbalance Information to include the following additional information: Auction Reference Price, Auction Collar, Book Clearing Price, Far Clearing Price, Imbalance Freeze Indicator, and Auction Indicator. The Auction Reference Price is defined in Rule 7.35(a)(8)(A) and proposed Rule 7.35(e)(7)(A), described above. The Auction Collar is defined in Rule 7.35(a)(10) and proposed Rules 7.35(e)(7) and (e)(10)(B), described above. The Exchange proposes to define the additional terms as follows:

• Proposed Rule 7.35(a)(11) would define the term ''Book Clearing Price'' to mean the price at which all interest eligible to participate in an auction could be traded if not subject to an Auction Collar. The rule would further provide that the Book Clearing Price would be zero if a sell (buy) imbalance cannot be filled by any buy (sell) orders. For example, if there are only sell orders and no buy orders, the Book Clearing Price would be zero.

• Proposed Rule 7.35(a)(12) would define the term ''Far Clearing Price'' to mean the price at which Auction-Only Orders could be traded within the Auction Collar. Auction-Only Orders are defined in Rule 7.31(c).

• Proposed Rule 7.35(a)(13) would define the term ''Auction Indicator'' to mean an indicator of whether an auction could be conducted, based on the applicable Auction Collar and Imbalance. This information would be relevant for the Trading Halt Auction and provide transparency regarding whether a Trading Pause, MWCB Halt, or regulatory halt would be eligible to be conducted. If an Auction Indicator is ''no,'' market participants would be on notice that submitting offsetting interest may reduce the possibility of the Exchange extending a Trading Halt Auction.

• Proposed Rule 7.35(a)(14) would define the term ''Imbalance Freeze Indicator'' to mean an indicator of whether a security is currently in an Auction Imbalance Freeze. This indicator would put market participants on notice of whether there are order entry and cancellation restrictions in place at any given time before an auction.

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The Exchange proposes to implement the proposed rule change following the Commission's approval of Amendment 12 to the Plan. The Exchange will announce the implementation date via Trader Update to be issued after this proposed rule change is approved.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the

[17] *See* Rule 7.35(a)(7) (defining the terms Total Imbalance and Market Imbalance); 7.35(a)(8) (defining the term Indicative Match Price); and 7.35(a)(9) (defining the term Matched Volume).

''Act''),[18] in general, and furthers the objectives of Section 6(b)(5),[19] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes the proposed changes would 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, because they are designed, together with the proposed amendments to the Plan, to address the issues experienced on August 24, 2015 by reducing the number of repeat Trading Pauses in a single NMS Stock. The proposed Plan amendments are an essential component to Participants' goal of more standardized processes across Primary Listing Exchanges in reopening trading following a Trading Pause, and facilitates the production of an equilibrium Reopening Price by centralizing the reopening process through the Primary Listing Exchange, which would also improve the accuracy of the reopening Price Bands. The proposed Plan amendments support this initiative by requiring trading centers to wait to resume trading following Trading Pause until there is a Reopening Price.

This proposed rule change further supports this initiative by proposing uniform trading practices for reopening trading following a Trading Pause. The Exchange believes that the proposed standardized approach for how the Primary Listing Exchanges would conduct certain aspects of an automated reopening following a Trading Pause would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide certainty for market participants regarding how a security would reopen following a Trading Pause, regardless of the listing exchange. The Exchange further believes that the proposed changes would remove impediments to and perfect the mechanism of a free and open market and a national market system and protect investors and the public interest because the goal of the proposed changes is to ensure that all Market Order interest could be satisfied in an automated reopening auction while at the same time reducing the potential for multiple Trading Pauses in a single security due to a large order imbalance.

The Exchange further believes that the standardized proposal to extend a Trading Pause an additional five minutes would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide additional time to attract offsetting liquidity. If at the end of such extension, Market Orders still cannot be satisfied within price collar thresholds or if the reopening auction would be priced outside of the applicable price collar thresholds, the Primary Listing Exchange would extend the Trading Pause an additional five minutes, which the Exchange believes would further protect investors and the public interest by reducing the potential for significant price disparity in post-auction trading, which could otherwise trigger another Trading Pause. With each such extension, the Exchange believes that widening the price collar threshold on the side of the market on which there is buying or selling pressure would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide additional time to attract offsetting interest while at the same time addressing that an imbalance may not be resolved within the prior Auction Collars.

With respect to price collar thresholds, the Exchange believes that using the price of the limit state that preceded the Trading Pause, *i.e.,* either the Lower or Upper Price Band price, would better reflect the most recent price of the security and therefore should be used as the reference price for determining the Auction Collars for such Trading Halt Auction. The Exchange believes that widening Auction Collars only in the direction of the imbalance would address issues relating to the concept of mean reversion, which would protect investors and the public interest by reducing the potential for wide price swings following a Trading Halt Auction.

The Exchange believes that applying the proposed changes to its Trading Halt Auctions not only following a Trading Pause, but also following a MWCB Halt or regulatory halt, would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would promote consistency in how the Exchange conducts its Trading Halt Auctions, thus reducing complexity in the marketplace.

The Exchange believes that precluding ETP Holders from requesting a review of a Trading Halt Auction as a clearly erroneous execution would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed new procedures for reopening trading following a Trading Pause would reduce the possibility that an order(s) from an ETP Holder(s) caused a Trading Halt Auction to be clearly erroneous. Specifically, the Exchange believes that the proposed standardized procedures for reopening trading following a Trading Pause incorporates a methodology that allows for widened collars, which may result in a reopening price away from prior trading prices, but which reopening price would be a result of a measured and transparent process that eliminates the potential that such trade would be considered erroneous.

The Exchange believes that the proposed amendments to Rule 7.11 would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed changes would remove obsolete rule text and amend the remaining rule text to conform to the proposed amendments to the Plan, as described above.

The Exchange believes that the proposed rule change to add an IO Order for Trading Halt Auctions would further remove impediments to and perfect the mechanism of a free and open market and a national market system because such order type is designed to attract offsetting interest that would participate in the Trading Halt Auction. The Exchange believes that offering such order type would provide an option for market participants that are willing to participate in an auction to offset an imbalance, but do not want such orders to participate in continuous trading. The proposed order type is based in part on the CO Order offered by the NYSE, with the main difference being that the IO Order would be offered for the Trading Halt Auction only, whereas the CO Order on NYSE is available for the closing transaction only. However, in function, the two orders are designed with the same purpose—to reduce the imbalance to assist in achieving pricing equilibrium.

The Exchange further believes that the proposed rule change to add a Trading Halt Auction Imbalance Freeze would remove impediments to and perfect the mechanism of a free and open market and a national market system because it

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

would provide market participants with a brief period to assess the imbalance going into a Trading Halt Auction. During such time, order entry and cancellation would be revised in a manner designed to reduce the last-published imbalance. The proposed mechanism for the Trading Halt Auction Imbalance Freeze is not novel, as it is based in part on the existing Core Open Auction Imbalance Freeze, *i.e.,* the length of the Auction Imbalance Freeze, and the Closing Auction Imbalance Freeze, *i.e.,* how new orders and order instructions would be processed, with a proposed substantive difference to address how the proposed new IO Order type would be processed during the Auction Imbalance Freeze.

The Exchange believes that the proposed manner of how it would process Limit Orders that do not participate in a Trading Halt Auction, but have a limit price within the applicable Auction Collars, in that such orders would roll into continuous trading, would remove impediments to and perfect the mechanism of a free and open market and a national market system. Such Limit Orders likely would not impact the pricing of post-auction trading and trigger another Trading Pause because the limit price of such orders would be within the same price range that trading would otherwise be permitted.

Finally, the Exchange believes that the proposed amendments to enhance the Auction Imbalance Information to add the Auction Reference Price, the Auction Collar, the Book Clearing Price, the Far Clearing Price, the Imbalance Freeze Indicator, and the Auction Indicator would remove impediments to and perfect the mechanism of a free and open market and a national market system because they are designed to promote additional transparency regarding the Exchange's auctions by providing additional detail regarding what Auction Reference Price would be used in an auction, the Auction Collars applicable to such auction, additional information about potential pricing for such auction, and the status of the applicable auction.

Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change is not designed to address any competitive issues, but rather, to achieve the Participants' goal of more standardized processes across Primary Listing Exchanges in reopening trading following a Trading Pause, and facilitates the production of an equilibrium Reopening Price by centralizing the reopening process through the Primary Listing Exchange, which would also improve the accuracy of the reopening Price Bands. The Exchange believes that the proposed rule change reduces the burden on competition for market participants because it promotes a transparent and consistent process for reopening trading following a Trading Pause regardless of where a security may be listed. The Exchange further believes that the proposed rule change would not impose any burden on competition because they are designed to increase transparency regarding the Exchange's Trading Halt Auction process while at the same time increasing the ability for offsetting interest to participate in an auction, which would assist in achieving pricing equilibrium for such an auction.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period 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 the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2016–130 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2016–130. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca-2016–130 and should be submitted on or before November 14, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25572 Filed 10–21–16; 8:45 am]

BILLING CODE 8011–01–P

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79116; File No. SR–FINRA–2016–027]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Reporting of Transactions in U.S. Treasury Securities to TRACE

October 18, 2016.

I. Introduction

On July 18, 2016, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to require FINRA members to report secondary market transactions in U.S. Treasury securities to the Trade Reporting and Compliance Engine (''TRACE''). The proposed rule change was published for comment in the **Federal Register** on July 25, 2016.[3] The Commission received 12 comments in response to the proposed rule change.[4] On September 6, 2016, FINRA consented to an extension of time for the Commission to act on the proposal until October 21, 2016.[5] FINRA responded to the comments and filed Amendment No. 1 to the proposal on September 23, 2016.[6] The Commission is publishing this notice to solicit comment on Amendment No. 1 to the proposal from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Background

As described in further detail below, FINRA has proposed to require its members to report transactions in U.S. Treasury securities to TRACE. At this time, FINRA is not proposing to publicly disseminate any reports of transactions in U.S. Treasury securities, nor is FINRA proposing at this time to impose any fees on its members for the reporting of such transactions.

A. Origin of the Proposal

On the morning of October 15, 2014, the market for U.S. Treasury securities, futures, and other closely related instruments experienced an unusually high level of volatility. Subsequently, an interagency working group consisting of representatives from the Commission, the Department of the Treasury (the ''Treasury Department''), the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, and the Commodity Futures Trading Commission (''CFTC'') issued a report (''Joint Staff Report'') analyzing the structure of the U.S. Treasury market and the conditions that contributed to the market volatility on October 15.[7] The Joint Staff Report proposed several next steps in understanding the U.S. Treasury market, including an assessment of the data about the U.S. Treasury market available to the public and to the official sector.[8]

Following the publication of the Joint Staff Report, the Treasury Department published a Request for Information (''RFI'') seeking public comment on structural changes in the U.S. Treasury market and their implications for the overall functioning of this market, including considerations with respect to more comprehensive official sector access to Treasury securities market data.[9] The RFI Notice observed that ''[t]he official sector does not currently receive any regular reporting of Treasury cash market transactions'' and that ''[t]he need for more comprehensive official sector access to data, particularly with respect to U.S. Treasury cash market activity, is clear.'' [10]

The Treasury Department received 52 comment letters in response to the RFI Notice.[11] Following a review of these comments, the Treasury Department and the Commission announced that, as part of their efforts to obtain better information about the U.S. Treasury market for oversight purposes, the agencies had requested FINRA to consider a proposal to require its members to report transactions in U.S. Treasury securities to a centralized repository.[12]

B. Definitions and Scope of Proposal

The TRACE reporting rules apply to ''Reportable TRACE Transactions,'' as defined in FINRA Rule 6710(c), involving ''TRACE-Eligible Securities,'' as defined in FINRA Rule 6710(a). Because the current definition of ''TRACE-Eligible Security'' specifically excludes a ''U.S. Treasury Security,'' FINRA members currently are not required to report any transactions in U.S. Treasury Securities to TRACE. The proposal would amend the definition of ''TRACE-Eligible Security'' to include a U.S. Treasury Security, which would have the effect of rendering a transaction in a U.S. Treasury Security a Reportable TRACE Transaction.

The proposal would revise the existing definition of ''U.S. Treasury Security'' in FINRA Rule 6710(p) to include separate principal and interest components of a U.S. Treasury Security that have been separated pursuant to the

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78359 (July 19, 2016), 81 FR 48465 (''Notice'').

[4] *See* letters to Brent J. Fields, Secretary, Commission, from Mike Nicholas, Chief Executive Office, Bond Dealers of America (''BDA''), dated August 15, 2016 (''BDA Letter''); Adam C. Cooper, Senior Managing Director and Chief Legal Officer, Citadel LLC (''Citadel''), dated August 15, 2016 (''Citadel Letter''); Shane O'Cuinn, Managing Director, Credit Suisse, dated August 15, 2016 (''Credit Suisse Letter''); Marc R. Bryant, Senior Vice President and Deputy General Counsel, Fidelity Investments (''Fidelity''), dated August 15, 2016 (''Fidelity Letter''); David W. Blass, General Counsel, Investment Company Institute (''ICI''), dated August 15, 2016 (''ICI Letter''); John A. McCarthy, General Counsel, KCG Holdings, Inc. (''KCG''), dated August 15, 2016 (''KCG Letter''); Robert Toomey, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (''SIFMA'') and Timothy W. Cameron, Head, Asset Management Group, Head, Asset Management Group, SIFMA, dated August 15, 2016 (''SIFMA Letter''); and Douglas Friedman, General Counsel, Tradeweb Markets LLC (''Tradeweb''), dated August 15, 2016 (''Tradeweb Letter''); and letters to Robert W. Errett, Deputy Secretary, Commission, from Mary Lou Von Kaenel, Managing Director, Financial Information Forum (''FIF''), dated August 15, 2016 (''FIF Letter''); Manisha Kimmel, Chief Regulatory Officer, Wealth Management, Thomson Reuters, dated August 15, 2016 (''Thomson Reuters Letter''); and John Shay, Senior Vice President, Virtu Financial, Inc. (''Virtu''), dated August 15, 2016 (''Virtu Letter''); and letter from Jane Carson, received on August 5, 2016 (''Carson Letter'').

[5] *See* letter from Brant K. Brown, Associate General Counsel, FINRA, to Katherine England, Assistant Director, Division of Trading and Markets, Commission, dated September 6, 2016.

[6] *See* letter from Brant Brown, Associate General Counsel, FINRA, to Brent J. Fields, Secretary, Commission, dated September 23, 2016 (''FINRA Response''). Amendment No. 1 revised the proposal to indicate that the ''.S'' modifier must be used if a transaction is part of a series of transactions and may not be priced based on the current market. FINRA posted a copy of its Amendment No. 1 on its Web site when if filed the amendment with the Commission. Amendment No. 1 is also available at *https://www.sec.gov/comments/sr-finra-2016-027/finra2016027-14.pdf.*

[7] *See* Treasury Department *et al., Joint Staff Report: The U.S. Treasury Market on October 15, 2014* (July 13, 2015), *https://www.sec.gov/reportspubs/special-studies/treasury-market-volatility-10-14-2014-joint-report.pdf.*

[8] *See* Joint Staff Report at 6–7.

[9] *See* Notice Seeking Public Comment on the Evolution of the Treasury Market Structure, 81 FR 3928, 3931 (January 22, 2016) (''RFI Notice'').

[10] *Id.* at 3931.

[11] *See https://www.regulations.gov/document?D=TREAS-DO-2015-0013-0001.*

[12] *See* Press Release, Treasury Department, Statement on Trade Reporting in the U.S. Treasury Market (May 16, 2016), *https://www.treasury.gov/press-center/press-releases/Pages/jl0457.aspx* (''Treasury Press Release''). *See also* Joint Press Release, Treasury Department and Commission, Statement on Trade Reporting in the U.S. Treasury Market (May 16, 2016), *https://www.sec.gov/news/pressrelease/2016-90.html* (''May 16 Joint Press Release'').

Separate Trading of Registered Interest and Principal of Securities (STRIPS) program operated by the Treasury Department.[13] The proposal also would revise several defined terms to ensure that the definition of ''TRACE-Eligible Security'' encompasses Treasury bills, which have maturities of one year or less. The existing definition of ''TRACE-Eligible Security'' in FINRA Rule 6710(a) excludes a Money Market Instrument. FINRA Rule 6710(o) currently defines ''Money Market Instrument'' to include, among other things, a debt security that at issuance has a maturity of one calendar year or less. A Treasury bill with a maturity of one year or less would fall within the current definition of ''Money Market Instrument'' and, accordingly, would not be a TRACE-Eligible Security. To provide for the reporting of transactions in U.S. Treasury bills, the proposal would revise the current definition of ''Money Market Instrument'' to exclude U.S. Treasury Securities. Thus, the definition of ''TRACE-Eligible Security'' would include Treasury bills, as well as Treasury bonds, notes, and the separate principal and interest components of a U.S. Treasury Security that have been separated pursuant to the STRIPS program.

In addition, the proposal would revise the definition of ''U.S. Treasury Security'' to exclude savings bonds. FINRA notes that savings bonds issued by the Treasury Department are generally non-transferable and are therefore not marketable securities purchased and sold in the secondary market. Therefore, FINRA did not believe that it was appropriate to include savings bonds within the scope of this proposal.[14]

Under the proposal, any transaction in a U.S. Treasury Security is a ''Reportable TRACE Transaction'' and would therefore be subject to TRACE reporting requirements, unless it fell within an enumerated exception.[15] FINRA notes that all U.S. Treasury Securities that, under the proposal, would be reportable to TRACE are offered to the public by the Treasury Department through an auction process.[16] When-issued trading in U.S. Treasury Securities can begin before the auction takes place after the Treasury Department announces an auction.[17] When-issued transactions in U.S. Treasury Securities currently are not reported to the Treasury Department.[18] Under the proposal, when-issued transactions would be reportable to TRACE. In connection with this reporting requirement, FINRA has proposed new definitions of ''Auction'' and ''When-Issued Transaction.'' [19]

Existing FINRA Rule 6730(e) enumerates several transactions and transfers of TRACE-Eligible Securities that are not reportable to TRACE. The proposal would add two types of transactions to the list in FINRA Rule 6730(e). First, FINRA Rule 6730(e) would be expanded to include bona fide repurchase and reverse repurchase transactions involving TRACE-Eligible Securities. FINRA notes that, although repurchase and reverse repurchase transactions are structured as purchases and sales, the transfer of securities effectuated as part of these transactions is not made as the result of an investment decision, but is more akin to serving as collateral pledged as part of a secured financing.[20] Consequently, repurchase and reverse repurchase transactions are, according to FINRA, economically equivalent to financings, and the pricing components of these transactions are typically not the market value of the securities.[21] For these reasons, FINRA historically has taken the position that repurchase and reverse repurchase transactions should not be reported to TRACE.[22]

Second, FINRA Rule 6730(e) would be expanded to include Auction Transactions, which proposed FINRA Rule 6710(gg) would define as ''the purchase of a U.S. Treasury Security in an Auction.'' FINRA asserts that the Treasury Department maintains transaction data for Auction Transactions and that this data is readily accessible to regulators.[23] Accordingly, FINRA believes that TRACE reporting of these transactions would be duplicative and of little additional benefit to regulators.[24]

C. Reporting Obligations

As is currently the case with all TRACE reporting obligations, any FINRA member that is a ''Party to a Transaction'' in a TRACE-Eligible Security is required to report the transaction.[25] Thus, by amending the definition of ''TRACE-Eligible Security'' in the manner described above, FINRA would require members to report transactions in U.S. Treasury Securities to TRACE. If both counterparties are FINRA members, both would have the duty to report.[26]

Under the proposal, a transaction in a U.S. Treasury Security would have to be reported on a same-day or next-day basis, depending on the time of execution.[27] FINRA states that it is proposing this reporting requirement, rather than a more immediate reporting requirement, because FINRA is not

[13] Although trading a principal or interest component of a U.S. Treasury Security that has been separated under the STRIPS program would constitute a Reportable TRACE Transaction, the act of separating or reconstituting the components of a U.S. Treasury Security under the STRIPS program would not constitute a Reportable TRACE Transaction. This is because, for purposes of the trade reporting rules, FINRA considers a ''trade'' or a ''transaction'' to entail a change of beneficial ownership between parties. *See, e.g.,* Securities Exchange Act Release No. 74482 (March 11, 2015), 80 FR 13940, 13941 (March 17, 2015) (order approving File No. SR–FINRA–2014–050) (noting that, in the context of TRACE reporting, ''[b]ecause the transaction between the member and its non-member affiliate represents a change in beneficial ownership between different legal entities, it is a reportable transaction and is publicly disseminated under the current rule''); Trade Reporting Frequently Asked Questions, Q100.4, *http://www.finra.org/industry/trade-reporting-faq#100* (defining ''trade'' and ''transaction'' for purposes of the equity trade reporting rules as a change in beneficial ownership). *See* Notice, 81 FR at 48467. FINRA has proposed new Supplementary Material .05 to FINRA Rule 6730 to address the reporting obligation associated with this process.

[14] *See* Notice, 81 FR at 48466.

[15] *See id.* at 48467.

[16] *See id.*

[17] *See id.* When-issued trading of Treasury securities, *i.e.,* the trading of forward contracts with a delivery date after the securities are issued, begins on the date of the announcement of a Treasury auction and continues after the auction takes place, up until the issue date. Prior to an auction, when-issued securities are quoted for trading on a yield basis because a coupon is not determined until after the auction is completed. After the auction, the securities are quoted on a price basis.

[18] *See id.*

[19] *See* proposed FINRA Rules 6710(ff) (defining ''Auction'') and 6710(hh) (defining ''When-Issued Transaction'').

[20] *See* Notice, 81 FR at 48467.

[21] *See id.*

[22] *See id. See also* Reporting of Corporate and Agencies Debt Frequently Asked Questions, Question 4.6, *http://www.finra.org/industry/faq-reporting-corporate-and-agencies-debt-frequently-asked-questions-faq.*

[23] *See* Notice, 81 FR at 48467.

[24] *See id.*

[25] *See id. See also* FINRA Rules 6730(a) and 6730(b)(1).

[26] *See* Notice, 81 FR at 48467.

[27] *See* proposed FINRA Rule 6730(a)(4). *See also* Notice, 81 FR at 48467. Under proposed FINRA Rule 6730(a)(4), a Reportable TRACE Transaction in a U.S. Treasury Security executed on a business day at or after 12:00:00 a.m. Eastern Time through 5:00:00 p.m. Eastern Time would have to be reported the same day during TRACE System Hours. A transaction executed on a business day after 5:00:00 p.m. Eastern Time but before the TRACE system closes would have to be reported no later than the next business day (T+1) during TRACE System Hours, and, if reported on T+1, would have to be designated ''as/of'' and include the date of execution. A transaction executed on a business day at or after 6:30:00 p.m. Eastern Time through 11:59:59 p.m. Eastern Time—or on a Saturday, a Sunday, a federal or religious holiday, or other day on which the TRACE system is not open at any time during that day (determined using Eastern Time)—would have to be reported the next business day (T+1) during TRACE System Hours, designated ''as/of,'' and include the date of execution. *See also* FINRA Rule 6710(t) (defining ''TRACE System Hours'').

currently proposing to publicly disseminate any trade-level information regarding transactions in U.S. Treasury Securities.[28]

FINRA Rule 6730(c) lists the specific transaction information that a member must report to TRACE for each Reportable TRACE Transaction.[29] These existing requirements generally would apply to Reportable TRACE Transactions in U.S. Treasury Securities but with certain modifications to clarify the reporting of certain information for transactions involving U.S. Treasury Securities.[30] First, the proposal would amend FINRA Rule 6730(c)(3) to indicate that a member must report yield in lieu of price for a When-Issued Transaction because when-issued trading is based on yield rather than on price as a percentage of face or par value.[31]

Second, the proposal would amend FINRA Rule 6730(d)(1) to specify that (1) for a When-Issued Transaction conducted on a principal basis, the reported yield must include the mark-up or mark-down; and (2) for a When Issued Transaction conducted on an agency basis, the reported yield must exclude the commission and the member must report the total dollar amount of any commission separately.[32]

Third, the proposal would add new Supplementary Material .04 to FINRA Rule 6730 to specify that, when reporting a transaction in a U.S. Treasury Security executed electronically, a member would have to report the time of execution to the finest increment of time captured in the member's system (*e.g.,* millisecond or microsecond), but at a minimum, in increments of seconds.[33] FINRA noted that the proposal would not require members to update their systems to comply with a finer time increment, but to report the time of execution only in the same time increment captured by the member's system.[34] FINRA also noted that a significant portion of the trading in the U.S. Treasury cash market occurs on electronic platforms, many of which capture timestamps in sub-second increments.[35]

Fourth, the proposal would add new FINRA Rule 6730(d)(4)(G) to implement a new trade indicator and two new trade modifiers that are specific to transactions in U.S. Treasury Securities. FINRA states that a new trade indicator for When-Issued Transactions would allow FINRA to readily determine whether a price is being reported based on a percentage of face or par value or whether the member is reporting the yield, as required for When-Issued Transactions.[36] This indicator also would be used to validate a transaction in a U.S. Treasury Security reported with an execution date before the auction for the security has taken place.[37] Because transactions in U.S. Treasury Securities often are executed as part of larger trading strategies, the proposal also would add two new modifiers for these transactions.[38] Proposed FINRA Rule 6730(d)(4)(G)(ii)(a) would require a member to add a ''.B'' modifier to the trade report for a transaction that is part of a series of transactions in which at least one involves a futures contract.[39] Proposed FINRA Rule 6730(d)(4)(G)(ii)(b) would require a member to add a ''.S'' modifier if a transaction is part of a series of transactions and might not be priced based on the current market.[40] According to FINRA, the ''.B'' and ''.S'' modifiers would allow FINRA to better understand and evaluate execution prices of transactions in U.S. Treasury Securities that otherwise might appear aberrant, thus potentially reducing the number of false positives generated through automated surveillance mechanisms that include the price as part of the surveillance pattern.[41]

D. Additional Changes

The proposal would amend FINRA Rule 6750(b) to add U.S. Treasury Securities to the list of transaction types for which transaction information will not be disseminated. The proposal also would amend FINRA Rule 0150 to add the FINRA Rule 6700 series to the list of FINRA rules that apply to exempted securities, excluding municipal securities. Finally, FINRA has proposed to amend two provisions in its fee rules to reflect that, initially, FINRA will not charge fees for transactions in U.S. Treasury Securities reported to TRACE. First, Section 1(b)(2) of Schedule A to the FINRA By-Laws would be revised to exclude transactions in U.S. Treasury Securities from the Trading Activity Fee. Second, FINRA Rule 7730(b) would be revised to exclude transactions in U.S. Treasury Securities from the TRACE transaction reporting fees.[42]

E. Effective Date of Proposed Rule Change

FINRA has represented that it will announce the effective date of the proposed rule change and the specific implementation dates in a *Regulatory Notice* to be published no later than 90 days following Commission approval of the proposal, and that the effective date

[28] *See* Notice, 81 FR at 48467.

[29] FINRA Rule 6730(c) requires the appropriate member to report the following information for each Reportable TRACE Transaction: (1) The CUSIP number or, if a CUSIP number is not available at the Time of Execution, a similar numeric identifier or a FINRA symbol; (2) the size (volume) of the transaction, as required by Rule 6730(d)(2); (3) the price of the transaction (or the elements necessary to calculate price, which are contract amount and accrued interest) as required by Rule 6730(d)(1); (4) a symbol indicating whether the transaction is a buy or a sell; (5) the date of Trade Execution (for ''as/of'' trades only); (6) the contra-party's identifier (MPID, customer, or a non-member affiliate, as applicable); (7) capacity—Principal or Agent (with riskless principal reported as principal); (8) the time of execution; (9) reporting side executing broker as ''give-up'' (if any); (10) contra side Introducing Broker in case of ''give-up'' trade; (11) the commission (total dollar amount); (12) the date of settlement; (13) if the member is reporting a transaction that occurred on an ATS pursuant to FINRA Rule 6732, the ATS's separate MPID obtained in compliance with FINRA Rule 6720(c); and (14) such trade modifiers as required by either the TRACE rules or the TRACE users' guide.

[30] *See* Notice, 81 FR at 48468.

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *See id.* FINRA noted that the rules governing the trade reporting of equity securities require a member to report time to the millisecond if the member captures time to that level of granularity. *See id.;* FINRA Rule 6380A, Supplementary Material .04; FINRA Rule 6380B, Supplementary Material .04; FINRA Rule 6622, Supplementary Material .04. *See also* FINRA Regulatory Notice 14–21 at 3 (May 2014).

[35] *See* Notice, 81 FR at 48468.

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] *See id.*

[40] FINRA Rule 6730(d)(4)(G)(ii)(b), as originally proposed, would have required use of the ''.S'' modifier ''if the transaction is part of a series of transactions where at least one of the transactions is executed at a pre-determined fixed price *or would otherwise result in the transaction being executed away from the current market*'' (emphasis added). One commenter stated that this formulation suggests that only transactions executed away from the market should be assigned the ''.S'' modifier. *See* SIFMA Letter at 7. The commenter recommended, instead, that the ''.S'' modifier apply to any transaction that is part of a series, regardless of whether one or more of the legs of the trade is, in fact, away from the current market. *See id.* FINRA agreed that the ''.S'' modifier should be utilized whenever a transaction is part of a series and therefore could be, but need not be, priced away from the market. Therefore, in Amendment No. 1, FINRA revised proposed Rule 6730(d)(4)(G)(ii)(b) to require use of the ''.S'' modifier if a transaction ''is part of a series of transactions *and may not be priced based on the current market*'' (emphasis added). FINRA expressed the view that Amendment No. 1 should reduce compliance burdens because a member would not be required to assess whether a particular transaction was, in fact, priced away from the market at the time of execution when attaching the ''.S'' modifier. *See* FINRA Response at 9.

[41] *See* Notice, 81 FR at 48468.

[42] FINRA states that, because it will incur costs to expand the TRACE system and to enhance its examination and surveillance efforts to monitor members' trading activity in U.S. Treasury Securities, FINRA is considering the appropriate long-term funding approach for the program and will analyze potential fee structures once it has more data relating to the size and volume of U.S. Treasury Security reporting. *See id.* at 48469.

will be no later than 365 days following Commission approval.[43] FINRA anticipates staggering the implementation dates so that the general reporting requirement is implemented before members are required to include the ''.B'' and ''.S'' trade modifiers.[44]

III. Summary of Comments and FINRA's Response

The Commission received 12 comments regarding the proposed rule change.[45] Seven commenters expressed support for the proposal.[46] Several commenters supported the goals of the proposal but argued that regulatory reporting requirements should be expanded to other Treasury market participants that are not FINRA members.[47] Certain of these commenters argued that transaction information provided only by FINRA-member reporting would provide regulators with an incomplete view of the U.S. Treasury market.[48] Other commenters noted the disproportionate impact of the proposal on FINRA members and the potential to place FINRA members at a competitive disadvantage vis-à-vis other market participants.[49]

FINRA agreed that the proposal would not capture the entire universe of transactions in the U.S. Treasury market, but stated that the proposal represents a significant and important first step.[50] FINRA also noted that the Treasury Department, the Commission, the Federal Reserve Bank of New York, and the CFTC have stated that they are assessing means to ensure that the collection of data regarding the Treasury market is comprehensive and includes information from institutions that are not FINRA members.[51]

Several commenters discussed the costs associated with the proposal or FINRA's analysis of the costs and benefits associated with the proposal. One commenter disagreed with FINRA's view that the direct costs to FINRA members already reporting to TRACE would be limited, stating that the reporting of transactions in U.S. Treasury securities would require significant IT investment.[52] A second commenter noted that the proposal would be a significant build for firms that do not currently incur TRACE reporting obligations.[53] A third commenter stated that a more thorough implementation discussion prior to approval of the proposal would permit a more robust cost/benefit analysis.[54]

FINRA acknowledged that the proposal would impose certain costs and burdens on FINRA members that would not apply to non-members, but also noted that there are several cost-effective means for members to comply with the new rules.[55] FINRA noted that firms with limited trading volumes generally could use a web browser to report, thereby limiting the cost of reporting.[56] For firms with higher levels of trading activity, FINRA offers direct connectivity via either CTCI or FIX protocols.[57] In addition, FINRA noted that some firms may rely on clearing firms that offer transaction reporting as a service to their correspondents, and that several service bureaus offer TRACE reporting as a service to subscribers to their order management systems.[58] FINRA stated that a majority of its members that are also government securities brokers or dealers currently are registered for, and report to, TRACE.[59] According to FINRA, the FINRA members that are government securities dealers or brokers but currently are not registered for TRACE, or that are registered for TRACE but have not reported a trade between June 2015 and May 2016, are predominantly small firms, with 80% having fewer than 25 registered representatives.[60]

Commenters expressed mixed views regarding the proposed timeframes for reporting transactions in U.S. Treasury Securities. Three commenters supported real-time or near-real-time reporting.[61] One commenter supported end-of-day reporting.[62] Two commenters stated that FINRA should provide flexibility to allow firms to report earlier than end-of-day.[63] By contrast, one commenter recommended that transactions in U.S. Treasury securities be reported on a T+1 basis to alleviate reporting challenges presented by the limited hours of the TRACE system.[64]

FINRA responded that, because the reported transaction information would not be publicly disseminated, it is

[43] *See id.*

[44] *See id.*

[45] *See supra* note 4.

[46] *See* BDA Letter at 1 (stating that regulators should have access to comprehensive Treasury market transaction data); Citadel Letter at 1 (stating that enhanced reporting to the official sector will improve general monitoring and surveillance capabilities, including those designed to detect prohibited trading practices and potential risks to market stability) ; ICI Letter at 1–2 (stating that regulatory reporting of transactions in U.S. Treasury securities could help regulators ensure an efficient and competitive market for all participants, including funds and other investors); KCG Letter at 2–3 (expressing support for the goal of making U.S. Treasury transactional data more available to regulators); SIFMA Letter at 1–2 (expressing support for the policy goals underlying the proposal and noting that regulatory reporting of U.S. Treasury trades in the secondary market will provide regulators with greater clarity regarding the nature of activity in this market); Tradeweb Letter at 2 (expressing broad support for the policy goals of the proposal and the overall structure of the requirements); Virtu Letter at 2 (stating that access to transaction-level data will help regulators to effectively design surveillance to prevent fraudulent and manipulative acts, and that transaction reporting could inform future decisions regarding standards such as circuit breakers and volatility guards).

[47] *See* Credit Suisse Letter at 3 (requesting that the proposal not be put into effect unless and until the requirements are expanded to non-FINRA-member market participants); Fidelity Letter at 3 (stating that ''The official sector and market participants will be best served by coordinated and harmonized reporting requirements across Treasury cash market intermediaries''); SIFMA Letter at 3 (urging the Commission and the Treasury Department to coordinate the implementation of similar requirements for non-FINRA-members); BDA Letter at 1 (urging regulators to work to create a comprehensive reporting regime that would also include banking institutions that do not currently report any fixed-income transactions to TRACE); KCG Letter at 5 (stating that regulators should provide specifics about their plan to collect data from non-FINRA members and should prioritize implementation of this plan); Virtu Letter at 2 (asking the Treasury Department and the Commission to move quickly to capture transactions by non-FINRA members who trade U.S. Treasury securities to help to assure the efficacy of the monitoring system).

[48] *See* Credit Suisse Letter at 3; Fidelity Letter at 4–5 (noting that its concern would be more pronounced if incomplete data were used as a basis for rulemaking); KCG Letter at 5; SIFMA Letter at 3; ICI Letter at 2 (cautioning regulators not to develop rules that would change the structure of the U.S. Treasury market using data obtained through TRACE reporting until regulators attain a more complete view of market activity, including the activity of principal trading firms (''PTFs'')).

[49] *See* Credit Suisse Letter at 3; Fidelity Letter at 4; Tradeweb Letter at 2.

[50] *See* FINRA Response at 3.

[51] *See id.* (citing Joint Press Release, Treasury Department *et al.,* Statement Regarding Progress on the Review of the U.S. Treasury Market Structure since the July 2015 Joint Staff Report (August 2, 2016), available at *https://www.sec.gov/news/pressrelease/2016-155.html). See also* May 16 Joint Press Release, *supra* note 12.

[52] *See* Credit Suisse Letter at 6. *See also* Fidelity Letter at 4 (noting the costs associated with the proposal, including technology builds, testing, maintenance of feeds, and the development and maintenance of regulatory compliance programs); Tradeweb Letter at 2 (stating that the implementation and phasing of the reporting requirements should be carefully evaluated with respect to the cost and the technical build required).

[53] *See* FIF Letter at 4.

[54] *See* Thomson Reuters Letter at 2.

[55] *See* FINRA Response at 3.

[56] *See id.* at 14–15. FINRA noted that the cost of the secure web browser for reporting purposes is $20 per month. *See id.* at 14; FINRA Rule 7730(a)(1).

[57] *See* FINRA Response at 14.

[58] *See id.*

[59] *See id.*

[60] *See id.*

[61] *See* Citadel Letter at 4 (suggesting that FINRA modify the proposal to require reporting within a certain number of minutes or hours following execution); KCG Letter at 4 (recommending real-time reporting); Virtu Letter at 2 (stating that, for surveillance to be effective, the underlying data collection should be comprehensive and immediate, with limited exceptions).

[62] *See* Tradeweb Letter at 2.

[63] *See* FIF Letter at 2; SIFMA Letter at 9.

[64] *See* Credit Suisse Letter at 6.

preferable to provide firms with the flexibility to report as appropriate for their current operations (*e.g.,* on a trade-by-trade basis or at the end of the day), rather than to mandate prompt reporting at this time.[65] FINRA noted that this flexibility could ease the compliance burden on some firms, and confirmed that firms that wish to report on an immediate basis could do so.[66] FINRA acknowledged that this reporting timeframe could change in the future, and noted that firms may wish to consider this possibility in designing their systems.[67] FINRA disagreed with one commenter's assertion that end-of-day reporting would negatively affect the surveillance of trading in U.S. Treasury Securities.[68]

Several commenters requested clarifications regarding the scope of securities covered by the proposal. One commenter asked FINRA to clarify whether Treasury Inflation-Protected Securities (''TIPS'') would be in scope and, if so, to publish for comment an amendment to the proposal providing details regarding the reporting of these transactions.[69] Two commenters requested guidance with respect to the reporting of reopenings of Treasury securities.[70] One commenter requested clarification with respect to the reporting of When-Issued Transactions, noting that execution venues differ in the way that they define and process these transactions.[71]

FINRA responded that TIPS would be reportable under the proposal and that FINRA is not providing, or requiring the reporting of, factor information in TIPS transactions at this time.[72] FINRA also stated that any transaction in a U.S. Treasury Security to be sold in an Auction but that occurs prior to the Auction, including a reopening transaction effected prior to the Auction or a transaction on the day of the Auction, would be considered a When-Issued Transaction for purposes of the proposed rules.[73]

One commenter expressed support for the proposal to exempt bona fide repurchase and reverse repurchase transactions in all TRACE-Eligible Securities from TRACE reporting.[74] This commenter also noted its assumption that all applicable TRACE rules would apply to in-scope transactions in U.S. Treasury Securities, unless explicitly exempted.[75] FINRA confirmed that, because U.S. Treasury Securities would be included within the definition of ''TRACE-Eligible Securities,'' any rule applicable to TRACE-Eligible Securities would apply to U.S. Treasury Securities, unless specifically exempted.[76]

Commenters also expressed views or raised questions with respect to the reporting of particular data elements. One commenter requested clarification regarding the treatment of inter-dealer broker fees for principal trading and platform fees that may be applied to client transactions.[77] A second commenter stated that an additional field for ATS MPID would be required, and expressed a preference to keep the fields aligned with existing requirements.[78] This commenter also assumed that the ''no remuneration'' flag would be considered a modifier to be consistent with the reporting of other modifiers under FINRA Rule 6730.[79]

FINRA stated that it would be appropriate to remain consistent with well-established TRACE protocols for reporting commissions, mark-ups, and mark-downs.[80] In addition, FINRA confirmed that both the ''no remuneration'' flag and the ATS MPID field (to be used when an ATS has received a trade reporting exemption pursuant to FINRA Rule 6732) would be required, as applicable, for reportable transactions in U.S. Treasury Securities.[81] FINRA noted that it has issued rules and provided guidance with respect to remuneration reporting since the implementation of TRACE in 2002, and that its current remuneration guidance will be helpful for reporting of transactions in U.S. Treasury Securities.[82] FINRA added that it will continue to provide timely guidance as needed.[83]

Commenters expressed mixed views regarding the proposed ''.B'' and ''.S'' trade modifiers. One commenter supported the use of both modifiers, stating that ''it is important that the various types of package transactions involving a U.S. Treasury are able to be accurately identified so that linkages between different types of instruments are better understood.'' [84] Other commenters expressed concerns regarding these modifiers. One commenter stated that adding the ''.B'' and ''.S'' modifiers would be ''exceedingly difficult'' because firms would have to establish linkages across trading platforms and systems that do not exist today and questioned whether there was a more straightforward way to achieve FINRA's objectives in requiring the use of the modifiers.[85] Commenters suggested that it might be difficult for FINRA members to identify separate trades as components of a series of transactions.[86] One commenter asked

[65] *See* FINRA Response at 7.

[66] *See id.*

[67] *See id.*

[68] *See id.*

[69] *See* Thomson Reuter Letter at 2 (stating that TIPS have characteristics different from other Treasury securities). *See also* FIF Letter at 2 (stating its assumption that TIPS would be handled in a manner similar to the reporting of securitized products and expressing a preference ''that factor information be required only in cases where anything other than the default settlement date or the current factor has been applied'').

[70] *See* Credit Suisse Letter at 4 (asking whether reopened trades should be reported using the same CUSIP number as the regular-way security with a different issue date, and noting that reopenings may not be handled consistently across all systems and venues); FIF Letter at 1 (questioning whether reopenings should be considered an extended settlement date trade or should be reported with a ''when-issued'' flag).

[71] *See* Credit Suisse Letter at 4. The commenter stated that some execution venues treat transactions as when-issued until the night of the auction, while others treat transactions as when-issued only until the day before the issue date. The commenter further stated that some platforms treat when-issued transactions as two separate products during their life cycle, ''so additional consideration will be required for subsequent updates to the trade bookings from the [when-issued] to the new On-the-Run Treasury.'' *See id.*

[72] *See* FINRA Response at 4–5.

[73] *See id.* at 5–6.

[74] *See* SIFMA Letter at 5–6.

[75] *See id.* at 6.

[76] *See* FINRA Response at 5.

[77] *See* Credit Suisse Letter at 5.

[78] *See* FIF Letter at 2. Another commenter expressed support for the requirement to report information concerning the ATS on which a transaction is executed. *See* SIFMA Letter at 6.

[79] *See* FIF Letter at 2.

[80] *See* FINRA Response at 12.

[81] *See id.* at 11.

[82] *See id.* at 11. FINRA noted, for example, that inter-dealer brokers that charge remuneration on a per-transaction basis generally are required to calculate and include such remuneration when reporting the transaction to TRACE. *See id.* However, commissions, mark-ups, or mark-downs charged on a monthly or other basis that cannot be assessed on a per-transaction basis are not required to be reported. *See id.* (citing Regulatory Notice 15–47 (November 2015)). In addition, FINRA stated that firms generally should not include platform fees in TRACE reports and should report only bona fide commissions in the commission field. *See id.* (citing letter from Sharon K. Zackula, FINRA, to Mustafa Fazel, National Financial Services, LLC, dated July 11, 2003, available at *http://www.finra.org/industry/interpretive-letters/july-11-2003-1200am).*

[83] *See* FINRA Response at 11.

[84] Citadel Letter at 2. The commenter also stated that (1) reported data should more generally identify whether a U.S. Treasury security transaction is part of a package and, if so, the number of legs associated with the package and the types of instruments involved (*e.g.,* a future or an interest rate swap); (2) the requirement to report trading venue (if any) should be expanded to include dealer-to-dealer and dealer-to-customer trading venues that currently are exempt from registration as ATSs because they trade only U.S. Treasury securities; and (3) market participants should be required to report whether a transaction was cleared. *See id.*

[85] *See* FIF Letter at 2. *See also* SIFMA Letter at 8 (asking regulators to engage in further discussion with the industry prior to adopting the proposed modifiers); Thomson Reuters Letter at 2 (urging FINRA to work with the industry to determine whether the new modifiers are justified).

[86] *See* Credit Suisse Letter at 5; FIF Letter at 2 (stating that adding the ''.B'' and ''.S'' modifiers

Continued

FINRA to clarify that the ''.B'' modifier is intended to capture transactions where both the cash leg and the futures contract relate to U.S. Treasury transactions.[87] The commenter also asked FINRA to provide specific examples of any additional trading strategy that the ''.B'' modifier is designed to capture, and to provide ''a clear and comprehensive list'' of each specific type of transaction and strategy to which the ''.S'' modifier must be applied.[88] Noting that the language of the proposed rule suggested that only transactions executed away from the market should be assigned the ''.S'' modifier, the commenter recommended instead that the ''.S'' modifier apply to the specified strategy regardless of whether one or both legs of the trade were off market.[89]

In response to these comments, FINRA reiterated that the ''.B'' and ''.S'' modifiers would allow FINRA to more easily identify transactions that, standing alone, might appear to raise regulatory concerns because they were executed at a price that was significantly outside of the price range for the security at the time of execution.[90] FINRA asserted that the modifiers are necessary for effective and efficient implementation of the proposal even if they could result in additional implementation burdens or costs to firms.[91] FINRA stated that ''.B'' trades are well-defined, in that they relate specifically to a series of trades involving both a U.S. Treasury Security and a futures contract.[92] FINRA agreed that the ''.S'' modifier should apply to a transaction in a particular strategy that meets the ''.S'' criteria regardless of whether one or more of the transactions in the series is off market.[93] Accordingly, FINRA filed Amendment No. 1 to the proposal to clarify that the ''.S'' modifier must be used in these circumstances.[94] FINRA expressed the view that Amendment No. 1 should reduce the compliance burden for firms because they would not need to assess, before appending the ''.S'' indicator, whether a particular transaction was, in fact, priced outside of the market at the time of execution.[95] In addition, FINRA stated that permitting end-of-day reporting would ease the compliance burden on firms in implementing the modifiers.[96]

FINRA declined to publish a list of specific transactions and strategies that would require the ''.S'' modifier, stating that such a list could not be comprehensive or account for variations that might be appropriate.[97] FINRA also stated that, following any Commission approval of the proposal, it would work with members to better understand their questions and would post any necessary trade reporting guidance on FINRA's Web site, as it has done in connection with other new trade reporting implementations.[98]

As discussed above, new Supplementary Material .04 to FINRA Rule 6730 would require members to report the time of an electronically executed transaction in a U.S. Treasury Security in the finest time increment captured in the member's system, but at a minimum in increments of seconds. Three commenters opposed this aspect of the proposal.[99] One commenter stated that one standard for timestamps and clock synchronization should uniformly to ensure a level playing field.[100] A second commenter noted that the requirement could result in mismatched timestamps for transactions involving two FINRA members if each member captures time differently.[101] Two commenters recommended that FINRA eliminate this aspect of the proposal or, alternatively, that FINRA confirm that it would not require members to update their systems to provide for time increments of less than one second.[102]

FINRA reiterated that a significant portion of trading activity in the U.S. Treasury cash market occurs on electronic platforms that currently capture timestamps in sub-second time increments.[103] FINRA stated that more granular timestamps on execution data could enhance its ability to surveil trading activity and recreate the proper time sequencing of trades.[104] In addition, FINRA noted that it recently required firms that capture time in milliseconds to report time to the millisecond level when reporting trades in equity securities to FINRA.[105] FINRA noted that in adopting this requirement for equity securities, it did not require firms to update their existing systems, but simply required firms to report time at the same level that they captured it.[106] FINRA believed that a similar approach is appropriate for transactions in U.S. Treasury Securities that are executed electronically.[107]

Two commenters recommended that FINRA update its daily list of reportable securities to include CUSIP numbers of U.S. Treasury Securities that are TRACE-eligible, so that members would not have to take steps to have such securities placed on the list.[108] FINRA stated that it intends to update the daily list to include the CUSIP numbers of outstanding U.S. Treasury Securities and thereafter add CUSIP numbers of new securities coincident with the announcement of an auction.[109]

Commenters also discussed general aspects of the reporting process. One commenter expressed hope that FINRA would utilize existing message formats to the extent possible.[110] A second commenter urged FINRA to allow reporting of transactions in U.S. Treasury Securities through an existing line, rather than requiring new network connectivity.[111] This commenter also asked FINRA to work directly with the FIX protocol organization to create industry standard tags for use in reporting new indicators and modifiers.[112]

FINRA stated that TRACE generally allows a firm reporting through FIX or CTCI to use the same connection line to submit transactions to the system.[113] FINRA noted that some firms currently use the same connection line to report transactions in the TRACE products that are currently available.[114] FINRA stated that firms using the FIX protocol to report transactions may use the same connection line but are required to obtain separate ports for each product, and that a firm's need to obtain and operate separate lines is dependent on the firm's activity in each product and its desired balance between costs and latency/performance.[115]

assumes that firms are able to associate multiple trades that may have been executed at different times on different desks and processed independently).

[87] *See* SIFMA Letter at 6.

[88] *Id.* at 6, 8.

[89] *See id.* at 7.

[90] *See* FINRA Response at 8–9.

[91] *See* FINRA Response at 9. FINRA also stated that it would monitor the information that it receives after reporting begins to determine whether additional transaction information might be needed to enhance the audit trail and FINRA's surveillance program. *See id.* at 8; Notice, 81 FR at 48474.

[92] *See* FINRA Response at 9.

[93] *See id.*

[94] *See supra* note 40.

[95] *See* FINRA Response at 9.

[96] *See id.*

[97] *See id.*

[98] *See id.*

[99] *See* Credit Suisse Letter at 5; FIF Letter at 3; SIFMA Letter at 9.

[100] *See* FIF Letter at 3.

[101] *See* Credit Suisse Letter at 5.

[102] *See* SIFMA Letter at 9; Credit Suisse Letter at 5.

[103] *See* FINRA Response at 10.

[104] *See id.* at 10–11.

[105] *See id.;* Regulatory Notice 14–21 (May 2014).

[106] *See* FINRA Response at 10.

[107] *See id.*

[108] *See* FIF Letter at 1; SIFMA Letter at 8.

[109] *See* FINRA Response at 12.

[110] *See* FIF Letter at 2.

[111] *See* Thomson Reuters Letter at 2.

[112] *See id.* at 1.

[113] *See* FINRA Response at 13.

[114] *See id.*

[115] *See id.*

Commenters also asked FINRA to confirm that error corrections submitted intra-day would not count toward a firm's error statistics,[116] and that there would be no fees or charges for intra-day corrections.[117] FINRA stated that, as in other FINRA trade reporting contexts, re-reporting or amending transaction reports would be captured in a firm's error statistics published on the TRACE Report Cards even if the transactions are not considered late.[118] Because FINRA is not at this time proposing to charge fees for reporting transactions in U.S. Treasury Securities, there also would be no fees charged for re-reports or amendments.[119]

Commenters expressed mixed views regarding the proposal's assignment of reporting obligations. One commenter urged FINRA to re-assess the dual-sided reporting obligation, stating that the transaction volume in the U.S. Treasury market may warrant a different approach to reduce complexity and data discrepancies, and arguing that a single-sided reporting hierarchy could reduce implementation costs by leveraging trading venues and registered broker-dealers.[120] Other commenters expressed support for use of the existing framework for TRACE reporting.[121]

FINRA stated that it continues to believe that a two-sided reporting requirement, like that which currently applies to all TRACE transactions, is also appropriate for transactions in U.S. Treasury Securities.[122] FINRA expressed the view that two-sided reporting helps to ensure accuracy because it allows FINRA to compare information reported by each party to identify discrepancies or potential non-reporting by one party, thereby enhancing the quality of the audit trail.[123] FINRA stated, moreover, that altering TRACE requirements to accommodate single-sided reporting would necessitate changes to TRACE's existing infrastructure that could affect all TRACE-reporting firms and reduce the benefits of using TRACE for U.S. Treasury Security reporting.[124]

Three commenters expressed support for the proposed one-year implementation period, noting, among other things, the complexity of the system modifications that would be required to comply with the proposed rules.[125] Two commenters supported the proposed staggered implementation period for the ''.B'' and ''.S'' modifiers,[126] with one commenter noting that implementing the modifiers would require extended development time.[127] Three commenters emphasized the importance of FINRA's publishing technical specifications as far in advance as possible.[128] One of these commenters asked FINRA to release a technical specification with expected changes for all phases of implementation to avoid multiple code releases.[129]

FINRA acknowledged the importance of timely and detailed technical specifications to ensure that firms are able to effectively implement the new reporting requirements, and stated that it is preparing to publish technical specifications concurrent with any Commission approval of the proposal.[130] FINRA also acknowledged the implementation challenges that firms might face if the proposal is approved, and stated that it would consider these challenges in establishing an implementation date.[131]

Commenters expressed different views of FINRA's determination not to impose fees at this time for reporting transactions in U.S. Treasury Securities. One commenter expressed support for this aspect of the proposal.[132] A second commenter expressed concern that trade reporting fees eventually will be charged and could be significant.[133] A third commenter stated that the proposal's ambiguity regarding the charging of fees makes it difficult to understand the true cost of the proposal and expressed the view that FINRA should not assess fees with respect to the reporting of transactions in U.S. Treasury Securities for a minimum of five years.[134]

FINRA stated that, because it would incur costs to expand the TRACE system and to enhance its existing examination and surveillance efforts to monitor transactions in U.S. Treasury Securities following any Commission approval of the proposal, it was unable to commit to continuing to exclude these transactions from the applicable fees for a specified period.[135] FINRA noted, however, that any new fees would be subject to a proposed rule change filed with the Commission.[136]

Several commenters expressed support for, or raised concerns regarding, the public dissemination of information with respect to transactions in U.S. Treasury Securities.[137] FINRA

[116] *See* FIF Letter at 2; SIFMA Letter at 9.

[117] *See* FIF Letter at 2.

[118] *See* FINRA Response at 12.

[119] *See id.*

[120] *See* Citadel Letter at 3. The commenter also stated that a single-sided methodology could be more easily applied to other market participants as reporting requirements are extended to include trading activity involving non-FINRA members. *See id.*

[121] *See* ICI Letter at 2 (stating that the proposal would leverage the existing reporting and communications systems for TRACE reporting rather than imposing obligations on customers—such as funds and other investors—that do not currently have systems to accommodate such obligations); SIFMA Letter at 2 (stating that the proposal leverages the existing framework of the TRACE system and that FINRA members generally have systems and procedures in place that can incorporate the additional reporting obligations for U.S. Treasury securities). One commenter also noted that, because virtually all trades in U.S. Treasury securities involve an intermediary—such as a broker-dealer, trading platform, or PTF—regulators would be able to obtain comprehensive information about the U.S. Treasury market by receiving trade reports from intermediaries. *See* ICI Letter at 2.

[122] *See* FINRA Response at 6.

[123] *See id.*

[124] *See id.*

[125] *See* Credit Suisse Letter at 6 (noting that U.S. Treasury securities are traded within the firm across multiple divisions and on various trading platforms, none of which capture trade information in a uniform or consistent manner); FIF Letter at 3–4 (noting that broker-dealers must devote resources to comply with multiple regulatory initiatives); SIFMA Letter at 10 (noting that reportable U.S. Treasury market activity may occur throughout a firm and on different desks, and that a one-year implementation period would allow for the integration of these activities within a firm's reporting apparatus). *See also* Tradeweb Letter at 3 (expressing the need for ''an appropriately sized implementation period'' to allow firms to develop, test, and implement the necessary technical changes and internal policies and procedures); Thomson Reuters Letter at 3 (stating that the implementation effort will be complex and require significant coordination across the industry). One commenter noted that firms that are solely government securities dealers, which previously have not reported to TRACE, would be required to develop reporting systems and policies from scratch. *See* SIFMA Letter at 10. Another commenter stated that certain required data elements, including counterparty identifiers and the total dollar amount of commissions, would require additional implementation efforts. *See* Credit Suisse Letter at 5.

[126] *See* FIF Letter at 2; SIFMA Letter at 10–11.

[127] *See* SIFMA Letter at 11.

[128] *See id.* at 10; Thomson Reuters Letter at 1; Tradeweb Letter at 3.

[129] *See* Thomson Reuters Letter at 2.

[130] *See* FINRA Response at 14.

[131] *See id.*

[132] *See* BDA Letter at 2.

[133] *See* Fidelity Letter at 4.

[134] *See* Thomson Reuters Letter at 2.

[135] *See* FINRA Response at 13.

[136] *See id.*

[137] *See* Carson Letter (expressing support for transparency in the U.S. Treasury market); Citadel Letter at 3–4, 6 (recommending that FINRA ensure that the reporting infrastructure is scalable and able to accommodate possible public dissemination of transactions in U.S. Treasury securities in the future); KCG Letter at 4 (supporting real-time reporting and immediate public dissemination); BDA Letter at 1 (urging financial regulators to refrain from moving forward with any proposal to require public dissemination); Credit Suisse Letter at 7 (recommending that regulators study the potential risks of public dissemination and consult with the industry before moving forward); Fidelity Letter at 5 (urging careful consideration of any decision regarding public dissemination); ICI Letter at 3 (stating that the appropriateness of public dissemination should be considered after the official sector has obtained a more complete view of Treasury market activity); SIFMA Letter at 5

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reiterated that it is not proposing to disseminate information with respect to transactions in U.S. Treasury Securities at this time, and stated that careful consideration of the potential benefits of public dissemination, as well as the concerns raised by the commenters, should be undertaken after a reporting requirement is in place.[138]

IV. Discussion and Commission Findings

After carefully considering the proposal, the comments submitted, FINRA's response to the comments, and Amendment No. 1, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[139] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[140] which requires, among other things, that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

Prior to TRACE's implementation, the National Association of Securities Dealers (''NASD'') (FINRA's predecessor) did not have routine access to comprehensive transaction information for the over-the-counter corporate bond market, even though the NASD bore responsibility for regulating that market. In originally approving the TRACE rules, the Commission stated that obtaining such information to better conduct market surveillance was a fundamental means of promoting fairness and confidence in U.S. capital markets.[141] Similarly, with respect to the over-the-counter market for U.S. Treasury Securities, FINRA, the Commission, and other public authorities currently do not possess information to properly oversee the market. The Commission believes, therefore, that it is consistent with the Act for FINRA to expand TRACE to designate U.S. Treasury Securities as TRACE-Eligible Securities and to establish reporting requirements relating to such securities in the manner set forth in the proposal.[142] Expanding TRACE to include member transactions in U.S. Treasury Securities is reasonably designed to help FINRA fulfill its mandate in Section 15A(b)(6) of the Act to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The Commission believes that FINRA's proposal is an important first step in providing the official sector with more comprehensive data about the Treasury cash market. The RFI Notice stated that ''[t]he need for more comprehensive official sector access to data, particularly with respect to U.S. Treasury cash market activity, is clear'' [143] and that ''[d]ata from across the U.S. Treasury cash and futures markets is necessary to conduct comprehensive analysis or surveillance of these markets.'' [144] The Commission believes that FINRA's proposal is reasonably designed to further these objectives outlined in the RFI Notice with respect to the Treasury cash market. The transaction data that will become available to the official sector through TRACE will help to inform policymaking and help regulators detect and deter improper trading activity.

The Commission acknowledges the concerns raised by various commenters that the proposal could create a competitive advantage for non-FINRA members over FINRA members, because only FINRA members will incur costs for reporting transactions in U.S. Treasury Securities and because counterparties might seek to avoid trading with FINRA members to shield their trading activity from regulatory oversight. Commenters also noted that imposing a reporting requirement solely on FINRA members would provide regulators with a less-than-comprehensive view of activity in the Treasury market. The Commission believes, nevertheless, that these comments do not preclude approval of the proposal at this time. The Commission recognizes that certain transactions in the Treasury market will not be within scope of the new TRACE reporting requirements, but the transactions that are reported should greatly enhance regulators' understanding of the market. The Commission notes that other public sector authorities have expressed their intention to continue to assess effective means to ensure that the collection of data regarding Treasury cash securities market transactions is comprehensive and includes information from institutions that are not FINRA members.[145]

Furthermore, the Commission believes that the proposal is reasonably designed to minimize any potential disparate impact on FINRA members. FINRA is not proposing at this time to publicly disseminate any transactions in U.S. Treasury Securities.[146] In addition, FINRA is not at this time imposing any fees on its members for reporting transactions in U.S. Treasury Securities, so FINRA members will not face any additional direct costs that their competitors do not. The Commission recognizes that FINRA members could face additional indirect costs to expand their infrastructure, policies, and procedures that support TRACE reporting. However, the proposal is reasonably designed to minimize those costs. Many FINRA members that will be subject to the new reporting requirements for U.S. Treasury Securities already report transactions in other types of debt securities to TRACE, so their costs of complying with this proposal are likely to be incremental rather than wholesale. FINRA members who are active in the Treasury market are likely to be active in other fixed income markets, and are thus likely to be familiar with existing protocols for reporting transactions to TRACE. To the extent that certain firms become subject to TRACE reporting requirements for the first time (or firms that already carry out TRACE reporting from certain desks have other desks that do not currently trade TRACE-Eligible Securities and do not yet have TRACE capabilities), FINRA's proposal to allow transactions to be reported by end-of-day should provide such firms with some flexibility

(urging careful consideration of costs and benefits of public dissemination) and 11 (asking regulators to defer any analysis of pricing data in connection with potential public dissemination until the ''.B'' and ''.S'' trade modifiers are included in reported data); Tradeweb Letter at 3 (urging regulators to weigh carefully the potential benefits and risks of public dissemination).

[138] *See* FINRA Response at 4.

[139] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[140] 15 U.S.C. 78o–3(b)(6).

[141] *See* Securities Exchange Act Release No. 43873 (January 23, 2001), 66 FR 8131, 8136 (January 29, 2001) (order approving File No. SR–NASD–99–65).

[142] The Commission notes that FINRA previously has expanded TRACE to require the reporting to TRACE of transactions in agency debt securities and asset-backed securities. *See* Securities Exchange Act Release Nos. 61566 (February 22, 2010), 75 FR 9262 (March 1, 2010) (order approving File No. SR–FINRA–2009–065) (''Asset-Backed Securities Order''); and 60726 (September 28, 2009), 74 FR 50991 (October 2, 2009) (order approving File No. SR–FINRA–2009–010).

[143] 81 FR at 3931.

[144] *Id.* at 3932.

[145] *See http://www.sec.gov/news/pressrelease/2016–155.html;* May 16 Joint Press Release, *supra* note 12.

[146] Pursuant to Section 19(b)(5) of the Act, 15 U.S.C. 78s(b)(5), the Commission shall consult with and consider the views of the Secretary of the Treasury prior to approving a proposed rule filed by FINRA that primarily concerns conduct related to transactions in government securities, including any proposed rule that would provide for public dissemination of transactions in U.S. Treasury Securities.

to determine the most cost-effective way of meeting the new reporting requirements, while allowing regulators to obtain Treasury market transaction information in a reasonable timeframe.

The Commission believes that the timeframes proposed by FINRA for reporting a transaction in a U.S. Treasury Security—on an end-of-day or next-day basis, depending on the time that the transaction was executed—are consistent with the Act. The Commission previously has approved a similar approach of allowing extended reporting timeframes when new asset classes were made TRACE-eligible and FINRA sought to make accommodations for the new compliance burdens.[147]

The proposal generally extends existing TRACE reporting protocols, which the Commission has approved previously, to transactions in U.S. Treasury Securities. For example, the proposal retains FINRA's existing dual-sided reporting structure (where both parties are FINRA members),[148] which has been utilized since TRACE's inception. The Commission believes that dual-sided reporting for transactions in U.S. Treasury Securities is consistent with the Act because having both sides report (where both parties are FINRA members) is reasonably designed to promote the accuracy of reported transaction information and, thus, the quality of the audit trail. As a general matter, the Commission believes that utilizing the existing TRACE reporting framework to the extent practicable should facilitate compliance and minimize the costs associated with the proposal. Members that currently report to TRACE generally will be able to leverage their existing reporting processes, with some modifications, to report transactions in U.S. Treasury Securities.

FINRA proposed various changes to existing TRACE rules and definitions that will define the scope of U.S. Treasury securities and transactions that will become subject to the TRACE reporting requirements. For example, the proposal excludes transactions in savings bonds because such bonds are generally non-transferable and are therefore not marketable securities purchased and sold in the secondary market. Although trading a principal or interest component of a U.S. Treasury Security that has been separated under the STRIPS program would constitute a Reportable TRACE Transaction, the act of separating or reconstituting the components of a U.S. Treasury Security under the STRIPS program would not constitute a Reportable TRACE Transaction. This is because, for purposes of the trade reporting rules, FINRA considers a ''trade'' or a ''transaction'' to entail a change of beneficial ownership between parties.[149] The Commission notes that this is consistent with FINRA's existing treatment of transactions that do not involve a change of beneficial ownership.[150] For Treasury auctions, the Treasury Department maintains the auction data, which is available to regulators.[151]

Furthermore, the proposal excludes from reporting bona fide repurchase and reverse repurchase transactions involving TRACE-Eligible Securities. Historically, FINRA has taken the position that repurchase transactions and reverse repurchase transactions should not be reported to TRACE.[152] According to FINRA, the transfer of securities effectuated as part of a repurchase or a reverse repurchase transaction is not the result of an investment decision but is more akin to collateral pledged as part of a secured financing.[153] Therefore, FINRA views repurchase and reverse repurchase transactions as economically equivalent to financings, and the pricing components of such transactions are typically not the market value of the securities.[154] The Commission believes that FINRA's proposed rules for defining the scope of U.S. Treasury securities and transactions that will become subject to the TRACE reporting requirements are consistent with the Act. If FINRA seeks to revise the scope of covered securities or transactions in the future, it would have to do so consistent with the requirements of the Act and, in particular, the rule filing requirements of Section 19(b) of the Act.

The Commission believes that it is consistent with the Act for FINRA to adopt certain new rules and to revise certain existing rules to accommodate particular features of U.S. Treasury securities or the Treasury market. The Commission believes, for example, that the new trade indicator required for When-Issued Transactions is reasonably designed to promote the accuracy of the audit trail and allow FINRA to better understand the price of a reported transaction. The Commission believes that the new ''.B'' and ''.S'' modifiers are reasonably designed to provide regulators with a more complete understanding of activity in the Treasury market by identifying transactions that are negotiated as part of a larger strategy.[155] The Commission notes that FINRA has represented that it will work with members on implementing the new modifiers and will post any necessary guidance on its Web site.[156]

The proposal adds new FINRA Rule 6730, Supplementary Material .04, to require a member to report an electronically executed transaction in a U.S. Treasury Security to the finest increment of time captured in the member's system, but at a minimum in increments of seconds. The Commission notes that this requirement is consistent with existing FINRA rules that require a member to report a trade in an equity security in milliseconds if the member's system captures time in milliseconds.[157] The Commission agrees with FINRA that capturing the time of execution in more granular increments, when available, could assist FINRA in sequencing trades and enhance its ability to surveil trading activity.[158]

FINRA stated that the effective date for the proposal shall be no later than 365 days following this approval, with the general reporting requirement preceding the requirement to use the ''.B'' and ''.S'' trade modifiers.[159] As noted above, several commenters supported a one-year implementation period.[160] The Commission believes that the proposed timeframe for implementation is consistent with the Act, and that the commenters have not raised any issue that would preclude approval of the proposal at this time. The Commission notes that FINRA has acknowledged the importance of timely publication of the technical specifications for reporting, and indicated that it would publish

[147] *See* Asset-Backed Securities Order, *supra* note 142, at 9264–65 (implementing a T+1 reporting period for a six-month pilot period to ease the compliance burdens on those affected by the proposal).

[148] *See* FINRA Rule 6730(a).

[149] *See supra* footnote 13.

[150] *See id.*

[151] *See* Notice, 81 FR at 48467.

[152] *See id.*

[153] *See id.*

[154] *See id.*

[155] The Commission notes that Amendment No. 1 addresses the concerns of one commenter by revising the ''.S'' modifier to indicate that the modifier will apply to a strategy that meets the ''.S'' criteria regardless of whether one or more of the transactions in the series is, in fact, off market. *See* Amendment No. 1; FINRA Response at 9.

[156] *See* FINRA Response at 9.

[157] *See* FINRA Rules 6380A, Supplementary Material .04; 6380B, Supplementary Material .04; 6622, Supplementary Material .04; and 7440(a)(2). *See also* FINRA Regulatory Notice 14–21 (May 2014).

[158] *See* FINRA Response at 10–11.

[159] *See* Notice, 81 FR at 48469. FINRA also represented that it will announce the effective date of this proposed rule change in a *Regulatory Notice* to be published no later than 90 days following this approval. *See id.*

[160] *See supra* note 125 and accompanying text.

technical specifications concurrent with this approval.[161]

The proposal amends existing FINRA Rule 6750(b) to add U.S. Treasury Securities to the list of transaction types for which transaction information will not be disseminated. The Commission believes that it is consistent with the Act for FINRA to refrain from publicly disseminating information regarding transactions in U.S. Treasury Securities at this time. The Commission agrees that it is appropriate to study the transaction information that will be reported to regulators under this rule change before proceeding with any new proposal to provide for the public dissemination of information concerning transactions in U.S. Treasury Securities. The proposal also amends FINRA's existing rules to provide that, at this time, FINRA will not charge fees for transactions in U.S. Treasury Securities reported to TRACE. The Commission believes that it is within FINRA's discretion to refrain from charging fees for reporting transactions in U.S. Treasury Securities at this time. The Commission notes that FINRA would be required to file with the Commission, pursuant to Section 19(b)(1) of the Act, any proposal to establish transaction reporting fees for, or to provide for the public dissemination of, transactions in U.S. Treasury Securities.

Pursuant to Section 19(b)(5) of the Act,[162] the Commission consulted with and considered the views of the Treasury Department in determining to approve the proposed rule change. The Treasury Department supports FINRA's proposal to require its members to report transactions in U.S. Treasury Securities to TRACE.[163] Pursuant to Section 19(b)(6) of the Act,[164] the Commission has considered the sufficiency and appropriateness of existing laws and rules applicable to government securities brokers, government securities dealers, and their associated persons in approving the proposal. As noted above, regulators currently do not have ready access to information about transactions in the U.S. Treasury cash market, and the events of October 15, 2014, highlighted the importance of making available to regulators more comprehensive information concerning activity in this market.[165] By requiring FINRA members, including those that are government securities brokers or dealers, to report transactions in U.S. Treasury Securities to TRACE, the new rules represent an important first step in providing regulators with more comprehensive information concerning activity in the U.S. Treasury cash market.

V. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 to the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2016–027 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2016–027. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2016–027 and should be submitted on or before November 14, 2016.

VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[166] for approving the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after the publication of Amendment No. 1 in the **Federal Register**. The Commission believes that Amendment No. 1 addresses the commenter's suggestion that the ''.S'' modifier apply to transactions in a series that meet the ''.S'' criteria regardless of whether one or more of the transactions is executed away from the market.[167] The Commission believes that the changes with respect to the ''.S'' modifier simplify the rule, and ease the compliance burden associated with it, by eliminating the need for members to determine whether a transaction was priced outside of the market at the time of execution. At the same time, the ''.S'' modifier will facilitate oversight and provide regulators with information and insights into trading activity by identifying transactions in U.S. Treasury Securities that were executed as part of a series of transactions. Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendment No. 1, on an accelerated basis.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[168] that the proposed rule change (SR–FINRA–2016–027), as modified by Amendment No. 1, is approved on an accelerated basis.

[161] *See* FINRA Response at 14. *See also* Notice, 81 FR at 48469 (FINRA's acknowledgement that sufficient lead-time between the publication of technical specifications and the implementation date is critical to firms' ability to meet the announced implementation date).

[162] 15 U.S.C. 78s(b)(5) (providing that the Commission ''shall consult with and consider the views of the Secretary of the Treasury prior to approving a proposed rule filed by a registered securities association that primarily concerns conduct related to transactions in government securities, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor'').

[163] Telephone conversation between Treasury Department staff and Stephen Luparello, Director, Division of Trading and Markets, *et al.,* Commission, on October 14, 2016.

[164] 15 U.S.C. 78s(b)(6).

[165] *See* RFI Notice, 81 FR at 3931.

[166] 15 U.S.C. 78s(b)(2).

[167] *See* SIFMA Letter at 7.

[168] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[169]

Brent J. Fields,

Secretary.

[FR Doc. 2016–25604 Filed 10–21–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79114; File No. SR–NYSEMKT–2016–93]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Article IV, Section 4.05 of the Ninth Amended and Restated Operating Agreement of the Exchange

October 18, 2016.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 6, 2016, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Article IV, Section 4.05 of the Ninth Amended and Restated Operating Agreement of the Exchange (''Operating Agreement'') regarding use of regulatory assets, fees, fines and penalties, and make additional, non-substantive edits. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Article IV, Section 4.05 (Limitation on Distributions) of the Operating Agreement (''Section 4.05''), regarding use of regulatory assets, fees, fines and penalties (''Regulatory Funds''), and make additional, non-substantive edits.

Proposed Amendment to Section 4.05

Section 4.05 provides that:

[t]he Company shall not use any regulatory assets or any regulatory fees, fines or penalties collected by Exchange regulatory staff for commercial purposes or distribute such assets, fees, fines or penalties to the Member or any other entity.[4]

Although it prohibits the use of Regulatory Funds for ''commercial purposes,'' that term is not defined in Section 4.05 or elsewhere in the Operating Agreement. Accordingly, to add greater clarity to the limits on the use of Regulatory Funds, the Exchange proposes to replace the prohibition against using Regulatory Funds for ''commercial purposes'' with a statement that Regulatory Funds ''will be applied to fund the legal, regulatory and surveillance operations'' of the Exchange. The prohibition on using Regulatory Funds for distributions to the Member or any other entity would remain.

In addition, ''Exchange'' is not a defined term in the Operating Agreement, which defines the Exchange as the ''Company.'' Accordingly, the Exchange proposes to replace ''Exchange regulatory staff'' with ''Company regulatory staff.''

The amended Section 4.05 would read as follows:

Any regulatory assets or any regulatory fees, fines or penalties collected by Company regulatory staff will be applied to fund the legal, regulatory and surveillance operations of the Company, and the Company shall not distribute such assets, fees, fines or penalties to the Member or any other entity.

The Exchange believes that the increased clarity in the scope of the limits on use of Regulatory Funds will enhance the protections provided by Section 4.05 against the possibility that Regulatory Funds may be assessed to respond to the Exchange's budgetary needs rather than to serve a disciplinary purpose.[5]

The proposed amendments would have the benefit of bringing Section 4.05 into greater conformity with the bylaws of the Exchange's affiliate NYSE Arca, Inc., which provide that regulatory fees and penalties ''will be applied to fund the legal, regulatory and surveillance operations of the Exchange.'' [6]

The proposed amendments would make Section 4.05 more consistent with the limitations on the use of regulatory income of other self-regulatory organizations (''SROs''). Most such limitations are substantially similar to the proposed revised Section 4.05. For example, similar to the proposed Section 4.05, the limited liability company agreements of the BOX Options Exchange (''BOX''), International Securities Exchange, LLC (''ISE''), and its affiliates ISE Gemini, LLC and ISE Mercury, LLC, provide that regulatory funds shall be used to fund the relevant SRO's legal, regulatory and surveillance operations.[7] Consistent with the proposed revised Section 4.05, their definition of ''regulatory funds'' includes fees, fines or penalties derived from its regulatory operations.[8]

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[169] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b-4.

[4] *See* Ninth Amended and Restated Operating Agreement of NYSE MKT LLC, Art. IV, Sec. 4.05; *see also* Securities Exchange Act Release No. 77901 (May 25, 2016), 81 FR 35092 (June 1, 2016) (SR–NYSEMKT–2016–26).

[5] *See* Securities Exchange Act Release No. 77899 (May 24, 2016), 81 FR 34393 (May 31, 2016) (SR–NYSE–2016–37).

[6] *See* Bylaws of NYSE Arca, Inc., Art. II, Sec. 2.06 (''Any revenues received by the Exchange from regulatory fees or regulatory penalties will be applied to fund the legal, regulatory and surveillance operations of the Exchange and will not be used to pay dividends. For purposes of this Section, regulatory penalties shall include restitution and disgorgement of funds intended for customers.''). The Exchange's affiliate New York Stock Exchange LLC has submitted substantially the same proposed amendment to its operating agreement. *See* SR–NYSE–2016–66.

[7] Such provisions also limit the relevant SRO from making any distribution to its member using regulatory funds. *See* Box Options Exchange Limited Liability Company Agreement, Art. 1, Sec. 1.1 and Art. 8, Sec. 8.1; Third Amended and Restated Limited Liability Company Agreement of International Securities Exchange, LLC, Art. III, Sec. 3.3(ii); Second Amended and Restated Limited Liability Company Agreement of ISE Gemini, LLC, Art. III, Sec. 3.3(ii); and Limited Liability Company Agreement of ISE Mercury, LLC, Art. III, Sec. 3.3(ii).

[8] The BOX definition of regulatory funds also states that such funds ''shall not include revenues derived from listing fees, market data revenues, transaction revenues or any other aspect of the commercial operations of the Exchange or a facility of the Exchange, even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Exchange.'' Box Options Exchange Limited Liability Company Agreement, Art. 1, Sec.

Continued

Some SROs have provisions that are less restrictive than the proposed Section 4.05. More specifically, the governing documents of affiliates Bats BZX Exchange, Inc., Bats BYX Exchange, Inc., Bats EDGX Exchange, Inc., and Bats EDGA Exchange, Inc. permit such SROs to use regulatory funds to fund legal and regulatory operations, including surveillance and enforcement activities, but also provide that revenues received from fees derived from the regulatory function or regulatory penalties may be used to pay restitution and disgorgement of funds intended for customers.[9] The limited liability company agreement of Miami International Securities Exchange, LLC, and bylaws of National Stock Exchange, Inc., have similar provisions.[10] By contrast, the operating agreement of the NASDAQ Stock Market LLC (''Nasdaq'') simply limits Nasdaq from making a distribution to its member using regulatory funds, and does not impose other restrictions.[11]

Additional Proposed Amendments

The Exchange proposes to make a non-substantive amendment to the second sentence of Article II, Section 2.03(h)(iii) (Board). Currently, the sentence provides that the Committee for Review (''CFR'') will be responsible for, among other things, ''reviewing determinations to limit or prohibit the continued listing of an issuer's securities on the Exchange.'' The Exchange proposes to replace ''Exchange'' with ''exchange operated by the Company.'' The Exchange proposes to make the change because, as noted above, ''Exchange'' is not a defined term in the Operating Agreement.

Finally, the Exchange proposes to make technical and conforming changes to the recitals and signature page of the Operating Agreement.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act [12] in general, and Section 6(b)(1) [13] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

The Exchange believes that replacing the current prohibition against using Regulatory Funds for undefined ''commercial purposes'' with a requirement that Regulatory Funds ''be applied to fund the legal, regulatory and surveillance operations'' of the Exchange would enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange, because it would add greater clarity to the limits on the use of Regulatory Funds, enhancing the protections provided by Section 4.05 against the possibility that Regulatory Funds may be assessed to respond to the Exchange's budgetary needs rather than to serve a disciplinary purpose.[14] The proposed changes to Section 4.05 would make it more transparent to market participants.

Similarly, the Exchange believes that replacing ''Exchange regulatory staff'' with ''Company regulatory staff'' in Section 4.05 and replacing ''Exchange'' with ''exchange operated by the Company'' in Article II, Section 2.03(h)(iii) would enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange, because it would add greater clarity to the Operating Agreement by using the defined term ''Company'' instead of ''Exchange,'' which is not defined in the Operating Agreement

For the same reasons, the Exchange believes that the proposed rule changes are consistent with Section 6(b)(4),[15] which requires that the rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among the exchange's members and issuers and other persons using its facilities, and Section 6(b)(5),[16] which requires that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed changes would add greater clarity to the limits on the use of Regulatory Funds, enhancing the protections provided by Section 4.05, and ensure the use of defined terms, thereby making Section 4.05 and Article II, Section 2.03(h)(iii) more transparent to market participants.

The Exchange notes that the proposed change to Section 4.05 would have the additional benefit of bringing the Exchange's restrictions on the use of regulatory assets and income into greater conformity with those of its affiliate NYSE Arca, Inc. In addition, the proposed amendments would make Section 4.05 more consistent with the limitations on the use of regulatory income of other SROs. Most such limitations are substantially similar to the proposed revised Section 4.05. In fact, the proposed Section 4.05 is more restrictive than the provisions of some

1.1. The agreements of ISE and its affiliates have substantially similar language. *See* Third Amended and Restated Limited Liability Company Agreement of International Securities Exchange, LLC, Art. III, Sec. 3.3(ii); Second Amended and Restated Limited Liability Company Agreement of ISE Gemini, LLC, Art. III, Sec. 3.3(ii); and Limited Liability Company Agreement of ISE Mercury, LLC, Art. III, Sec. 3.3(ii).

[9] The described revenues may not be used for non-regulatory purposes or distributed to the stockholder. *See* Fourth Amended and Restated Bylaws of Bats BZX Exchange, Inc., Art. X, Sec. 4; Fourth Amended and Restated Bylaws of Bats BYX Exchange, Inc., Art. X, Sec. 4; Fifth Amended and Restated Bylaws of Bats EDGX Exchange, Inc., Art. X, Sec. 4; and Fifth Amended and Restated Bylaws of Bats EDGA Exchange, Inc., Art. X, Sec. 4.

[10] *See* Second Amended and Restated Limited Liability Company Agreement of Miami International Securities Exchange, LLC, Art. IX, Sec. 9.4 (''Any Regulatory Funds will not be used for non-regulatory purposes or distributed to the LLC Member, but rather, shall be applied to fund the legal and regulatory operations of the Company (including surveillance and enforcement activities), or, as the case may be, shall be used to pay restitution and disgorgement of funds intended for customers.''); Third Amended and Restated By-laws of National Stock Exchange, Inc., Art. X, Sec. 10.4 (''Any revenues received by the Exchange from fees derived from its regulatory function or regulatory penalties will not be used to pay dividends and shall be applied to fund the legal and regulatory operations of the Exchange (including surveillance and enforcement activities), or, as the case may be, shall be used to pay restitution and disgorgement of funds intended for customers.''); *see also* Amended and Restated By-Laws of Miami International Securities Exchange, LLC, Art. IX, Sec. 9.4.

[11] *See* Second Amended Limited Liability Company Agreement of The NASDAQ Stock Market LLC, Sec. 15. *See also* by-laws of NASDAQ BX, Inc., Art. IX, Sec. 9.8, and Second Amended Limited Liability Company Agreement of NASDAQ PHLX LLC, Sec. 14. When the NASDAQ OMX Group, Inc. acquired the Boston Stock Exchange (''BSE''), the BSE by-laws were amended to include a similar provision that dividends could not be paid to the stockholders using regulatory funds. *See* Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR–BSE– 2008–02; SR–BSE–2008–23; SR–BSE–2008– 25; SR–BSECC–2008–01), at 46942.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(1).

[14] *See* Securities Exchange Act Release No. 77899 (May 24, 2016), 81 FR 34393 (May 31, 2016) (SR–NYSE–2016–37).

[15] 15 U.S.C. 78f(b)(4).

[16] 15 U.S.C. 78f(b)(5).

other SROs, whose rules allow the use of regulatory funds for restitution and disgorgement of funds intended for customers, or simply limit the SRO from making a distribution to its member using regulatory funds.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with the administration and functioning of the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [17] and Rule 19b–4(f)(6) thereunder.[18] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[20] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [21] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2016–93 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2016–93. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2016–93 and should be submitted on or before November 14, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25576 Filed 10–21–16; 8:45 am]

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[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6).

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79111; File No. SR–NYSEArca–2016–96]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend NYSE Arca Equities Rule 8.700 and To List and Trade Shares of the Managed Emerging Markets Trust Under Proposed Amended NYSE Arca Equities Rule 8.700

October 18, 2016.

I. Introduction

On July 1, 2016, NYSE Arca, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Equities Rule 8.700 and to list and trade shares (''Shares'') of the Managed Emerging Markets Trust (''Trust'') under proposed amended NYSE Arca Equities Rule 8.700. The proposed rule change was published for comment in the **Federal Register** on July 21, 2016.[3] On August 30, 2016, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] The Commission received no comments on the proposed rule change. This order institutes proceedings under Section 19(b)(2)(B) of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78345 (July 15, 2016), 81 FR 47447 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 78727, 81 FR 61268 (September 6, 2016). The Commission designated October 19, 2016 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

the Act[6] to determine whether to approve or disapprove the proposed rule change.

II. Exchange's Description of the Proposal

A. Amendments to NYSE Arca Equities Rule 8.700

NYSE Arca Equities Rule 8.700 permits the trading of Managed Trust Securities on the Exchange. A Managed Trust Security is a security that is registered under the Securities Act of 1933, as amended, and (i) is issued by a trust that (1) is a commodity pool as defined in the Commodity Exchange Act (''CEA'') and regulations thereunder, and that is managed by a commodity pool operator registered with the Commodity Futures Trading Commission (''CFTC'') and (2) holds long and/or short positions in exchange-traded futures contracts and/or certain currency forward contracts selected by the trust's advisor consistent with the trust's investment objectives, which will only include exchange-traded futures contracts involving commodities, currencies, stock indices, fixed income indices, interest rates and sovereign, private and mortgage or asset backed debt instruments, and/or forward contracts on specified currencies, each as disclosed in the trust's prospectus; and (ii) is issued and redeemed continuously in specified aggregate amounts at the next applicable net asset value (''NAV'').[7] The Exchange proposes to amend NYSE Arca Equities Rule 8.700 to permit the use of swaps on equity indices, fixed income indices, commodity indices, commodities, or interest rates.

B. Proposal To List and Trade Shares of the Trust

The Exchange proposes to list and trade Shares of the Trust under proposed amended NYSE Arca Equities Rule 8.700. The Trust is a Delaware statutory trust that will issue Shares representing fractional undivided beneficial interests in the Trust. The Trust is a commodity pool as defined in the CEA and the regulations of the CFTC.[8] The Trust will be operated by Artivest Advisors LLC, a Delaware limited liability company (''Sponsor'') that is also the Trust's adviser (''Adviser''), and will be registered under the CEA as a commodity pool operator. The sole member of the Sponsor is Artivest Holdings, Inc., a Delaware corporation. The Adviser is the commodity trading advisor of the Trust and will at all times be either registered as a commodity trading advisor or properly exempt from such registration under the CEA. The Adviser is not a broker-dealer and is not affiliated with a broker-dealer. In the event (a) the Adviser or any sub-adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition of and changes to the Trust's portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.[9]

The Bank of New York Mellon, a New York banking corporation, is the trustee of the Trust. Wilmington Trust, National Association, a national banking association, is the Delaware trustee of the Trust. The Bank of New York Mellon also is the administrator, custodian, processing agent, and settlement agent of the Trust. The Trust has engaged Foreside Fund Services, LLC to act as a distributor on its behalf.

Principal and Other Trust Investments

The Trust will pursue long-term total returns by seeking to provide both (1) a long-only exposure to one or more emerging markets equity indices (''index exposure'') and (2) ''alpha'' returns that are additive to, and are not correlated with, the index exposure (measured over rolling 5-year periods), while seeking to control overall downside risk and volatility.

According to the Exchange, the Trust will primarily trade and invest in futures on emerging market equity indices[10] and foreign currency forward contracts, as discussed in more detail below. The Trust's portfolio may also contain cash which may be used, as needed, to secure the Trust's trading obligations with respect to its trading positions. Although the Trust's investment objective is not primarily to hold significant amounts of cash, cash may comprise a significant portion of the NAV of the Trust. Moreover, in order to collateralize futures contracts and forward contracts, the Trust may invest in U.S. government debt instruments, which are U.S. Treasury bills, notes, and bonds of varying maturities that are backed by the full faith and credit of the United States government, or other short-term securities (in each case eligible as margin deposits under the rules of the Exchange), which may include money market instruments (''Short-Term Securities''). Although the Trust's investment objective is not primarily to trade and invest in Short-Term Securities, Short-Term Securities may comprise a significant portion of the NAV of the Trust.

Index Exposure Portfolio Construction

According to the Exchange, the Trust will seek to maintain constant exposure to one or more emerging markets equity indices by holding long positions in emerging markets index futures contracts.[11] Generally, the Adviser will seek to maintain an emerging markets index exposure equal to 100% of the Trust's net assets, although this may vary from time to time depending on market conditions. Initially, the Trust will hold long MSCI Emerging Markets Index[12] futures contracts to achieve its index exposure.[13] The Adviser may in the future invest in additional or different emerging markets index futures contracts.[14]

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[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* NYSE Arca Equities Rule 8.700(c)(1).

[8] According to the Exchange, the Trust will not be an investment company registered under the Investment Company Act of 1940 (''1940 Act'') and will not be required to register under the 1940 Act.

[9] The activities of the Trust will be limited to (1) issuing Baskets (*i.e.,* blocks of 100,000 Shares) in exchange for cash, (2) paying out of Trust assets any Trust expenses and liabilities not assumed by the Sponsor, (3) delivering proceeds consisting of cash in exchange for Baskets surrendered for redemption, (4) depositing any required margin in the form of cash or other eligible assets with domestic futures commission merchants, foreign futures brokers, or other financial intermediaries or dealers, and (5) investing its cash, at the direction of the Adviser, in a portfolio of futures contracts, forward contracts, and swaps.

[10] The Trust expects to trade futures contracts on U.S. exchanges and non-U.S. exchanges. Not more than 10% of the net assets of the Trust in the aggregate invested in futures contracts will consist of futures contracts whose principal market is not a member of the Intermarket Surveillance Group (''ISG'') or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

[11] According to the Exchange, the Adviser will look at a variety of factors to determine whether a country is an ''emerging market.'' Currently, the Adviser views countries as ''emerging markets'' if they are considered to be developing, emerging, or frontier by sources such as MSCI, the International Monetary Fund, the World Bank, the International Finance Corporation, the United Nations, The Economist magazine, Standard & Poor's and Dow Jones, or if they are countries with a stock market capitalization of less than 5% of the MSCI World Index. Additional information regarding emerging markets as related to this proposal can be found in the Notice, *supra* note 3, 81 FR at 47449–50.

[12] Information regarding the MSCI Emerging Markets Index can be found in the Notice, *supra* note 3, 81 FR at 47450.

[13] ICE Futures U.S. has been licensed to create futures contracts on the MSCI Emerging Markets Index. ICE Futures U.S. is a member of the ISG.

[14] Information regarding rebalancing and risk management for the index portfolio can be found in the Notice, *supra* note 3, 81 FR at 47450 and 74752.

Alpha Portfolio Construction

According to the Exchange, the Trust's alpha strategy [15] will seek to provide returns that are independent of, and uncorrelated to, the index exposure, by trading and investing primarily in futures contracts and forward contracts relating to emerging markets. The alpha portfolio primarily will be composed of futures contracts on emerging market equity indices and foreign currency forward contracts. According to the Exchange, the Adviser anticipates that as the Trust grows larger, it may also, in certain limited circumstances, invest in exchange-traded swaps, swaps accepted for central clearing (''cleared swaps''), *and* swaps that are not accepted for central clearing (''uncleared swaps''). These limited circumstances include the following:

- When futures contracts are not available or market conditions do not permit investing in futures contracts (for example, a particular futures contract may not exist or may trade only on an exchange that has not yet been approved by the Trust); and
- When there are position limits, price limits or accountability limits on futures contracts.

According to the Exchange, swaps would only be used by the Trust as a substitute for futures contracts in the limited circumstances described above when the Adviser has determined that it is necessary to use swaps in order for the Trust to remain consistent with the Trust's investment objective. Further, the Adviser expects that the Trust's use of swaps, if any, will be of a de minimis nature. Moreover, to the extent that the Trust invests in swaps, it would first make use of exchange-traded swaps if such swaps are available. If an investment in exchange-traded swaps is unavailable, then the Trust would invest in cleared swaps that clear through derivatives clearing organizations that satisfy the Trust's criteria. If an investment in cleared swaps is unavailable, then the Trust would invest in other swaps, including uncleared swaps in the over-the-counter (''OTC'') market. However, no more than 20% of the portfolio may be invested, on both an initial and an ongoing basis, in OTC swaps.[16]

Alpha Futures Contracts

The Adviser expects that 75%–90% of the portfolio's alpha exposure will be obtained via futures contracts. The Trust expects to take long or short positions in a wide variety of commodity futures contracts (including metals, agriculturals, energies, and softs) and financial futures contracts (including interest rates, currencies and currency indices, U.S. and non-U.S. equity indices, and government bond futures contracts).

Alpha Forward Contracts

The Trust may enter into foreign currency forward contracts, which the Adviser expects may make up 10%–25% of the portfolio's alpha exposure.[17] The Adviser does not currently expect to engage in any transactions that would be considered ''retail forex'' transactions for purposes of the CEA. The Trust will only enter into foreign currency forward contracts related to foreign currencies that have significant foreign exchange turnover and are included in the Bank for International Settlements Triennial Central Bank Survey, September 2013 (''BIS Survey''). Specifically, the Trust may enter into foreign currency forward contracts that provide exposure to such currencies selected from the top 40 currencies (as measured by percentage share of average daily turnover for the applicable month and year) included in the BIS Survey.[18]

[15] According to the Exchange, the Adviser will pursue a strategy based on fundamental analysis and will make investment decisions based on its view of the fundamental value of various financial instruments relative to market prices and expectations. To construct the alpha portfolio, the Adviser will apply both quantitative and qualitative analysis to market and economic data to generate investment ideas, to trade and invest on a discretionary basis, and to manage portfolio risk. The Adviser will form conclusions regarding future economic conditions and future financial instruments pricing based on its review and analysis of macroeconomic factors. From time to time, the Adviser will form thematic, macroeconomic-based ''alpha views'' regarding its desired exposures to investment themes. Additional information regarding the alpha strategy can be found in the Notice, *supra* note 3, 81 FR at 47449.

[16] Information regarding rebalancing and risk management for the alpha portfolio can be found in the Notice, *supra* note 3, 81 FR at 47452.

[17] The Trust may enter into deliverable forward contracts or non-deliverable forward contracts.

[18] The Trust's forward contracts will be collateralized to the extent required by the relevant counterparties. The counterparties to the Trust's forward contracts are expected to be brokers, dealers, and other financial institutions. The Adviser will seek to diversify the Trust's counterparty exposure but may from time to time have concentrated exposure to one or more counterparties. However, the Adviser represents that it will not concentrate risks with a single counterparty and will establish policies and procedures to manage counterparty concentration and monitor counterparty creditworthiness. The policies and procedures to monitor counterparty creditworthiness will consider the credit rating of the counterparty and any past experience with the counterparty.

III. Proceedings To Determine Whether To Approve or Disapprove SR–NYSEArca–2016–96 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [19] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[20] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest.'' [21]

Under the proposal, an authorized participant may place a purchase or redemption order to create or redeem Baskets of Shares on any ''Eligible Business Day'' (rather than on any Business Day). The proposal defines ''Eligible Business Day'' to mean any Business Day [22] other than a Business Day which immediately precedes two or more days on which there is no scheduled exchange trading session for one or more futures contracts purchased or sold, or that may be purchased or sold, by the Trust on that day. Moreover, purchase and redemption orders must be placed by 1:15 p.m. Eastern Time or the close of regular trading on the New York Stock Exchange, whichever is earlier (''Cutoff Time''). Purchase and redemption

[19] 15 U.S.C. 78s(b)(2)(B).

[20] *Id.*

[21] 15 U.S.C. 78f(b)(5).

[22] Under the proposal, ''Business Day'' is defined to mean any day other than (a) a Saturday or Sunday; (b) a day on which the Exchange is closed for regular trading; (c) a day on which any of the Adviser, the processing agent, the settlement agent, the trust administrator, the Sponsor or the trustee is authorized or required by law or regulation to remain closed; or (d) a day on which the Federal Reserve wire transfer system is closed for cash wire transfers.

orders received after the Cutoff Time on an Eligible Business Day, or on a day that is not an Eligible Business Day, will be treated as received on the next Eligible Business Day. The Exchange does not discuss whether these aspects of the proposal would have any impact on the trading of the Shares, including any impact on arbitrage. The Commission seeks commenters' views on these aspects of the proposal, and on whether the Exchange's statements relating to the creation and redemption process support a determination that the listing and trading of the Shares would be consistent with Section 6(b)(5) of the Act, which, among other things, requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[23]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by November 14, 2016. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by November 28, 2016. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,[24] in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2016–96 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2016–96. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2016–96 and should be submitted on or before November 14, 2016. Rebuttal comments should be submitted by November 28, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25575 Filed 10–21–16; 8:45 am]

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[23] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[24] *See supra* note 3.

[25] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79110; File No. SR–CBOE–2016–064]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Withdrawal of Proposed Rule Change Relating to SPX Combo Orders

October 18, 2016.

On September 8, 2016, Chicago Board Options Exchange, Incorporated (''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 modify the minimum trading increment applicable to SPX Combo Orders. The proposed rule change was published for comment in the **Federal Register** on September 26, 2016.[3] The Commission received no comments regarding the proposal. On October 13, 2016, the Exchange withdrew the proposed rule change.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[4]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25574 Filed 10–21–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79108; File No. SR–NYSEMKT–2016–92]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE MKT Rule 6A—Equities and NYSE MKT Rule 6—Equities

October 18, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 4, 2016, NYSE MKT LLC (''NYSE MKT'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78885 (September 20, 2016), 81 FR 66105.

[4] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE MKT Rule 6A—Equities (''Trading Floor'') to exclude from the definition of Trading Floor the area within fully enclosed telephone booths located in 18 Broad Street and NYSE MKT Rule 6—Equities (''Floor'') to provide greater specificity regarding the physical locations that constitute the Floor. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend NYSE MKT Rule 6A—Equities (''Trading Floor'') (''Rule 6A'') to exclude from the definition of ''Trading Floor'' the area within fully enclosed telephone booths located in 18 Broad Street. These proposed changes are based on recent amendments to the rules of the New York Stock Exchange LLC (''NYSE'').[3] In addition, the Exchange proposes to amend NYSE MKT Rule 6—Equities (''Floor'') (''Rule 6'') to provide greater specificity regarding the physical locations that constitute the Floor.

The Exchange currently defines ''Trading Floor'' [4] in Rule 6A to mean the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the ''Main Room,'' the ''Blue Room'' and the ''Garage.'' [5] The term ''Trading Floor'' is distinct from the term ''Floor.'' The term ''Floor'' is currently defined to have the meaning given that term in the Securities Exchange Act of 1934, as amended, and the General Rules and Regulations thereunder.[6] Rule 11a–1 under the Act (''Rule 11a–1'') defines the term ''on the floor of the Exchange'' to include ''the trading floor; the rooms, lobbies, and other premises immediately adjacent thereto for use of members generally; other rooms, lobbies and premises made available primarily for use by members generally; and the telephone and other facilities in any such place.'' [7] At the Exchange, the physical locations that meet this definition of Floor under Rule 11a–1 are the trading floor of the Exchange and the premises immediately adjacent thereto, such as the various entrances and lobbies of the 11 Wall Street, 18 New Street, 8 Broad Street, 12 Broad Street, and 18 Broad Street buildings, and also means the telephone facilities available in these locations.[8] The Exchange proposes to amend Rule 6 to specify these locations within the definition of Floor. This proposed rule change is based on NYSE Rule 6. NYSE and the Exchange share the same Floor.

Rule 6A also specifies that the Exchange's Trading Floor does not include areas designated by the Exchange for the trading of its listed options securities, commonly known as the ''Extended Blue Room,'' which, for the purposes of the Exchange's Equities Rules, are referred to as the ''NYSE Amex Options Trading Floor.'' [9] The Exchange proposes to add sub-paragraph numbering to Rule 6A, so that the first paragraph of the rule would be sub-paragraph (a) and the second paragraph would be sub-paragraph (b). As proposed, Rule 6A(a) would define the term ''Trading Floor,'' and proposed Rule 6A(b) would define which physical areas are excluded from the definition of ''Trading Floor.''

The Exchange first proposes to amend Rule 6A to reflect the renaming of the physical area formerly known as the ''Garage.'' That area has been renamed the ''Buttonwood Room'' and the Exchange proposes to reflect this change in Rule 6A. Rule 6A also currently defines Trading Floor to include areas commonly known as the ''Blue Room'' and also refers to an area commonly referred to as the ''Extended Blue Room.'' [10] The Exchange recently closed those areas and moved all member organizations, member organization employees and NYSE Amex Options trading activities that were previously housed in these areas to the Buttonwood Room. To reflect this change, the Exchange proposes to delete references to the Blue Room and Extended Blue Room from Rule 6A and replace them with a reference to the Buttonwood Room.

With respect to proposed Rule 6A(b), the current rule already excludes the NYSE Amex Options Trading Floor from the definition of ''Trading Floor.'' To reflect the change to the names of the trading rooms and the relocation of the NYSE Amex Options Trading Floor to the Buttonwood Room, the Exchange proposes to amend Rule 6A(b) to refer to the Buttonwood Room when referring to the NYSE Amex Options Trading Floor. Accordingly, the proposed rule would exclude from the definition of Trading Floor the designated areas in the Buttonwood Room where the trading of its listed options securities takes place which, for the purposes of the Exchange's Rules, would continue to be referred to as the ''NYSE Amex Options Trading Floor.'' [11] This proposed change does not make any substantive changes and reflects only the location change for NYSE Amex Options. This proposal would have no impact on the physical location of NYSE Amex Options personnel as they would remain in their current location in the Buttonwood Room.

The Exchange next proposes to amend Rule 6A(b) to exclude an additional area from the definition of Trading Floor. As proposed, the Exchange proposes to exclude from the definition of Trading Floor the area within fully enclosed telephone booths located in 18 Broad Street at the Southeast wall of the

[3] *See* Securities Exchange Act Release No. 78855 (September 15, 2016) (SR–NYSE–2016–31) (''NYSE Approval Order'').

[4] Access to the Trading Floor is restricted at each entrance by turnstiles and only authorized visitors, members or member firm employees are permitted to enter.

[5] *See* Rule 6A; *see also* Securities Exchange Act Release No. 59480 (Mar. 2, 2009), 74 FR 10109 (Mar. 9, 2009) (SR–NYSEALTR–2009–21) (Notice of filing adopting Rule 6A and explaining that the proposed definition of ''Trading Floor'' will provide a more accurate description of the physical areas of the Floor where trading is actually conducted).

[6] *See* Rule 6.

[7] *See* 17 CFR 240.11a–1.

[8] The Exchange no longer has any premises for use primarily by members that would meet the Rule 11a–1 definition of Floor.

[9] *See* Rule 6A.

[10] The Blue Room and Extended Blue Room are references to trading spaces previously utilized by member firm employees and NYSE Amex Options at 20 Broad Street.

[11] As when the NYSE Amex Options Trading Floor was located in the Extended Blue Room, in the Buttonwood Room, the Exchange has erected physical barriers between the NYSE Amex Options Trading Floor and any Exchange member organizations or Exchange personnel that are also located in the Buttonwood Room.

Trading Floor.[12] The telephone booths would be located in a vestibule area adjacent to 18 Broad Street elevator banks that provide access to the Trading Floor and that are separated from the equity trading areas of the Main Room by approximately forty (40) feet and a partial physical barrier. In addition, the glass on the telephone booths has been frosted to make them opaque, which would reduce any sight lines to non-public information on the Trading Floor. As such, while inside the telephone booths, there is not any visual or auditory access to activities conducted at the trading posts or by Floor Brokers.

These telephone booths would be designed for use by DMMs, but could be used by anyone on the Trading Floor. Because the telephone booths would be excluded from the definition of Trading Floor, there would not be any restrictions on the use of personal cell phones by DMMs while in these telephone booths, nor would there be restrictions on which cellular phone a Floor broker may use while in the telephone booth. For example, currently, a DMM who is not on the Trading Floor, *i.e.,* is located outside the restricted-access areas of the Floor, may use a personal cell phone to communicate with an issuer. As proposed, because the area within the telephone booth would similarly be excluded from the definition of Trading Floor, a DMM could use a personal cell phone while inside the telephone booth to communicate with an issuer. The Exchange believes that a DMM's use of a personal cell phone while within the telephone booth would be no different than if the DMM used his or her personal cell phone to communicate with an issuer from the DMM's office off the Exchange or while outside the restricted-access areas of the Floor, *i.e.,* outside the Trading Floor.

While in the telephone booth, the DMM would not have access to any time and place information that he or she may have at the trading post. The proposed location of these telephone booths would ensure the privacy of any conversations, for a number of reasons: The closest location of any Floor Broker operations, which also contain privacy barriers, is approximately forty (40) feet from the proposed location of the telephone booths; there are high arching walls with limited line and sight vision separating the telephone booths from any trading posts on the Trading Floor; and lastly, the telephone booths are fully enclosed with frosted glass so any conversation that would occur would take place behind closed doors. The Exchange believes that the combination of these visual and acoustical barriers would substantially eliminate the risk that any conversations occurring inside the telephone booth could be overheard. In addition, it substantially eliminates the risk that an individual having a telephone conversation while inside the telephone booth would be able to hear or see anything at a trading post where securities trade.

To the extent that a DMM would use the telephone booths to communicate off the Trading Floor, current Exchange restrictions governing the protection of material non-public information would continue to apply. Rule 98—Equities (''Operation of a DMM Unit'') (''Rule 98'') currently provides that that when a Floor-based employee of a DMM unit moves to a location off of the Trading Floor of the Exchange or if any person that provides risk management oversight or supervision of the Floor-based operations of the DMM unit is aware of Floor-based non-public order information, he or she shall not (1) make such information available to customers, (2) make such information available to individuals or systems responsible for making trading decisions in DMM securities in away markets or related products, or (3) use any such information in connection with making trading decisions in DMM securities in away markets or related products.[13] The proposed rule change is not intended to circumvent the restrictions prescribed in Rule 98 applicable to DMMs. Accordingly, DMMs would continue to be subject to the restrictions against the misuse of material non-public information prescribed in Rule 98. To that end, any communication between a DMM and an issuer would be limited to information that is in the public domain and not deemed material, non-public information.[14] Except for the requirement to protect against the misuse of material non-public information set forth in Rule 98, Exchange rules do not have any restrictions on DMMs communicating with issuers from locations off of the Trading Floor. To the contrary, an important element of the DMM role is its relationship with issuers.

Moreover, DMMs would continue to be subject to supplementary material .30 to Rule 36—Equities (''DMM Unit Post Wires'') (''Rule 36''), which permits a DMM to maintain at their posts telephone lines and wired or wireless devices that are registered with the Exchange to communicate with personnel at the off-Floor offices of the DMM, the DMM's clearing firm, or with persons providing non-trading related services to the DMM. The Exchange is not proposing any changes to Rule 36 and, therefore, the current restrictions in Rule 36.30 would remain applicable and would not be affected by the proposed amendment to the definition of Trading Floor in Rule 6A. The proposed amendment to Rule 6A would allow the Exchange to delineate an area inside the telephone booth as being off the Trading Floor where a DMM may use a personal cell phone, which would not be subject to Rule 36.30.

Because the proposed telephone booths would still fall within the broader definition of Floor under Exchange rules, the Exchange will retain jurisdiction in this area to regulate conduct that is inconsistent with Exchange Rules and the federal securities laws and rules thereunder. Specifically, the Exchange monitors and surveils for the misuse of material, non-public information, including trading ahead of customer orders, and misuse of non-public Floor-based non-public order information. The Exchange believes that its existing surveillance procedures, together with the surveillance and examination program that the Financial Industry Regulatory Authority, Inc. (''FINRA'') performs on its behalf, should be effective to monitor for any misuse of material non-public information. These programs are designed to detect such misuse regardless of where communications may occur, including the use of telephone booths in close proximity to the Trading Floor within which individuals may use personal cellular phones. As part of its surveillance procedures, the Exchange or FINRA, or both, can require its member organizations to produce any additional

[12] Because the Exchange shares its equities trading market with the NYSE's physical facilities, including using the same Trading Floor, and under Rule 2.10—Equities and NYSE Rule 2.10, all Exchange member organizations are also NYSE member organizations, the phone booths proposed for use by Exchange DMMs would be the same phone booths that have been approved for use by the NYSE DMMs. *See* NYSE Approval Order, *supra* note 3.

[13] *See* Rule 98(c)(3)(C). Rule 98, however, permits a DMM that needs to take on a larger risk profile in a security because of a proposed floor broker transaction to discuss the proposed transaction, which would be deemed material non-public information, with the DMM's risk manager located off of the Trading Floor without violating Exchange rules or federal securities laws.

[14] The Exchange will publish an Information Memo reminding member organizations of their obligation not to misuse material non-public information, and for DMMs in particular, to update their respective written policies and procedures to reflect that any use of the telephone booths by Floor-based employees would be subject to Rule 98, and in particular, Rule 98(c)(3).

information necessary regarding telephone booth use.

2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with, and further the objectives of, Section 6(b)(5) of the Securities Exchange Act of 1934 [15] (the ''Act''), in that they are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change would exclude from the definition of Trading Floor fully-enclosed telephone booths that are located on the perimeter of the Trading Floor, approximately 40 feet away from any trading operations. The Exchange believes that excluding these telephone booths from the definition of Trading Floor is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade because the visual and acoustic lines while within the fully-enclosed telephone booths to any trading activities are extremely limited. The Exchange believes that the combination of these visual and acoustical barriers would substantially eliminate the risk that any conversations occurring inside the telephone booth could be overheard. In addition, it substantially eliminates the risk that an individual having a telephone conversation while inside the telephone booth would be able to hear or see anything at a trading post where securities trade. Accordingly, because being inside the telephone booths would be akin to being off of the Trading Floor, the Exchange believes that it would remove impediments to and perfect the mechanism of a free and open market and a national market system to treat the areas within the telephone booths similarly to areas located outside of the Trading Floor.

The Exchange believes that the proposal provides a balance between the Exchange's interest to provide a convenient location for DMMs and others on the Trading Floor to place telephone calls while minimizing the risk of any potential time and place advantage that could come with using personal portable communication devices in proximity to trading activity. Moreover, the Exchange believes that given the current speed of electronic trading, any Floor-based non-public information that the DMM, or other Floor-based personnel using the telephone booths, had prior to leaving his or her trading post or booth area would likely be rendered stale by the time he or she reached the telephone booths, thereby substantially reducing the risk of any time and place advantage.

The Exchange further believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it will reduce the burdens on the ability of a DMM to communicate with an issuer. Currently, a DMM may use a personal cell phone to communicate with an issuer outside of the Trading Floor, but short of going to an office at a separate physical location, there are limited areas where a DMM may have a private conversation. The telephone booths would provide a physical space in which a DMM could have a private conversation with an issuer while at the same time remaining subject to existing Rule 98 requirements to protect against the misuse of material, non-public information. If a DMM or other Floor personnel learns of information about customer orders or other material non-public information while using a personal cell phone within the telephone booths, the Exchange believes that the speed of electronic trading, together with the Exchange's ongoing surveillance of trading activity occurring at the Exchange, would reduce the risk of misuse of non-public order information.

The Exchange believes that the proposed amendment to Rule 6 will remove impediments to and perfect the mechanism of a free and open market and a national market system by providing greater specificity in Exchange rules regarding which physical locations constitute the Floor at the Exchange. The proposed rule change does not make any substantive differences to Rule 6 as these locations constitute the current definition of Floor, as defined by Rule 11a–1 under the Exchange Act.[16] Moreover, the proposed rule is based on the current NYSE Rule 6 definition of Floor, which has the same physical location as the Exchange.

The Exchange further believes that updating the references in the Exchange rules to reflect the correct use of the Exchange Trading Floor would eliminate any potential confusion among investors and other market participants on the Exchange as to areas of the Trading Floor where certain conduct is, or is not, permitted.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would ease burdens on the ability of a DMM to have a private conversation with an issuer by providing a physical location that would be excluded from the definition of Trading Floor that is private. Moreover, the Exchange believes that the proposed rule change would remove a significant burden on competition because it would enable DMMs that operate on both the NYSE and the Exchange to be subject to the same requirements regarding the use of the proposed telephone booths, regardless of the market on which they are trading.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [17] and Rule 19b–4(f)(6) thereunder.[18] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[20] the

[15] 15 U.S.C. 78f(b)(5).

[16] *See* 17 CFR 240.11a–1.

[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give 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. The Exchange has satisfied this requirement.

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange has stated that it is requesting this waiver because the proposed rule change is based on the approved rules of NYSE and would be applicable to member organizations that are also NYSE member organizations, trade on the same physical facilities as NYSE, and are subject to trading rules based on the rules of NYSE. The Exchange further stated that the proposed rule change would permit the Exchange to implement changes to its rules at the same time that the approved changes are implemented by NYSE.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because this waiver will enable the Exchange to maintain consistent definitions of Trading Floor and Floor between the Exchange and NYSE, which utilize the same physical location and have their member organizations in common. Waiver could thus avoid confusion that might arise from excluding the telephone booths described herein from the definition of Trading Floor for purposes of NYSE but not for the Exchange. The Commission notes that the Exchange, in adopting this proposed rule change, will be held to the same standards with respect to conducting surveillance for the misuse of material non-public information and monitoring for compliance with Exchange rules within the telephone booths and on the Trading Floor that the Commission based its findings on when approving NYSE's version of the proposed rule change. For the reasons described above, consistent with the protection of investors and the public interest, the Commission hereby waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing.[21]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[22] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2016–92 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2016–92. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2016–92, and should be submitted on or before November 14, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Robert W. Errett,

Deputy Secretary.

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[21] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 15 U.S.C. 78s(b)(2)(B).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79118; File No. SR–NASDAQ–2016–121]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change Related to the Payment of a Credit by Execution Access, LLC Based on Volume Thresholds Met on the NASDAQ Options Market

October 19, 2016.

On August 29, 2016, The Nasdaq Stock Market LLC (''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 related to the payment of a credit by Execution Access, LLC that would be based on volume thresholds met on the NASDAQ Options Market LLC. The proposed rule change was published for comment in the **Federal Register** on September 8, 2016.[3] The Commission has received no comment letters on the proposal.

Section 19(b)(2) of the Act[4] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is October 23,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78749 (September 1, 2016), 81 FR 62212.

[4] 15 U.S.C. 78s(b)(2).

2016. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, pursuant to Section 19(b)(2) of the Act,[5] the Commission designates December 7, 2016, as the date by which the Commission shall either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change (File No. SR–NASDAQ–2016–121).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Brent J. Fields,

Secretary.

[FR Doc. 2016–25615 Filed 10–21–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79115; File No. SR–NYSE–2016–66]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Article IV, Section 4.05 of the Tenth Amended and Restated Operating Agreement of the Exchange

October 18, 2016.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 6, 2016, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Article IV, Section 4.05 of the Tenth Amended and Restated Operating Agreement of the Exchange (''Operating Agreement'') regarding use of regulatory assets, fees, fines and penalties, and make additional, non-substantive edits. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Article IV, Section 4.05 (Limitation on Distributions) of the Operating Agreement (''Section 4.05''), regarding use of regulatory assets, fees, fines and penalties (''Regulatory Funds''), and make additional, non-substantive edits.

Proposed Amendment to Section 4.05

Section 4.05 provides that:

[t]he Company shall not use any regulatory assets or any regulatory fees, fines or penalties collected by the Exchange's regulatory staff for commercial purposes or distribute such assets, fees, fines or penalties to the Member or any other entity.[4]

Although it prohibits the use of Regulatory Funds for ''commercial purposes,'' that term is not defined in Section 4.05 or elsewhere in the Operating Agreement. Accordingly, to add greater clarity to the limits on the use of Regulatory Funds, the Exchange proposes to replace the prohibition against using Regulatory Funds for ''commercial purposes'' with a statement that Regulatory Funds ''will be applied to fund the legal, regulatory and surveillance operations'' of the Exchange. The prohibition on using Regulatory Funds for distributions to the Member or any other entity would remain.

In addition, ''Exchange'' is not a defined term in the Operating Agreement, which defines the Exchange as the ''Company.'' Accordingly, the Exchange proposes to replace ''Exchange's regulatory staff'' with ''Company's regulatory staff.''

The amended Section 4.05 would read as follows:

> Any regulatory assets or any regulatory fees, fines or penalties collected by the Company's regulatory staff will be applied to fund the legal, regulatory and surveillance operations of the Company, and the Company shall not distribute such assets, fees, fines or penalties to the Member or any other entity.

The Exchange believes that the increased clarity in the scope of the limits on use of Regulatory Funds will enhance the protections provided by Section 4.05 against the possibility that Regulatory Funds may be assessed to respond to the Exchange's budgetary needs rather than to serve a disciplinary purpose.[5]

The proposed amendments would have the benefit of bringing Section 4.05 into greater conformity with the bylaws of the Exchange's affiliate NYSE Arca, Inc., which provide that regulatory fees and penalties ''will be applied to fund the legal, regulatory and surveillance operations of the Exchange.'' [6]

The proposed amendments would make Section 4.05 more consistent with the limitations on the use of regulatory income of other self-regulatory organizations (''SROs''). Most such limitations are substantially similar to the proposed revised Section 4.05. For example, similar to the proposed Section 4.05, the limited liability company agreements of the BOX Options Exchange (''BOX''), International Securities Exchange, LLC (''ISE''), and its affiliates ISE Gemini, LLC and ISE Mercury, LLC, provide that regulatory funds shall be used to fund the relevant SRO's legal, regulatory and surveillance operations.[7] Consistent

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Tenth Amended and Restated Operating Agreement of New York Stock Exchange LLC, Art. IV, Sec. 4.05; *see also* Securities Exchange Act Release No. 78805 (September 9, 2016), 81 FR 63536 (September 15, 2016) (SR–NYSE–2016–51).

[5] *See* Securities Exchange Act Release No. 77899 (May 24, 2016), 81 FR 34393 (May 31, 2016) (SR–NYSE–2016–37).

[6] *See* Bylaws of NYSE Arca, Inc., Art. II, Sec. 2.06 (''Any revenues received by the Exchange from regulatory fees or regulatory penalties will be applied to fund the legal, regulatory and surveillance operations of the Exchange and will not be used to pay dividends. For purposes of this Section, regulatory penalties shall include restitution and disgorgement of funds intended for customers.''). The Exchange's affiliate NYSE MKT LLC has submitted substantially the same proposed amendment to its operating agreement. *See* SR–NYSEMKT–2016–93.

[7] Such provisions also limit the relevant SRO from making any distribution to its member using regulatory funds. *See* Box Options Exchange Limited Liability Company Agreement, Art. 1, Sec.

Continued

with the proposed revised Section 4.05, their definition of ''regulatory funds'' includes fees, fines or penalties derived from its regulatory operations.[8]

Some SROs have provisions that are less restrictive than the proposed Section 4.05. More specifically, the governing documents of affiliates Bats BZX Exchange, Inc., Bats BYX Exchange, Inc., Bats EDGX Exchange, Inc., and Bats EDGA Exchange, Inc. permit such SROs to use regulatory funds to fund legal and regulatory operations, including surveillance and enforcement activities, but also provide that revenues received from fees derived from the regulatory function or regulatory penalties may be used to pay restitution and disgorgement of funds intended for customers.[9] The limited liability company agreement of Miami International Securities Exchange, LLC, and bylaws of National Stock Exchange, Inc., have similar provisions.[10] By contrast, the operating agreement of the NASDAQ Stock Market LLC (''Nasdaq'') simply limits Nasdaq from making a distribution to its member using regulatory funds, and does not impose other restrictions.[11]

Additional Proposed Amendments

The Exchange proposes to make a non-substantive amendment to the second sentence of Article II, Section 2.03(h)(iii) (Board). Currently, the sentence provides that the Committee for Review (''CFR'') will be responsible for, among other things, ''reviewing determinations to limit or prohibit the continued listing of an issuer's securities on the Exchange.'' The Exchange proposes to replace ''Exchange'' with ''exchange operated by the Company.'' The Exchange proposes to make the change because, as noted above, ''Exchange'' is not a defined term in the Operating Agreement.

Finally, the Exchange proposes to make technical and conforming changes to the recitals and signature page of the Operating Agreement.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act [12] in general, and Section 6(b)(1) [13] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

The Exchange believes that replacing the current prohibition against using Regulatory Funds for undefined ''commercial purposes'' with a requirement that Regulatory Funds ''be applied to fund the legal, regulatory and surveillance operations'' of the Exchange would enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange, because it would add greater clarity to the limits on the use of Regulatory Funds, enhancing the protections provided by Section 4.05 against the possibility that Regulatory Funds may be assessed to respond to the Exchange's budgetary needs rather than to serve a disciplinary purpose.[14] The proposed changes to Section 4.05 would make it more transparent to market participants.

Similarly, the Exchange believes that replacing ''Exchange's regulatory staff'' with ''Company's regulatory staff'' in Section 4.05 and replacing ''Exchange'' with ''exchange operated by the Company'' in Article II, Section 2.03(h)(iii) would enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange, because it would add greater clarity to the Operating Agreement by using the defined term ''Company'' instead of ''Exchange,'' which is not defined in the Operating Agreement.

For the same reasons, the Exchange believes that the proposed rule changes are consistent with Section 6(b)(4),[15] which requires that the rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among the exchange's members and issuers and other persons using its facilities, and Section 6(b)(5),[16] which requires that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed changes would add greater clarity to the limits on the use of Regulatory Funds, enhancing the protections provided by Section 4.05, and ensure the use of defined terms, thereby making Section 4.05 and Article

1.1 and Art. 8, Sec. 8.1; Third Amended and Restated Limited Liability Company Agreement of International Securities Exchange, LLC, Art. III, Sec. 3.3(ii); Second Amended and Restated Limited Liability Company Agreement of ISE Gemini, LLC, Art. III, Sec. 3.3(ii); and Limited Liability Company Agreement of ISE Mercury, LLC, Art. III, Sec. 3.3(ii).

[8] The BOX definition of regulatory funds also states that such funds ''shall not include revenues derived from listing fees, market data revenues, transaction revenues or any other aspect of the commercial operations of the Exchange or a facility of the Exchange, even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Exchange.'' Box Options Exchange Limited Liability Company Agreement, Art. 1, Sec. 1.1. The agreements of ISE and its affiliates have substantially similar language. *See* Third Amended and Restated Limited Liability Company Agreement of International Securities Exchange, LLC, Art. III, Sec. 3.3(ii); Second Amended and Restated Limited Liability Company Agreement of ISE Gemini, LLC, Art. III, Sec. 3.3(ii); and Limited Liability Company Agreement of ISE Mercury, LLC, Art. III, Sec. 3.3(ii).

[9] The described revenues may not be used for non-regulatory purposes or distributed to the stockholder. *See* Fourth Amended and Restated Bylaws of Bats BZX Exchange, Inc., Art. X, Sec. 4; Fourth Amended and Restated Bylaws of Bats BYX Exchange, Inc., Art. X, Sec. 4; Fifth Amended and Restated Bylaws of Bats EDGX Exchange, Inc., Art. X, Sec. 4; and Fifth Amended and Restated Bylaws of Bats EDGA Exchange, Inc., Art. X, Sec. 4.

[10] *See* Second Amended and Restated Limited Liability Company Agreement of Miami International Securities Exchange, LLC, Art. IX, Sec. 9.4 (''Any Regulatory Funds will not be used for non-regulatory purposes or distributed to the LLC Member, but rather, shall be applied to fund the legal and regulatory operations of the Company (including surveillance and enforcement activities), or, as the case may be, shall be used to pay restitution and disgorgement of funds intended for customers.''); Third Amended and Restated By-laws of National Stock Exchange, Inc., Art. X, Sec. 10.4 (''Any revenues received by the Exchange from fees derived from its regulatory function or regulatory penalties will not be used to pay dividends and shall be applied to fund the legal and regulatory operations of the Exchange (including surveillance and enforcement activities), or, as the case may be, shall be used to pay restitution and disgorgement of funds intended for customers.''); *see also* Amended and Restated By-Laws of Miami International Securities Exchange, LLC, Art. IX, Sec. 9.4.

[11] *See* Second Amended Limited Liability Company Agreement of The NASDAQ Stock Market LLC, Sec. 15. *See also* by-laws of NASDAQ BX, Inc., Art. IX, Sec. 9.8, and Second Amended Limited Liability Company Agreement of NASDAQ PHLX LLC, Sec. 14. When the NASDAQ OMX Group, Inc. acquired the Boston Stock Exchange (''BSE''), the BSE by-laws were amended to include a similar provision that dividends could not be paid to the stockholders using regulatory funds. *See* Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR–BSE– 2008–02; SR–BSE–2008–23; SR–BSE–2008–25; SR–BSECC–2008–01), at 46942.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(1).

[14] *See* Securities Exchange Act Release No. 77899 (May 24, 2016), 81 FR 34393 (May 31, 2016) (SR–NYSE–2016–37).

[15] 15 U.S.C. 78f(b)(4).

[16] 15 U.S.C. 78f(b)(5).

II, Section 2.03(h)(iii) more transparent to market participants.

The Exchange notes that the proposed change to Section 4.05 would have the additional benefit of bringing the Exchange's restrictions on the use of regulatory assets and income into greater conformity with those of its affiliate NYSE Arca, Inc. In addition, the proposed amendments would make Section 4.05 more consistent with the limitations on the use of regulatory income of other SROs. Most such limitations are substantially similar to the proposed revised Section 4.05. In fact, the proposed Section 4.05 is more restrictive than the provisions of some other SROs, whose rules allow the use of regulatory funds for restitution and disgorgement of funds intended for customers, or simply limit the SRO from making a distribution to its member using regulatory funds.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with the administration and functioning of the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [17] and Rule 19b–4(f)(6) thereunder.[18] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[20] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [21] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2016–66 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2016–66. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2016–66 and should be submitted on or before November 14, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25577 Filed 10–21–16; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6).

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2016–0051]

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov*

(SSA), Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov*

Or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2016–0051].

I. The information collection below is pending at SSA. SSA will submit it to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than December 23, 2016. Individuals can obtain copies of the collection instrument by writing to the above email address.

Requests for Self-Employment Information, Employee Information, Employer Information—20 CFR 422.120—0960–0508. When SSA cannot identify Form W–2 wage data for an individual, we place the data in an earnings suspense file and contact the individual (and in certain instances the employer) to obtain the correct information. If the respondent furnishes the name and Social Security Number (SSN) information which agrees with SSA's records, or provides information resolving the discrepancy, SSA adds the reported earnings to the respondent's Social Security record. We use Forms SSA–L2765, SSA–L3365, and SSA–L4002 for this purpose. The respondents are self-employed individuals and employees whose name and SSN information do not agree with their employer's and SSA's records.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–L2765	12,321	1	10	2,054
SSA–L3365	179,749	1	10	29,958
SSA–L4002	121,679	1	10	20,280
Totals	313,749			52,292

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding the information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than November 23, 2016. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. Application for Child's Insurance Benefits—20 CFR 404.350–404.368, 404.603, & 416.350—0960–0010. Title II of the Social Security Act (Act) provides for the payment of monthly benefits to children of an insured retired, disabled, or deceased worker. Section 202(d) of the Act discloses the conditions and requirements the applicant must meet when filing an application. SSA uses the information on Form SSA–4–BK to determine entitlement for children of living and deceased workers to monthly Social Security payments. Respondents are guardians completing the form on behalf of the children of living or deceased workers, or the children of living or deceased workers.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Life claims (paper)	15,207	1	12	3,041
Life Claims (MCS/Signature Proxy)	465,428	1	11	85,328
Death Claims (paper)	6,290	1	12	1,258
Death Claims (MCS/Signature Proxy)	193,131	1	11	35,407
Totals	680,056			125,034

2. Private Printing and Modification of Prescribed Application and Other Forms—20 CFR 422.527—0960–0663. 20 CFR 422.527 of the Code of Federal Regulations requires a person, institution, or organization (third-party entities) to obtain approval from SSA prior to reproducing, duplicating, or privately printing any application or other form the agency owns. To obtain SSA's approval, entities must make their requests in writing using their company letterhead, providing the required information set forth in the regulation. SSA uses the information to: (1) Ensure requests comply with the law and regulations, and (2) process requests from third-party entities who want to reproduce, duplicate, or privately print any SSA application or other SSA form. SSA employees review the requests and provide approval via email or mail to the third-party entities. The respondents are third-party entities who submit a request to SSA to reproduce, duplicate, or privately print an SSA-owned form.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
20 CFR 422.527	10	15	10	25

Dated: October 19, 2016.

Naomi R. Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2016–25625 Filed 10–21–16; 8:45 am]

BILLING CODE 4191–02–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket Number USTR–2016–0022]

Request for Public Comments Regarding the Interim Environmental Review of the WTO Environmental Goods Agreement

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for comments.

SUMMARY: The Office of the United States Trade Representative (USTR), on behalf of the Trade Policy Staff Committee (TPSC), invites written comments from the public on the interim environmental review of the proposed WTO Environmental Goods Agreement (EGA). The interim environmental review will be available at *https://ustr.gov/issue-areas/environment/environmental-reviews.*

DATES: Written comments are due by 11:59 p.m. on November 21, 2016.

ADDRESSES: You should submit written comments through the Federal eRulemaking Portal (*http://www.regulations.gov*) using docket number USTR–2016–0022. Follow the instructions for submitting comments in section II below. USTR strongly encourages filing submissions electronically. For alternatives to on-line submissions, please contact Yvonne Jamison (202–395–3475) before transmitting a comment and in advance of the relevant deadline.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding the submission of comments to Yvonne Jamison at (202) 395–3475. Direct questions concerning the interim environmental review to William McElnea at (202) 395–7320.

SUPPLEMENTARY INFORMATION:

1. Background

Executive Order 13141, *Environmental Review of Trade Agreements,* and its implementing guidelines, 64 FR 63169, Nov. 18, 1999, and 65 FR 79442, Dec. 19, 2000, respectively, provide for the conduct of environmental reviews of certain international trade agreements. The Executive Order and guidelines are available at: *https://ustr.gov/issue-areas/environment/environmental-reviews.* The purpose of environmental reviews is to ensure that policymakers and the public are informed about reasonably foreseeable environmental impacts of trade agreements (both positive and negative), to identify complementarities between trade and environmental objectives, and to help shape appropriate responses if environmental impacts are identified. Reviews are intended to be one tool, among others, for integrating environmental information and analysis into the fluid, dynamic process of trade negotiations. USTR and the Council on Environmental Quality jointly oversee implementation of the Order and Guidelines. USTR, through the TPSC, is responsible for conducting the individual reviews.

II. Requirements for Submissions

Persons submitting comments must do so in English and must identify on the first page of the submission, ''Comments Regarding the EGA Interim Environmental Review.'' In order to be assured of consideration, comments should be submitted by 11:59 p.m. on November 21, 2016.

In order to ensure the timely receipt and consideration of comments, USTR strongly encourages commenters to make on-line submissions, using the *www.regulations.gov* Web site. To submit comments via *www.regulations.gov,* enter docket number USTR–2016–0022 on the home page and click ''search.'' The site will provide a search results page listing all documents associated with this docket. Find a reference to this notice and click on the link entitled ''Comment Now!'' For further information on using the *www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How to Use Regulations.gov'' on the bottom of the home page.

The *www.regulations.gov* Web site allows users to provide comments by filling in a ''Type Comment'' field, or by attaching a document using an ''Upload File'' field. USTR prefers that comments be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''Type Comment'' 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 ''Type Comment'' field.

For any comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC''. Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. Filers of submissions containing business confidential information also must submit a public version of their comments. The file name of the public version should begin with the character ''P''. The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments. Filers submitting comments containing no business confidential information should name their file using the name of the person or entity submitting the comments.

Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the submission itself, not as separate files.

As noted, USTR strongly urges submitters to file comments through *www.regulations.gov.* Any alternative arrangements must be made with Yvonne Jamison in advance of transmitting a comment. You can contact Ms. Jamison at (202) 395–3475. General information concerning USTR is available at *www.ustr.gov.*

Comments will be placed in the docket and open to public inspection, except business confidential information. Comments may be viewed on the *www.regulations.gov* Web site by entering the relevant docket number in the search field on the home page.

Edward Gresser,

Chair of the Trade Policy Staff Committee, Office of the United States Trade Representative.

[FR Doc. 2016–25636 Filed 10–21–16; 8:45 am]

BILLING CODE 3290–F7–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Ninth RTCA SC–229 406 MHz ELT Plenary Joint With EUROCAE WG–98 10th Plenary

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Ninth RTCA SC–229 406 MHz ELT Plenary Joint with EUROCAE WG–98 10th Plenary.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of Ninth RTCA SC–229 406 MHz ELT

Plenary Joint with EUROCAE WG–98 10th Plenary.

DATES: The meeting will be held December 13–15, 2016, 9:00 a.m.–5:00 p.m.

ADDRESSES: The meeting will be held at: RTCA Headquarters, 1150 18th Street NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION, CONTACT: Rebecca Morrison at *rmorrison@rtca.org* or 202–330–0654, or The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of the Ninth RTCA SC–229 406 MHz ELT Plenary Joint with EUROCAE WG–98 10th Plenary. The agenda will include the following:

Tuesday, December 13, 2016 (9:00 a.m.–5:00 p.m.)

1. Welcome/Introductions/ Administrative Remarks
2. Agenda overview and approval
3. Lorient meeting review and approval
4. Review Action Items from Lorient meeting
5. ''Phasing in'' RTCA/DO–204B, EUROCAE/ED–62B—Timeline and ToR
6. Briefing of: ICAO GADSS–AG, COSPAS–SARSAT activities
7. Other Industry coordination and presentations
8. WG 2 to 5 status and week's plan
9. WG meetings (rest of the day)

Wednesday, December 14, 2016 (9:00 a.m.–5:00 p.m.)

WG 2 to 5 meetings

Thursday, December 15, 2016 (9:00 a.m.–4:00 p.m.)

1. WG 2–5 meetings in the morning
2. WGs' reports
3. Action item review
4. Future meeting plans and dates
5. Industry coordination and presentations (if any)
6. Other business
7. Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on October 18, 2016.

Mohannad Dawoud,

Management & Program Analyst, Partnership Contracts Branch, ANG–A17 NextGen, Procurement Services Division, Federal Aviation Administration.

[FR Doc. 2016–25578 Filed 10–21–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Eighth RTCA SC–233 Addressing Human Factors/Pilot Interface Issues for Avionics Plenary

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Eighth Plenary of RTCA SC–233 Addressing Human Factors/Pilot Interface Issues for Avionics.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of Eighth Plenary of RTCA SC–233 Addressing Human Factors/Pilot Interface Issues for Avionics.

DATES: The meeting will be held November 15–17, 2016 08:30 a.m.–04:30 p.m.

ADDRESSES: The meeting will be held at: Cessna Employees Fitness Center, 6711 W 31st St S., Wichita, Kansas 67215.

FOR FURTHER INFORMATION CONTACT: Rebecca Morrison at *rmorrison@rtca.org* or 202–330–0654, or The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of the Eighth RTCA SC–233 Addressing Human Factors/ Pilot Interface Issues for Avionics Plenary. The agenda will include the following:

Tuesday November 15, 2016

A.M.

- Introduction, Upcoming PMC Dates and Deliverable
- Review of TOR
- September meeting summary
- Roadmap for remaining items to be completed; notional schedule of activities remaining
- Consensus on document review process

P.M.

- Overview of the combined document and initial feedback
- Detailed review of document and identification of work to be done

Wednesday November 16, 2016

- Working Groups Break Out Sessions
- End of the Day Working Group Status Report Outs

Thursday November 17, 2016

A.M.

- Working Groups Break Out Session

P.M.

- Working Group Status
- Working group leader reports
- Follow-on actions
- Meeting Recap, Action Items, Key Dates

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on October 19, 2016.

Mohannad Dawoud,

Management & Program Analyst, Partnership Contracts Branch, ANG–A17, NextGen, Procurement Services Division, Federal Aviation Administration.

[FR Doc. 2016–25670 Filed 10–21–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Annual Financial Statement of Surety Companies—Schedule F

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Annual

Financial Statement of Surety Companies—Schedule F.

DATES: Written comments should be received on or before December 23, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, 200 Third Street A4–A, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov*.

SUPPLEMENTARY INFORMATION:

Title: Annual Financial Statement of Surety Companies—Schedule F.

OMB Number: 1530–0008.

Transfer of OMB Control Number: The Financial Management Service (FMS) and the Bureau of Public Debt (BPD) have consolidated to become the Bureau of the Fiscal Service (Fiscal Service). Information collection requests previously held separately by FMS and BPD will now be identified by a 1530 prefix, designating Fiscal Service.

Form Number: FS Form 6312.

Abstract: This form provides information that is used to determine the amount of unauthorized reinsurance of Treasury approved Surety Companies and Treasury approved Admitted Reinsurers. This computation is necessary to ensure the solvency of companies recognized by the Treasury to write Federal surety bonds, and their ability to carry out contractual requirements.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Business or Other For-Profit Organizations.

Estimated Number of Respondents: 50.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 13.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: October 18, 2016.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2016–25644 Filed 10–21–16; 8:45 am]

BILLING CODE 4810–AS–P

FEDERAL REGISTER

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Part II

Department of Transportation

Federal Highway Administration

23 CFR Parts 515 and 667
Asset Management Plans and Periodic Evaluations of Facilities Repeatedly Requiring Repair and Reconstruction Due to Emergency Events; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 515 and 667

[Docket No. FHWA–2013–0052]

RIN 2125–AF57

Asset Management Plans and Periodic Evaluations of Facilities Repeatedly Requiring Repair and Reconstruction Due to Emergency Events

AGENCY: Federal Highway Administration (FHWA); Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FHWA is issuing this final rule to address three new requirements established by the Moving Ahead for Progress in the 21st Century Act (MAP–21). First, as part of the National Highway Performance Program (NHPP), MAP–21 adopted a requirement for States to develop and implement risk-based asset management plans for the National Highway System (NHS) to improve or preserve the condition of the assets and the performance of the system. Second, for the purpose of carrying out the NHPP, MAP–21 requires FHWA to establish minimum standards for States to use in developing and operating bridge and pavement management systems. Third, to conserve Federal resources and protect public safety, MAP–21 mandates periodic evaluations to determine if reasonable alternatives exist to roads, highways, or bridges that repeatedly require repair and reconstruction activities. This rule establishes requirements applicable to States in each of these areas. The rule also reflects the passage of the Fixing America's Surface Transportation (FAST) Act, which added provisions on critical infrastructure to the asset management portion of the NHPP statute.

DATES: This rule is effective October 2, 2017, except for Part 667 which is effective November 23, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Nastaran Saadatmand, Office of Asset Management, 202–366–1336, *nastaran.saadatmand@dot.gov* or Ms. Janet Myers, Office of the Chief Counsel, 202–366–2019, *janet.myers@dot.gov,* Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

The notice of proposed rulemaking (NPRM) was published at 80 FR 9231 on February 20, 2015, and all comments received may be viewed online through: *http://www.regulations.gov*. Electronic retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: *http://www.orf.gov* and the Government Publishing Office's Web site at: *http://www.gpo.gov*.

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I. Executive Summary

A. Purpose of the Regulatory Action

The MAP–21 (Pub. L. 112–141) brought transformative changes to the Federal-aid highway program with its performance management and asset management requirements.[1] Asset management is defined as ''a strategic and systematic process of operating, maintaining, and improving physical assets, with a focus on both engineering and economic analysis based on quality information, to identify a structured sequence of maintenance, preservation, repair, rehabilitation, and replacement actions that will achieve and sustain a desired state of good repair over the life cycle of the assets at minimum practicable cost.'' [2] Asset management plans are an important highway infrastructure management tool to improve and preserve the condition of assets and system performance. This regulatory action establishes the implementing regulations for the asset management requirements contained in MAP–21 and the FAST Act (Pub. L. 114–94). This rule also establishes standards for bridge and pavement management systems as required by MAP–21 section 1203, and the requirements pursuant to MAP–21 section 1315(b) for the periodic evaluation of roads, highways, and bridges that have repeatedly required repair and reconstruction activities.[3]

Under the asset management provisions in MAP–21, State departments of transportation (State DOT) must develop and implement an asset management plan. This rule establishes the processes the State DOTs must use to develop their plans, requirements for the form and content of the resulting plans, implementation procedures, and procedures for FHWA oversight. This rule requires the State DOTs to use the best available data, and to use bridge and pavement management systems meeting the minimum standards adopted in this rule to analyze the condition of NHS pavements and bridges. State DOTs are required to include in their plans summaries of the information relating to NHS pavements and bridges that is produced by the periodic evaluations performed pursuant to MAP–21 section 1315(b).

This rule adopts a phased implementation approach to the asset management plan requirements. State DOTs will submit initial plans that contain their proposed asset management plan development processes, but State DOTs may exclude from their initial plans certain types of analyses as specified in the rule. The FHWA sets deadlines for both the initial plan and a subsequent plan that meets all requirements of this rule.

The rule describes how FHWA will carry out certain oversight actions required by the statute. There are the procedures for certifying and recertifying State DOT asset management plan development processes, and for the annual FHWA determination as to whether the State DOTs have developed and implemented asset management plans that comply with Federal requirements.

[1] The core performance management requirements are codified in 23 U.S.C. 150 and 23 U.S.C. 119. Asset management requirements are codified in 23 U.S.C. 119. The MAP–21 section 1106(b) contains uncodified transition provisions for performance management and asset management.

[2] The MAP–21 added this definition in 23 U.S.C. 101(a)(2).

[3] The MAP–21 section 1302 provision, codified in 23 U.S.C. 150(c)(3)(A)(i), requires FHWA to establish bridge and pavement management systems standards the States will use to carry out the requirements in 23 U.S.C.119. The MAP–21 section 1315(b), an uncodified provision, requires the Secretary to provide for periodic evaluations of roads, highways, and bridges to determine if reasonable alternatives exist to roads, highways, or bridges that repeatedly require repair and reconstruction activities.

This rule implements MAP–21 section 1315(b) by defining the scope and applicability of the requirement, and setting parameters for data collection for the evaluations required under that statute. This rule establishes a two-tier implementation approach, to ensure the evaluation of affected NHS facilities is given priority.

B. Summary of Major Provisions of the Regulatory Action in Question

This final rule retains the majority of the major provisions of the NPRM, but makes the following significant changes in response to comments received: (a) Reorganizing the content; (b) separating asset management plan regulations (23 CFR part 515) from the regulations implementing the periodic evaluation requirements under MAP–21 section 1315(b); (c) changing the timing and required elements for phased implementation; (d) reducing asset management plan requirements for assets other than NHS pavements and bridges if State DOTs elect to include such other assets in their plans; and (e) defining criteria for determining whether a State DOT has developed and implemented its asset management plan in accordance with applicable requirements. The FHWA updated these and other elements of the NPRM based on its review and analysis of comments received.

This rule removes the bridge and pavement management systems standards from the section on asset management plan processes, and places the standards in a separate section of the asset management rule. Table 1 shows the changes in designation in the final rule as compare to those in the NPRM.

TABLE 1—REDESIGNATION OF NPRM PROVISIONS

NPRM section	Final rule section
515.007(a)	515.7
515.007(a)(1)	515.7(a)
515.007(a)(1)(i)	515.7(a)(1)
515.007(a)(1)(ii)	515.7(a)(2)
515.007(a)(1)(iii)	515.7(a)(3)
515.007(a)(2)	515.7(b)
515.007(a)(2)(i)	515.7(b)(1)
515.007(a)(2)(ii)	515.7(b)(2)
515.007(a)(2)(iii)	515.7(b)(3)
515.007(a)(2)(iv)	515.7(b)(4)
515.007(a)(3)(i)	515.7(c)(1)
515.007(a)(3)(vi)	515.7(c)(6)
515.007(a)(4)	515.7(d)
515.007(a)(4)(ii)	515.7(d)(2)
515.007(a)(4)(iv)	515.7(d)(4)
515.007(a)(5)	515.7(e)
515.007(a)(5)(i)	515.7(e)(1)
515.007(a)(5)(ii)	515.7(e)(2)
515.007(a)(5)(iii)	515.7(e)(3)
515.007(a)(5)(iv)	515.7(e)(4)
N/A	515.7(f)
515.007(b)	515.7(g) and 515.17
515.007(b)(1)	515.17(a)
515.007(b)(3)	515.17(c)
515.007(b)(5)	515.17(e)
515.007(b)(1)	515.17(a)
515.007(b)(3)	515.17(c)
515.007(b)(5)	515.17(e)
515.011	515.11
515.011(a)	515.11(a)
515.0011(b)	515.11(b)
515.011(b)(1)	515.11(b)(1)
515.011(c)	515.11(c)
515.011	515.11
515.011(a)	515.11(a)
515.0011(b)	515.11(b)
515.013	515.13
515.013(a)	515.11(a)
515.013(b)	515.13(a)
515.013((b)((2)	515.13(a)(2)
515.013(c)	515.13(b)
515.013(d)	515.13(c)
515.013	515.13
515.013(a)	515.11(a)
515.013(b)	515.13(a)
515.019(a)	667.1, 667.3
515.019(b)	667.3
515.019(c)	667.7
515.019(d)	667.9(a)

Asset Management, 23 CFR Part 515

This rule has a deferred effective date of October 2, 2017, for part 515. The final asset management rule adds definitions for ''asset class,'' ''asset sub-group,'' ''critical infrastructure,'' [4] ''financial plan,'' ''minimum practicable cost,'' and ''NHS pavements and bridges and NHS pavement and bridge assets.'' The FHWA revised a number of the definitions proposed in the NPRM. The rule calls for State DOTs to develop and implement a risk-based asset management plan that covers at least a 10-year period. The State DOTs must include NHS pavements and bridges, and are encouraged to include other assets. Voluntarily included assets are subject to reduced requirements under the rule. The rule establishes the minimum process elements State DOT's must use to develop their asset management plans (such as a performance gap analysis, network-level life-cycle planning (LCP) analysis, and risk management plan), but gives State DOTs the flexibility to tailor the required processes to meet their needs and to add additional elements. The State DOTs must use the best available data to develop their asset management plans. For NHS pavements and bridges not owned by the State DOT, the rule requires the State DOT to work collaboratively and cooperatively with the other owner(s) to obtain the data needed for the plan. For NHS pavements and bridges, State DOTs must use pavement and bridge management systems meeting the standards established in the rule to analyze the condition of NHS pavements and bridges.

The rule includes requirements for the form and content of asset management plans. The requirements for NHS pavement and bridge assets include a summary listing of those assets and a description of their condition; discussions covering the State DOT's asset management objectives, and asset management measures and State DOT targets for asset condition; identification of performance gaps; a discussion of the LCP analysis; a discussion of the risk management analysis, including the results of the periodic evaluations done pursuant to MAP–21 section 1315(b) to the extent the results affect any of the required NHS assets in the plan; a discussion of the results of the financial planning process; and a description of investment strategies that collectively would make or support progress toward the following:

(a) Achieving and sustaining a desired state of good repair over the life cycle of the assets;

(b) improving or preserving the condition of the assets and the performance of the NHS relating to physical assets;

(c) achieving the State DOT targets for asset condition and performance of the NHS in accordance with 23 United States Code (U.S.C.) 150(d); and

(d) achieving the national goals identified in 23 U.S.C. 150(b).

The rule requires State DOTs to integrate their asset management plans into their transportation planning processes that lead to their Statewide Transportation Improvement Program (STIP). The reduced asset management plan requirements for assets other than NHS pavements and bridges permit State DOTs to address plan elements for those other assets at whatever level of effort is consistent with the State DOT's needs and resources. The rule requires State DOTs to make their asset management plans available to the public.

The asset management rule provides for phased implementation. The State DOTs must submit an initial plan by April 30, 2018. The FHWA will use the initial plan's descriptions of the State DOT's asset management plan

[4] The FAST Act added the term ''critical infrastructure'' to 23 U.S.C. 119(j).

development processes, such as the description of how the State performs its performance gap analysis, to make the statutorily required determination whether FHWA can certify the processes as meeting the process requirements in this rule. The rule allows State DOTs to exclude some analyses from the initial plan. The rule establishes process certification procedures that include an opportunity for the State DOT to cure any identified deficiencies, and to receive a certification even if there are minor deficiencies so long as the State DOT takes corrective action. The FHWA certification decision is due 90 days after the State DOT submission.

The rule calls for State DOT submission of an asset management plan meeting all requirements by June 30, 2019. The FHWA will use that plan for the first of the statutorily required annual determinations whether the State DOT has developed and implemented an asset management plan consistent with this rule. The rule provides the consistency determination will be based on FHWA's assessment whether: (a) The State DOT developed its asset management plan using certified processes; (b) the plan includes the required content; (c) the plan is consistent with the statute and this rule; and (d) the State DOT has implemented the plan. State DOTs may demonstrate implementation in a variety of ways, but the State DOT's submission must show the State DOT is using the investment strategies in its asset management plan to make progress toward achievement of its targets for asset condition and performance of the NHS, and to support progress toward the national goals identified in 23 U.S.C. 150(b). The rule states FHWA considers the best evidence of plan implementation to be State DOT funding allocations that are reasonably consistent with the investment strategies in the State DOT's asset management plan; and this approach takes into account the alignment between the actual and planned levels of investment for various work types (*i.e.,* initial construction, maintenance, preservation, rehabilitation and reconstruction). The rule provides FHWA may find a State DOT has implemented its asset management plan even if the State has deviated from the investment strategies included in the asset management plan, if the State DOT shows the deviation was necessary due to extenuating circumstances beyond the State DOT's reasonable control. The consistency determination procedures in the rule include an opportunity for the State DOT to cure any identified deficiencies.

The rule requires State DOTs to update their asset management plan development processes, and the asset management plans themselves, at least every 4 years. Updated procedures and plans must be submitted to FHWA for recertification of the procedures and a new consistency determination at least 30 days before the deadline for the next FHWA consistency determination. The first FHWA consistency determination is due by August 31, 2019, but thereafter the FHWA determination is due by July 31 of each year.

The rule sets forth the two penalty provisions that may apply if a State DOT does not develop and implement an asset management plan consistent with the requirements of this rule. Beginning with the second fiscal year beginning after the final asset management rule is effective, FHWA must determine whether each State DOT has developed and implemented an asset management plan consistent with 23 U.S.C. 119 and this rule. (23 U.S.C. 119(e)(5)). Eighteen months after the effective date of the second performance measure rulemaking,[5] which addresses NHS bridges and pavements, MAP–21 section 1106(b) requires FHWA to decide whether each State DOT has established the required 23 U.S.C. 150(d) performance targets and has a fully compliant asset management plan in effect. (MAP–21 section 1106(b)(1)). Both provisions impose a penalty if the State DOT has not met those requirements. The MAP–21 section 1106(b) permits FHWA to extend the 18-month compliance deadline if the State DOT has made a good faith effort to establish the asset management plan and set the required targets. (MAP–21 section 1106(b)(2)). The penalty and other legal consequences are stayed during the period of any extension. There is no extension or waiver provision for the penalty under 23 U.S.C. 119(e)(5).

The rule establishes the minimum standards each State DOT must use in developing and operating bridge and pavement management systems. Under the minimum standards, States must have documented procedures for the following: (a) Collecting, processing, storing, and updating inventory and condition data for NHS pavement and bridge assets; (b) forecasting deterioration for all NHS bridges and pavements; (c) determining the benefit-cost over the life cycle of assets to evaluate alternative strategies (including no action decisions), for managing the condition of NHS pavement and bridge assets; (d) identifying short-term and long-term budget needs for managing the condition of all NHS pavement and bridge assets; (e) determining strategies for identifying potential NHS pavement and bridge projects that maximize overall program benefits within financial constraints; and (f) recommending programs and implementation schedules to manage the condition of NHS pavements and bridges within policy and budgetary constraints.

The rule describes ''best practices'' for integrating asset management into a State DOT's organizational mission, culture, and capabilities at all levels.

Periodic Evaluation of Facilities Repeatedly Requiring Repair and Reconstruction Due to Emergency Events, Part 667

This final rule relocates the regulation implementing MAP–21 section 1315(b) to part 667 of 23 CFR. The rule establishes requirements for State DOTs to perform statewide evaluations to determine if there are reasonable alternatives to roads, highways, and bridges that have required repair and reconstruction activities on two or more occasions due to emergency events. The rule defines an emergency event as a ''natural disaster or catastrophic failure resulting in an emergency declared by the Governor of the State or an emergency or disaster declared by the President of the United States.'' The rule revises the NPRM's references to ''repair or reconstruction'' to read ''repair and reconstruction,'' to better align with the statutory language. The rule defines ''repair and reconstruction'' as work on a road, highway, or bridge that has one or more reconstruction elements; the term excludes emergency repairs as defined in 23 CFR 668.103. The rule defines the term ''roads, highways, and bridges'' to mean a highway, as defined in 23 U.S.C. 101(a)(11), that is open to the public and eligible for financial assistance under title 23, U.S.C.; the definition excludes tribally owned and federally owned roads, highways, and bridges.

Under the rule, State DOTs must prepare the first evaluation for NHS

[5] The FHWA has undertaken three separate rulemakings to implement performance management requirements. The first is ''National Performance Management Measures; Highway Safety Improvement Program'' (RIN 2125–AF49); the second is ''National Performance Management Measures; Assessing Pavement Condition for the National Highway Performance Program and Bridge Condition for the National Highway Performance Program'' (RIN 2125–AF53); the third is ''National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program'' (RIN 2125–AF54).

roads, highways, and bridges within 2 years of the effective date for part 667. State DOTs must update the evaluations for NHS roads, highways, and bridges at least every 4 years, and after each emergency event to the extent necessary to account for the effects of the event. For the rest of the roads, highways, and bridges in the State, beginning 4 years after the effective date for part 667, the State DOT must prepare an evaluation for the affected part of the facility prior to including any project relating to that part in its STIP. The evaluations must have a starting date no later than January 1, 1997. State DOTs must use reasonable efforts to obtain the data needed for the evaluations, and document those efforts in the evaluations if unable to obtain sufficient data for a facility.

The rule requires State DOTs to consider the results of the evaluations when developing projects, and State DOTs and metropolitan planning organizations (MPO) are encouraged to consider the information during the transportation planning process. The FHWA will periodically review State DOT compliance with part 667, including the State DOT's performance under the rule and its outcomes. The FHWA may consider the results of the evaluations when making a planning finding under 23 U.S.C. 134(g)(8), making decisions during the environmental review process under 23 CFR part 771, or when approving funding.

C. Costs and Benefits

The costs and benefits were estimated for implementing the requirement for States to develop a risk-based asset management plan and to use pavement and bridge management systems that comply with the minimum standards in this rulemaking.

Based on information obtained from nine State DOTs, the total nationwide costs for all States to develop their asset management plans, for four States [6] to acquire and install pavement and bridge management systems, and for one third of States to upgrade their current systems would be $54.3 million discounted at 3 percent and $46.3 million discounted at 7 percent.

The FHWA lacks data on the economic benefits of the practice of asset management as a whole. The field of asset management has only become common in the past decade and case studies of economic benefits from overall asset management have not been published.

While FHWA lacks data on the overall benefits of asset management, there are examples of the economic savings that result from the most typical component sub-sets of asset management, pavement and bridge management systems. Using an Iowa DOT study [7] as an example of the potential benefits of applying a long-term asset management approach using a pavement management system, the costs of developing the asset management plans and acquiring pavement management systems were compared to determine if the benefits of the proposed rule would exceed the costs. The FHWA estimates the total benefits for the 50 States, the District of Columbia, and Puerto Rico of utilizing pavement management systems and developing asset management plans to be $453.5 million discounted at 3 percent and $340.6 million discounted at 7 percent.

Based on the benefits derived from the Iowa DOT study and the estimated costs of asset management plans and acquiring pavement management systems, the ratio of benefits to costs would be 8.3 at a 3 percent discount rate and 7.4 at a 7 percent discount rate. The estimated benefits do not include the potential benefits resulting from savings in bridge programs. The benefits for States already practicing good asset management decisionmaking using their pavement management systems will be lower, as will the costs. If the requirement to develop asset management plans only marginally influences decisions on how to manage the assets, benefits are expected to exceed costs.

	Discounted at 3%	Discounted at 7%
Total Benefits for 52 States	$453,517,253	$340,580,894
Total Cost for 52 States	$54,337,661	$46,313,354
Benefit Cost Ratio	8.3	7.4

The FHWA believes that most of the information required to comply with part 667 of this final rule is already contained in files maintained by the State DOTs and their sub-recipients. As a result, FHWA expects the costs associated with complying with part 667 to be minimal. The FHWA expects the initial benefits associated with implementation of part 667 to be small, but expects that they will increase over time by lessening the extent and severity of the damage resulting from future disasters. In addition, the FHWA expects that the evaluations required as part of part 667 will result in improvements to the highway network, making it more adaptable to the impacts of climate change and extreme weather events that present significant and growing risks to the safety, reliability, effectiveness, and sustainability of the Nation's transportation infrastructure and operations.

II. Acronyms and Abbreviations

Acronym or abbreviation	Term
AASHTO	American Association of State Highway and Transportation Officials.
ACPA	American Concrete Pavement Association.
CFR	Code of Federal Regulations.
DOT	U.S. Department of Transportation.
EO	Executive Order.
FAHP	Federal-aid highway program.
FEMA	Federal Emergency Management Agency.
FHWA	Federal Highway Administration.

[6] There are currently four States that do not currently have pavement and bridge management systems that meet the standards of the proposed rule.

[7] Smadi, Omar, Quantifying the Benefits of Pavement Management, a paper from the 6th International Conference on Managing Pavements, 2004.

Acronym or abbreviation	Term
GTMA	Geospatial Transportation Mapping Association.
HSIP	Highway Safety Improvement Program.
ID	Idaho.
LCCA	Life-cycle cost analysis.
LCP	Life-cycle planning.
MAP–21	Moving Ahead for Progress in the 21st Century Act.
MPO	Metropolitan Planning Organization.
MT	Montana.
ND	North Dakota.
NHPP	National Highway Performance Program.
NHS	National Highway System.
NPRM	Notice of Proposed Rulemaking.
NYMTC	New York Metropolitan Transportation Council.
NYSAMPO	New York State Association of Metropolitan Planning Organizations.
PCA	Portland Cement Association.
PRA	Paperwork Reduction Act.
RDBMS	Relational Database Management System.
RIA	Regulatory Impact Analysis.
RIN	Regulatory Identification Number.
RSI	Remaining Service Interval.
Secretary	Secretary of the U.S. Department of Transportation.
SD	South Dakota.
SHSP	Strategic Highway Safety Plan.
State DOT	State department of transportation.
STIP	State Transportation Improvement Program.
STP	Surface Transportation Program.
TIP	Transportation Improvement Program.
U.S.C.	United States Code.
WY	Wyoming.

III. Background

On February 20, 2015, at 80 FR 9231, FHWA published an NPRM proposing the following: Definitions of key terms in the regulations; processes State DOTs would have to use to prepare asset management plans; standards for developing and operating bridge and pavement management systems; the required form and content for asset management plans; phase-in provisions for asset management plan requirements; procedures for FHWA certification, and periodic recertification, of State DOT asset management processes; procedures for annual FHWA determinations whether State DOTs have developed and implemented an asset management plan consistent with applicable requirements; procedures for administering statutory penalties relating to development and implementation of asset management plans; optional practices for integrating asset management into a State DOT's organizational mission, culture, and capabilities; the scope and timing of the evaluations State DOTs must perform to determine whether there are reasonable alternatives to roads, highways, and bridges that have required repair and reconstruction activities on two or more occasions due to emergency events; and inclusion of a summary of the results of the evaluations in the State DOT's asset management plan for the assets in the plan. On April 1, 2015, at 80 FR 17371, FHWA extended the comment period from April 21, 2015, to May 29, 2015.

IV. Summary of Comments

The FHWA received 59 public comment submissions to the docket. Of these, 57 were unique submissions and 2 were duplicates. The submissions included 38 unique submissions from 35 State DOTs, including one joint letter from 5 States. Seven submissions were received from trade, professional, and government associations, including the American Association of State Highway and Transportation Officials (AASHTO), the New York State Association of MPOs, and the American Society of Civil Engineers. Letters were also received from two MPOs, one local government, one planning district commission composed of local governments, and several submissions from individuals and private industry members.

The comment submissions covered a number of topics in the proposed rule, with the most numerous and substantive comments relating to the process for conducting life-cycle cost analysis/planning, the process for developing the financial plan and its duration, the process for developing the risk management plan, requirements for bridge and pavement management systems, asset management measures and targets, and the selection of projects for inclusion in the STIP. Commenters expressed concerns over the inclusion of non-State-owned assets in the asset management plan, indicating that States should not be held responsible for sections of the NHS that are not under their direct control. The commenters also expressed concerns about the availability of data for such assets. Commenters asked FHWA to recognize the acceptability of strategies calling for a decline in the condition and performance of assets. They expressed concerns about the 10-year duration of the asset management plan, with several commenters requesting a shorter or longer minimum duration, and expressed concerns in regard to the phase-in option for the initial plan. Commenters also expressed concerns about use of terminology such as ''desired state of good repair,'' ''financially responsible manner,'' and ''long- and short-term.'' Commenters conveyed their concerns about the proposal to apply the same requirements to both the mandatory NHS pavement and bridge assets and other assets a State DOT might elect to include in its plan. Commenters had a number of questions about the interaction between the asset management plan requirements and performance management requirements. Commenters raised a number of issues with respect to the proposed periodic evaluation requirements implementing MAP–21 section 1315(b). These included concerns about the burden on

State DOTs, the scope of facilities that would be subject to the evaluations, the timing of evaluation requirements, the inclusion of the information in asset management plans, and how the evaluations would be considered by FWHA and the State DOTs. In addition, commenters expressed concern that the Regulatory Impact Analysis (RIA) underestimated the costs of the rule.

The FHWA thanks commenters for their responses to questions posed in the NPRM and other comments. The FHWA carefully considered the comments received from the stakeholders. Comments that raised significant topics affecting multiple parts of the rule, and having an impact on the final regulatory language, are summarized in the following section. A detailed discussion of comments, and FHWA's responses, is included in Section VI.

V. Discussion of Major Issues Raised by Comments

System Performance, Performance Measures and Targets, and Asset Management Plans

As provided in 23 U.S.C. 119(e)(1), States must develop a risk-based asset management plan to address both the condition of NHS assets and the performance of the NHS. Some commenters raised questions about what this means for the scope of an asset management plan, particularly the gap analysis under proposed section 515.007(a)(1) of the rule, and how the plan relates to 23 U.S.C. 150 performance measures and targets for areas other than pavement and bridge conditions. Also, comments suggested FHWA limit the minimum required gap analysis to the gap, if any, between current asset conditions and the State's targets, thereby eliminating the concepts of ''improving or preserving the NHS'' and ''desired state of good repair'' from the gap analysis. These comments appeared to suggest the rule ought to require gap analysis only for targets for pavements and bridges, thus excluding consideration of targets for other section 150 performance measures. Commenters also noted that the relationship between system performance measures and program improvements is not well established.

These comments illustrate the need to further highlight the relationships among system performance, asset management plans, and section 150 performance measures and targets. Section 119(e)(2) requires asset management plans to contain strategies that not only make progress toward achievement of section 150 targets, but also support progress toward achievement of the broader national goals in section 150(b): Safety, infrastructure condition, congestion reduction, system reliability, freight movement and economic vitality, environmental sustainability, and reduced project delays. The FHWA interprets section 119(e) as calling for asset management plans that address both short term and long term needs relating to the goal of improving or preserving the condition and performance of the NHS. An asset management plan should serve as the analytical foundation and decisionmaking tool for investment choices that meet those needs. By contrast, section 150 performance measures, and the related 2-year and 4-year targets, are indicators of interim conditions and performance levels. They show how a State is progressing toward its longer term goals for the condition and performance of the NHS within its borders.

The final rule retains, with modification, the NPRM proposal on the required process for gap analysis. The asset management plan performance gap analysis requires a comparison of current conditions to State DOT section 150(d) targets for the condition of NHS pavements and bridges (*see* final rule section 515.7(a)(1)). The rule does not require any comparison between the current performance and targeted performance for other section 150 performance measures or targets. However, the final rule also requires State DOTs to have a process for analyzing gaps in the performance of the NHS that affect NHS pavements and bridges regardless of their physical condition (*see* final rule section 515.7(a)(2)). Under that provision, State DOTs must addresses instances where the results of comparisons done as part of other transportation plans and programs, such as the Highway Safety Improvement Programs (HSIP), State Highway Safety Plan (SHSP), or State Freight Plan (if the State has one), that may have an effect on the NHS pavement and bridge assets. This could occur when those other plans or programs indicate that certain system performance deficiencies are best addressed through strategies that involve an alteration or addition to the existing NHS pavement or bridge assets. For example, if a State DOT determines the needed solution to congestion in a corridor is the addition of new capacity on an NHS highway that is in good physical condition, the State DOT has to consider that need for additional capacity in its asset management plan. This is true even though the need for additional capacity is unrelated to the physical condition of the NHS pavements and bridges. In such cases, those strategies must be considered along with strategies that address system/asset resiliency or asset condition when developing a long-term asset management plan.

The FHWA emphasizes that all gap analysis under the rule ties to physical assets. That is consistent with the 23 U.S.C. 101(a)(2) definition of asset management, which is keyed to physical assets. Section 119(e) focuses primarily on NHS pavement and bridge assets, and includes them among the minimum plan requirements. However, there are other physical assets that affect NHS performance and progress toward achieving the national goals identified in 23 U.S.C. 150(b), and FHWA encourages States to include such other assets in their asset management plans. Examples include guard rail and pavement markings; traffic signals and incident response equipment; call boxes and variable message signs. These types of assets may be viewed as primarily relating to achievement of targets or objectives other than condition of NHS pavements and bridges (*e.g.,* safety, reliability, capacity, and environmental compliance), but the condition of these assets and how they are managed during their entire life affects the performance of the NHS and the achievement of the national goals. The need to invest in, and manage, such physical assets inevitably affects the analyses and decisions in the asset management plans. Additional illustrations of this relationship to NHS performance include increasing safety by providing adequate pavement friction, reducing delay due to construction by undertaking more preservation activities, and improving water quality through improving drainage.

Asset Management Plan Treatment of NHS Pavements and Bridges Not Owned by State DOTs

Section 119(e)(1) requires States to develop risk-based asset management plans for the NHS to improve the condition and performance of the system. Based on provisions in section 119(e)(4), the plan must include all NHS pavement and bridge assets. A number of commenters objected to the proposed rule's requirement that asset management plans include NHS pavement and bridge assets not owned by the State. Reasons for the objections included concerns a State cannot require other NHS owners to provide data on pavement and bridge conditions, the resources required to

gather the data, and an inability to require other NHS owners to participate in the development and implementation of an asset management plan for their NHS assets.

The FHWA acknowledges States may face challenges in developing and implementing an asset management plan that includes NHS pavements and bridges owned by others. However, there is no provision in section 119(e) that would permit exclusion of NHS pavements or bridges not owned by the State. Like the performance management requirements under 23 U.S.C. 150, the asset management statute requires the State to include all NHS pavement and bridge assets, regardless of ownership.

The final rule calls for State DOTs to use the best available information to prepare their asset management plans. It is important to understand the NHS pavement and bridge condition information required for asset management can be drawn from many sources, including existing National Bridge Inspection and Highway Performance Monitoring System data and the data collected to fulfill the section 150 performance management requirements for NHS pavements and bridges. The FHWA discusses the data types required for performance management in detail in the second performance measure rulemaking. The FHWA recognizes the asset management rule will make it necessary for States to coordinate with other entities that own and maintain portions of the NHS, and expects States to work with those other entities to develop effective processes for doing so. This is consistent with the requirement for State and MPO data coordination recently adopted in amendments to 23 CFR 450.314(h). (*see* Statewide and Nonmetropolitan Transportation Planning; Metropolitan Transportation Planning final rule (79 FR 31784, published June 2, 2016). If a State DOT is not able to perform a thorough analysis or fully develop other aspects of its asset management plan due to lack of required data, it is best to discuss this matter in the gap analysis section of the plan.

The FHWA recognizes that some State DOTs may require a substantial amount of time to develop the full data-gathering capability needed to develop complete asset management plans. This was a factor in FHWA's decision to use phasing for asset management plan implementation. Under this rule, which has an effective date for Part 515 of October 2, 2017, State DOTs will prepare and submit an initial plan on April 30, 2018. The initial plan must contain descriptions of the State DOT's asset management plan development processes meeting the requirements of section 515.7 of this rule. However, final rule section 515.11(b) provides the initial plans may exclude certain analyses. This will give State DOTs a long lead time, from the publication of the final rule to the June 30, 2019 deadline, for submission of a fully compliant asset management plan, during which State DOTs can develop the needed capability and data. After the transition period provided by the initial plan, FHWA expects States and other NHS owners to have resolved any data collection and coordination issues, including any resource issues.

The FHWA also appreciates the concerns of commenters who pointed out the regulation will make States responsible for developing and implementing an asset management plan that addresses the management of, and investment in, NHS assets owned by others. However, this State responsibility is part of the statutory scheme for asset management contained in MAP–21. The FHWA expects States to undertake the necessary coordination with other owners of NHS pavements and bridges, as well as with MPOs. When evaluating whether to certify a State DOT's asset management development processes, FHWA will consider whether the State DOT included a process for obtaining the necessary data from other NHS owners in a collaborative and coordinated effort, as required by final rule section 515.7(f). If a State DOT, despite reasonable efforts, is unable to obtain agreement from another NHS owner on implementation of an investment strategy in the plan, the State DOT can explain that problem in the documentation on asset management plan implementation provided under section 515.13(b) of the final rule.

Asset Management Requirements Applicable to Assets Other Than NHS Pavements and Bridges

In the final rule, consistent with section 119(e)(3), FHWA encourages States to include in their asset management plans all the infrastructure assets within the right-of-way corridor of the NHS. The FHWA similarly encourages inclusion of non-NHS assets in the plan. As pointed out in the NPRM, it is entirely up to each State to decide whether to include any assets other than the required NHS pavements and bridges.

The NPRM proposed making all the requirements of the asset management rule applicable to all assets included in the asset management plan. Many commenters expressed concern that applying all asset management plan requirements to the ''discretionary'' assets a State opted to include in its plan was overly burdensome, and would serve to discourage States from including anything other than the required NHS pavement and bridge assets. In the final rule, FHWA revised the requirements that will apply to ''discretionary'' assets in an asset management plan. Such assets will be subject to more limited requirements as set out in a new provision in the final rule, section 515.9(l). For assets a State voluntarily includes in its asset management plan, the State will not have to adhere to the asset management plan processes the State adopts pursuant to section 515.7. Instead, the State's plan will have to provide the following: (a) A summary listing of the discretionary assets, including a description of asset condition; (b) the State's performance measures and targets for the discretionary assets; (c) a performance gap analysis; (d) an LCP analysis; (e) a risk analysis; (f) a financial plan; and (g) investment strategies for managing the discretionary assets. States may use less rigorous analyses for discretionary assets than the analyses performed for NHS pavements and bridges pursuant to this rule, consistent with the State DOT's needs and resources.

Implementation Timeline for Asset Management Requirements

In the NPRM, FHWA proposed State DOTs initially submit a partial asset management plan, which would include the State DOT's proposed asset management plan development processes, by no later than 1 year after the effective date of the final asset management rule. The NPRM proposed a deadline for a fully compliant plan of not later than 18 months after the effective date of the final 23 U.S.C. 150 performance management rule covering NHS pavement and bridge asset conditions. The FHWA requested comments on whether the proposed phase-in was desirable and workable (see 80 FR 9231, at 9243 (published February 20, 2015)).

Commenters questioned whether the proposed rule provided sufficient time for State DOTs to implement the rule's requirements. Some questioned the investment of State resources to prepare the initial plan within 12 months, and the usefulness of the results. Concerns arose, in part, due to the statutory requirement that State DOTs must include their 23 U.S.C. 150(d) targets for NHS pavement and bridge conditions in their asset management plans. Because the FHWA rulemaking for target-setting

is a separate proceeding from this rulemaking, and that rule will impose its own requirements, commenters stated the timing of the various rulemakings needed to be coordinated and all rulemakings should be complete before the first deadline for submitting an asset management plan. Commenters indicated State DOTs need to know all the criteria affecting their development of asset management plans before starting the process. Commenters warned the potential burdens of the performance management and asset management rules would be too great for State DOTs to manage in a short time frame. The comments reflected concerns that State DOTs would need more time to put in place bridge and pavement management systems meeting the standards established by this rule. Commenters also were worried about the amount of time that would be needed to coordinate with other entities, including other owners of NHS pavements and bridges. Overall, commenters indicated State DOTs would need more than the proposed 1 year to develop an asset management plan. Commenters suggested time frames ranging from 18 months to 4 years. Some commenters supported the proposed phase-in of asset management requirements. Others suggested that instead of a phase-in, FHWA require a complete asset management plan by a deadline 1 year after the publication of the last of the FHWA performance management rules under 23 U.S.C. 150.

In response, FHWA believes there are three conditions that have substantial impacts on the ability of State DOTs to develop asset management plans that fully comply with 23 U.S.C. 119. First, the rulemaking establishing performance measures for NHS pavements and bridges needs to be completed well in advance of the deadline for submission of a complete asset management plan.[8] Otherwise, State DOTs will not have their 23 U.S.C. 150(d) targets in place and available for inclusion in their asset management plans. The FHWA considers the section 150(d) targets a critical part of the plans and 23 U.S.C. 119(e)(2) calls for inclusion of the targets. Second, State DOTs need to have FHWA-certified asset management plan development processes in place before a complete asset management plan is required. Without certainty about the acceptability of the selected processes for developing the asset management plan, it will be difficult for a State DOT to develop a fully compliant asset management plan. Third, the State DOTs need time to ensure they are gathering appropriate data for use in their asset management plans.

In the final rule, FHWA addresses these three principles, and the commenters' concerns. First, FHWA chose to defer the effective date of this rule until October 2, 2017, based on FHWA's determination that State DOTs would not be able to comply with this rule without the extra time. This provides State DOTs with more time to build the organizational, technical, and data foundations necessary for the development of an asset management plan. Among the foundational components are the bridge and pavement management systems that State DOTs will use to develop their plans, the State DOT's proposed asset management plan processes, and establishment of State DOT targets for NHS pavement and bridge conditions under 23 U.S.C. 150(d).

Second, in the final rule, FHWA retains and clarifies provisions on submission of an initial asset management plan that is subject to reduced requirements. The initial plan plays a crucial role in ensuring the State DOTs develop workable plan development processes and receive FHWA certifications of those processes before the State DOT develops a complete asset management plan. The FHWA will use the processes described in the initial plan for the first process certification review and approval. The FHWA decision on certification of the State DOT's processes is due 90 days after the submission of the initial plan. Based on the October 2, 2017 effective date for this rule, and an anticipated 2016 effective date for the second performance measure rulemaking addressing NHS pavement and bridge conditions on the NHS, the final rule sets a deadline of April 30, 2018, for the submission of an initial asset management plan. Thus, the State DOTs should have their processes approved sufficiently in advance of the deadline for a complete asset management plan to allow the use of those certified processes for the preparation of the fully compliant plan. The April 30, 2018, deadline for the initial plan permits State DOTs to develop their fully compliant asset management plans well after 23 CFR part 490 performance measures and data requirements for NHS pavements and bridges are known. The final rule also provides that State DOTs will have at least 6 months after the deadline for establishment of their 23 U.S.C. 150(d) targets for NHS pavements and bridges to incorporate the targets into their asset management plans.

Third, the final rule sets a deadline of June 30, 2019, for submission of a fully compliant asset management plan, together with State DOT documentation demonstrating the State DOT has implemented the plan. The FHWA will use the submitted complete asset management plan and implementation documentation to make the first required consistency determination under 23 U.S.C. 119(e)(5).

The FHWA believes the timelines in the final rule allow State DOTs a reasonable amount of time to accomplish the tasks necessary to develop their asset management plans. The FHWA believes the selected implementation approach overcomes the risk that implementation timelines would be too short and would make it impossible for State DOTs to comply, thus leaving them no choice but to incur penalties under 23 U.S.C. 119(e)(5) or MAP–21 section 1106(b).[9]

Determining Whether a State Has Implemented a Section 119(e) Asset Management Plan

The second fiscal year beginning after the effective date of the asset management rule, section 119(e)(5) requires FHWA to determine whether State DOTs have developed and implemented asset management plans consistent with section 119(e). If a State has not done so, by law the Federal share payable on account of any project or activity carried out in the State in that fiscal year under section 119, the NHPP, is reduced to 65 percent. The NPRM specifically requested comments on methods FHWA could use to determine whether a State has implemented its asset management plan. (See 80 FR 9231, at 9244, published February 20, 2015). The

[8] State DOTs have 1 year from the effective date of the rulemaking to establish their section 150(d) targets (23 U.S.C. 150(d)(1)).

[9] Section 119(e)(5) requires, beginning with the second fiscal year after the final asset management rule is effective, FHWA to determine whether each State DOT has developed and implemented an asset management plan consistent with section 119. Eighteen months after the performance management rule for pavement and bridge conditions, ''National Performance Management Measures; Assessing Pavement Condition for the National Highway Performance Program and Bridge Condition for the National Highway Performance Program'' (RIN 2125–AF53), is effective, MAP–21 section 1106(b) requires FHWA to decide whether each State DOT has established the required 23 U.S.C. 150(d) performance targets and has a fully compliant asset management plan in effect (MAP–21 section 1106(b)(1)). Both statutes impose a penalty if the State DOT has not met those requirements. The MAP–21 section 1106(b) permits FHWA to extend the 18-month compliance deadline if the State DOT has made a good faith effort to establish the asset management plan and set the required targets (MAP–21 section 1106(b)(2)). There is no extension or waiver provision for 23 U.S.C. 119(e)(5).

NPRM explained that FHWA believes an implementation determination should focus on whether the plan's investment strategies lead to ''a program of projects that would make progress toward achievement of the States' targets for asset condition and performance of the NHS in accordance with 23 U.S.C. 150(d), and supporting progress toward the national goals identified in 23 U.S.C. 150(b).'' This language is drawn from 23 U.S.C. 119(e)(2).

Many comments in response to the NPRM touched on issues related to implementation. Those comments related to NPRM section 515.013(c) on consistency determinations, as well as to proposed regulatory language on the purpose of part 515 (NPRM section 515.001), on defining and developing financial plans (NPRM sections 515.005, 515.007(a)(4), and 515.009), and defining and developing investment strategies (NPRM sections 515.005, 515.007(a)(5) and 515.009). Some commenters suggested FHWA measure implementation based on whether the State has followed the process and plan content requirements in proposed sections 515.007 and 515.009 of the regulation. Others proposed FHWA consider only whether a State has met its NHS pavement and bridge performance management targets established pursuant to 23 U.S.C. 150. Most comments on this topic raised concerns about any FHWA evaluation of implementation based on the projects a State includes in its STIP. Commenters generally expressed strong views about the importance of preserving a State's right to select the projects that will receive title 23 funding. Some commenters also indicated that investment decisions and judgments made by a State DOT in its asset management plan should not be subject to FHWA review.

The FHWA interprets section 119(e), and especially section 119(e)(5), as requiring FHWA to ensure States implement asset management plans for NHS assets. At the same time, FHWA recognizes the States' prerogative to select projects that will receive Federal financial assistance under title 23, and the importance of providing States the flexibility to respond to the needs within their jurisdictions. The FHWA believes the final rule adopts an approach that appropriately balances these imperatives.

When making a consistency determination under section 515.13(b) of the final rule, FHWA will evaluate whether the State developed an asset management plan that conforms to part 515 and has implemented the investment strategies in that plan. For the implementation part of the consistency determination, FHWA will look at whether the State DOT's funding allocations for the preceding 12 months are reasonably consistent with the investment strategies in the State DOT's asset management plan. The review also will consider any reasons offered by the State for why the State has not been able, or decided not, to allocate funds in a manner consistent with one or more of the investment strategies in its asset management plan. In sum, a State will have to document what actions the State took to implement its investment strategies through funding allocations. If a State is unable to allocate funds in accordance with investment strategies in its asset management plan, the State also must document its good faith efforts and the reasons the State was not able to implement the strategy despite its good faith efforts. States have discretion to choose how to document this information.

These requirements are contained in § 515.13(b) of the final rule. The FHWA has revised proposed § 515.009(h), to eliminate the reference to the selection of projects for inclusion in the STIP. The language of the final rule requires State DOTs to integrate asset management plans into the transportation planning processes that lead to their STIPs, to support efforts to achieve the goals in § 515.9(f)(1) through (4). This means a State DOT must consider its asset management plan, including the investment strategies in the plan, as a part of the decisionmaking process during planning.

The approach adopted in the final rule does not look at project-specific investments, and imposes no STIP requirements. The final rule does not require any FHWA approval of the State's investment strategies, or of projects included in a STIP. The final rule uses the State's allocation of funds at the strategic program, network, or asset class level as the measure of asset management plan implementation, not project selection. The FHWA believes allocation of funding at those levels inherently results in ''a program of projects'' within the meaning of 23 U.S.C. 119(e)(2).

While section 150 target achievement is important, and serves as one part of an overall scheme for achieving and sustaining a healthy NHS, the final rule does not use achievement of section 150 targets as the determinative measure of asset management plan implementation. There are several reasons for this decision.

First, section 150 targets are short term in nature because they are established on 2-year and 4-year cycles. This is a narrower scope than is required for asset management plans, which are intended to identify and establish paths toward longer term objectives, as well as account for section 150 performance targets. The targets will serve as incremental indicators of the State's progress toward its long term goals when those targets are well-aligned with the long term goals and investment strategies in the State's asset management plan. However, while FHWA anticipates States will elect to align their section 150 targets with the investment strategies in their asset management plans, States are not required to do so. Thus, there is no guaranteed relationship between section 150 targets and the investment strategies in a State's asset management plan.

Second, target achievement alone proves nothing about whether a State is using a risk-based asset management plan as required under section 119(e) and this rule. Asset management, by definition, employs economic and engineering analyses to identify a structured sequence of actions that will achieve and sustain a desired state of good repair over the life-cycle of the assets at minimum practicable cost. A State's means of achieving its section 150 targets may be entirely divorced from the investment strategies in its asset management plan.

Moreover, on occasion, a State's desire to achieve its section 150 targets could override asset management considerations, such as managing assets over their life-cycle at minimum practicable costs, or fulfilling long term NHS needs. The FHWA believes asset management plan implementation occurs when a State is pursuing whatever investment strategies the State chooses to adopt in its plan. For these reasons, FHWA decided achievement of section 150 targets will not be used to decide whether a State has implemented its asset management plan.

Relationship Between MAP–21 Section 1315(b) Evaluations and Asset Management Plans

The NPRM proposed implementing regulations for MAP–21 section 1315(b), which requires periodic evaluations to determine if there are reasonable alternatives to roads, highways, and bridges that have repeatedly require repair and reconstruction activities. The NPRM proposed a number of requirements relating to the use of the results of the evaluations. The proposal reflected FHWA's view that it is crucial for asset management plans to include relevant MAP–21 section 1315(b) evaluation information and address the

information in the asset management plan's risk analysis. The State DOT's asset management plan is a key mechanism for determining transportation needs and investment priorities. One of the primary intended outcomes of the MAP–21 section 1315(b) requirements is for the evaluations to help State DOTs make informed decisions on those issues. The FHWA believes requiring integration of the two processes is important to achieving the statutory purposes of both MAP–21 section 1315(b) and 23 U.S.C. 119(e).

However, comments received in response to the NPRM made it evident to FHWA that the proposed rule was not clear enough about the relationship, and the differences, between asset management and MAP–21 section 1315(b) evaluations. Similarly, the comments made it apparent there is confusion about the relationship and differences between MAP–21 section 1315(b) and the title 23 Emergency Relief Program funding eligibility provisions in 23 U.S.C. 125 and implementing regulations in 23 CFR part 668. Given these comments, FHWA decided the asset management regulations and the section 1315(b) regulations should be separated. Accordingly, in the final rule FHWA assigns the MAP–21 section 1315(b) regulations their own part in the Code of Federal Regulations (CFR). In the final rule, the 1315(b) regulations are in 23 CFR part 667. This will make it clearer that the evaluation requirements are independent. While there are interrelationships among the activities and requirements of the Emergency Relief (ER) Program, asset management, and 1315(b) evaluations, the evaluation requirements are not part of either the Asset Management Program or the Emergency Relief Program.

Second, FHWA removed from 1315(b) regulation the language proposed in NPRM Section 515.019(d) on the inclusion of evaluation summaries in the State DOT's asset management plan. With this change, only the asset management regulations have provisions regarding treatment of the evaluation information in asset management plans (*see* sections 515.7(c) and 515.9(d) of the final rule). This change reduces duplication and places all the provisions relating to asset management plans in the asset management regulation.

Facilities Subject to Evaluation Under MAP–21 Section 1315(b)

The FHWA received a number of comments relating to the scope and applicability of the proposed implementing regulations for MAP–21 section 1315(b). Some asked FHWA to limit the evaluation requirements to NHS assets. Others suggested FHWA require evaluations only for assets in the State DOT asset management plan. Commenters raised concerns about the availability of data needed to perform the required evaluations. Some commenters indicated the time period covered by the evaluations should be determined with data availability in mind. They believed that the evaluation period should be short enough to ensure good records existed for repairs and reconstruction performed as a result of emergency events. Others stated it would likely prove difficult to obtain necessary data from local entities, and to require evaluations of facilities not owned by the State would impose an unfair burden on the State DOTs.

The comments clearly indicated a need for greater clarity in the rule about which roads, highways, and bridges are covered by the rule. The MAP–21 section 1315(b)(1) requires the evaluation of reasonable alternatives for ''roads, highways, or bridges that repeatedly require repair and reconstruction activities.'' The statute makes no distinction based on NHS status, ownership, or inclusion in a State's asset management plan. The FHWA does not believe there is a basis for limiting the statute's coverage to NHS or State-owned routes. The final rule defines ''roads, highways, and bridges'' for purposes of part 667 as meaning a highway, as defined in 23 U.S.C. 101(a)(11), that is open to the public and eligible for financial assistance under title 23, U.S.C.; but excluding tribally owned and federally owned roads, highways, and bridges. The definition draws from the NPRM language (NPRM section 515.019(a)) on title 23 eligibility, as well as from the definitions of ''Federal-aid highway'' in 23 U.S.C. 101(a). However, unlike the term ''Federal-aid highway'' under 23 U.S.C. 101(a)(6), the final rule's definition does not exclude highways or roads functionally classified as local roads or rural minor collectors, because MAP–21 section 1315(b) does not do so. The FHWA views all facilities meeting the definition of ''roads, highways, and bridges'' in this final rule as subject to the evaluation requirement.

With respect to data issues, FHWA has set the starting date for the evaluations as January 1, 1997. This date is far enough back in time to capture damage trends, but recent enough to make it likely data is available for many, if not most, of the facilities subject to the rule. The FHWA also added a provision, in section 667.5(b) of the final rule, limiting the State DOT's data responsibility to using reasonable efforts to obtain the data needed for the evaluations. If the State DOT determines the needed data is not reasonably available for a road, highway, or bridge, the State DOT must document that fact in the evaluation. Together, these measures substantially reduce the potential burden on the State DOTs, while maintaining the rule's consistency with the objectives of MAP–21 section 1315(b).

Consideration of MAP–21 Section 1315(b) Evaluation Results by States and FHWA

In the NPRM, FHWA requested comments on two specific issues related to 1315(b): whether the rule should require States to consider the evaluations prior to requesting title 23 funding; and whether the rule should address when and how FHWA would consider the evaluations of reasonable alternatives in connection with a project approval.

As to whether the rule should require States to consider the evaluations prior to requesting title 23 funding, commenters stated FHWA should not require States to consider the section 1315(b) alternatives evaluation prior to requesting title 23 funding for a project.[10] Among the concerns expressed by commenters was that developing alternatives might take months or even years to complete, which would preclude rapid response to an emergency and restoring the functionality of the transportation system as quickly as possible. Some argued that when a facility is damaged due to an extreme event, the requirement to conduct and submit an evaluation for review prior to approval of funding could create an undue hardship to the public.

The FHWA believes the statutory intent cannot be achieved if State DOTs and FHWA do not take evaluation results into consideration. The FHWA notes that as articulated in the statute, the evaluations are intended to support long-term investment decisionmaking in a manner that results in the conservation of Federal resources and protection of public safety and health. These objectives can most easily be accomplished if the evaluations are considered early in the project development process. In light of the statutory purpose and potential burdens on State DOTs, FHWA concluded the

[10] AASHTO, Connecticut DOT, Delaware DOT, Maryland DOT, Mississippi DOT, New Jersey DOT, Oregon DOT, Tennessee DOT, Virginia DOT, Washington State DOT.

final rule should require State DOTs to consider the information, but provide flexibility in terms of when that consideration occurs. Under the final rule, State DOTs must consider the results of an evaluation when developing projects involving facilities subject to part 667 (other than emergency repair projects under 23 CFR part 668), and encourages the State DOTs to include consideration of the evaluations in the transportation planning process and the environmental review process. However, State DOTs are free to decide when in the overall project development process they wish to consider the information. The final rule expressly states that it does not prohibit a State DOT from responding immediately to an emergency, and restoring the functionality of the transportation system as quickly as possible, or from receiving funding under the ER Program.

The FHWA received several comments on the question whether the rule should address when and how FHWA would consider the evaluations of reasonable alternatives in connection with a project approval. Some commenters stated FHWA should not address when and how it would consider the section 1315(b) alternatives evaluation in connection with FHWA project approval. Others supported inclusion of the information in the rule. One concern was States should be given maximum flexibility to address damage due to extreme events because upgrading a facility to address a given probability of future repairs could be financially impractical.

The FHWA considered the comments and the purposes of the underlying statute. The FHWA also considered the issue in the context of FHWA's risk-based stewardship and oversight approach to program administration. The FHWA determined the final rule should not specify a particular milestone at which FHWA will consider evaluation results, but should make it clear FHWA reserves the right to consider the results whenever FHWA believes it is appropriate to do so. Accordingly, the final rule provides FHWA will periodically review the State DOT's compliance with part 667, to determine whether the State DOT is performing the evaluations and considering the results in a manner consistent with part 667. The FHWA will also consider whether the evaluations are having the beneficial effects on investment decisions that the statute promotes. This is for the purpose of assessing nationally whether the regulation is effective. In addition, the final rule makes it clear that FHWA may consider the results of the evaluations when it makes a planning finding under 23 U.S.C. 134(g)(8), when it makes decisions during the environmental review process for projects involving roads, highways, or bridges subject to part 667, or when approving funding.

Implementation Timeline for MAP–21 Section 1315(b) Evaluations

The proposed rule included a phased approach to implementing the evaluation requirements under MAP–21 section 1315(b). As proposed, the rule would have given States 2 years after effective date of the final rule to complete evaluations for NHS highways and bridges and any other assets included in the State DOT's asset management plan. The State DOTs would have had 4 years after the effective date of the final rule to complete the evaluation for all other roads, highways, and bridges meeting the criteria for evaluation. In the NPRM, FHWA requested comments on whether the time frames for the initial evaluations in the proposed rule were appropriate and, if not, how much time ought to be allotted.

Several commenters indicated the 2 years allotted for the initial evaluations of assets in the State DOT asset management plan was appropriate. Others called for flexibility in the timeframes or stated they could not answer the question without knowing more specific information about the evaluation process, such as the length of the look-back, the scale of repair to be considered, and the availability of data. With regard to the evaluation deadline for all other facilities not in the State DOT's asset management plan, several commenters stated that the 4 years allotted for the first evaluation of such other facilities was appropriate. Others indicated the time needed depended on the scope of the phrase ''roads, highways, and bridges,'' and that an appropriate timeframe depends on the complexity and sophistication of the expected evaluations, data availability, and other factors.

In developing the final rule, FHWA considered all of the comments on evaluation deadlines, along with related comments submitted with regard to the definition of ''roads, highways, and bridges'' (discussed in this section under *Facilities Subject to Evaluation under MAP–21 Section 1315(b)).* The FHWA acknowledges the potential burdens on State DOTs caused by the breadth of the MAP–21 section 1315(b) mandate, and believes these burdens ought to be considered when determining the timing for the first evaluation and the frequency of evaluations required for the varying types of roads, highways, and bridges covered by the rule.

Given the various factors, FHWA concluded the purposes of the statute (conservation of Federal resources and protection of public safety and health) can best be accomplished by focusing State DOT efforts primarily on NHS roads, highways, and bridges. The FHWA also concluded it would be reasonable to require evaluation of a non-NHS facility only when there is some plan to do work on the facility. Accordingly, under the final rule States must complete the first evaluations for NHS roads, highways, and bridges within 2 years after the effective date for part 667. States may defer the evaluations of other roads, highways, and bridges for 4 years after the effective date for part 667, and those evaluations will be required based on a timeline tied to the proposal of a project on the road, highway, or bridge. Prior to including any project relating to a non-NHS road, highway, or bridge in its STIP, the State DOT must prepare an evaluation that conforms to part 667 for the affected portion of the facility.

The FHWA believes the final rule provisions are consistent with the objectives of MAP–21 section 1315(b) and within FHWA's discretion to interpret the meaning of ''periodic evaluation'' in the statute. The final rule reduces the potential burden on State DOTs by focusing the highest and most immediate level of effort on evaluations of assets that are of high Federal interest and must be in State asset management plans. Evaluations for other roads, highways, and bridges are required only when there is some reasonable likelihood work will be performed on those facilities.

VI. Section-by-Section Discussion of Comments

This section describes individual comments received in response to the NPRM and FHWA's responses. Because the final rule assigns different numbering to some parts of the rule, and reorganizes portions of the rule, this section provides a reference to the provision as it appeared in the NPRM, and a reference to the location of the material in the final rule. This section also serves as a summary of changes the final rule makes to the regulatory text in the NPRM as a result of the comments. For topics on which similar comments were submitted on multiple parts of the proposed rule, FHWA has consolidated the comments and responses into a single discussion.

A. Asset Management Plans, Part 515

NPRM Section 515.001 (Final Rule Section 515.1)

The FHWA received four comments on the purpose provision in the NPRM. The Alabama DOT and AASHTO recommended that FHWA revise section 515.001 to make clear that States retain the prerogative to select individual projects. The AASHTO also requested that FHWA revise section 515.001 to clarify that the investment decisions and judgments made by a State DOT in its asset management plan are not within the scope of FHWA's review.

After considering the comments and the nature of section 515.001, FHWA does not see the need to revise section 515.001. However, FHWA has modified section 515.9(h) and section 515.13(b) of the final rule to address these comments. The revisions to section 515.9(h) clarify the relationship between a State's asset management plan and its STIP, which identifies specific projects for implementation. The FHWA did not intend to state or imply in the proposed rule that it is FHWA's role to validate a State's selection of individual projects or investment decisions. However, a State asset management plan must include strategies leading to a program of projects, and States are required to follow the statutory asset management framework to develop a performance-driven plan and to arrive at their investment strategies (*see* 23 U.S.C. 119(e)(2) and (4)). The processes used to develop this plan are subject to FHWA certification, as required by 23 U.S.C. 119(e)(6). The State asset management plan and the State's implementation of the plan are subject to FHWA review to determine if the State has complied with the requirements in 23 U.S.C. 119 and part 515. The revisions to section 515.13(b) clarify that this FHWA consistency determination does not involve any approval of the investment strategies or other decisions embodied in State asset management plans.

Alaska DOT suggested that FHWA remove proposed section 515.001(c), which relates to minimum standards for bridge and pavement management systems, and proposed section 515.001(e), which relates to the periodic evaluation of facilities requiring repair and reconstruction due to emergency events. In response, FHWA notes both of the cited provisions relate to statutory responsibilities for which this final rule establishes implementing regulations. Section 150(c)(3)(A)(i) of title 23 U.S.C., requires the Secretary to establish minimum standards for States to use to develop and operate bridge and pavement management systems for the purpose of carrying out 23 U.S.C. 119. Section 1315(b) of MAP–21 mandates that the Secretary, through rulemaking, provide for periodic evaluations to determine if reasonable alternatives exist to roads, highways, or bridges that repeatedly require repair and reconstruction activities. This final rule contains implementing regulations for both statutory provisions. However, because the final rule revises the proposed organization of part 515, this final rule moves NPRM section 515.001(c) to section 515.1(d). The final rule also relocates all provisions relating to MAP–21 section 1315(b) to a separate part of title 23 of the CFR, and for that reason removes NPRM section 515.001(e) from part 515.

Colorado DOT requested clarification as to why the proposed rule addresses both asset management plans and periodic evaluations of facilities requiring repair or reconstruction due to emergency events. This commenter said that the requirement to develop risk-based asset management plans should help States identify risks associated with emergency events. However, according to Colorado DOT, the proposed rule would require implementation of processes and procedures after an emergency event occurs that could conflict with asset management approaches.

The FHWA chose to address both subjects in the proposed asset management rule because comments received through an earlier rulemaking, Environmental Impact and Related Procedures NPRM (77 FR 59875, Oct. 1, 2012) supported that approach. Additionally, the NPRM proposed, in sections 515.007 and 515.009, requiring asset management plans to include in their risk analysis the results of the periodic evaluations of facilities requiring repair and reconstruction due to emergency events. However, based on comments on the NPRM, FHWA decided to separate the asset management regulations from the MAP–21 section 1315(b) regulations, to reduce confusion and clarify that asset management, MAP–21 section 1315(b) requirements, and FHWA's ER Program are separate programs. The final rule also makes it clear that the periodic evaluation requirements do not prevent a State DOT from responding to an emergency event (*see* final rule section 667.9(a)).

NPRM Section 515.003 (Final Rule Section 515.3)

The FHWA received a number of comments on the applicability provision in section 515.003 of the proposed rule. Several commenters addressed the roles of agencies beyond State DOTs. Maryland DOT suggested that the responsibility for preparing an asset management plan should apply to all agencies that own and operate at least 0.1-mile segments of NHS, regardless of whether the responsible party is a Federal, State, or local agency. Two commenters specifically addressed whether or how the proposed rule would apply to MPOs. New York State Association of MPOs said that MPOs have a significant stake in the rulemaking, because they are responsible for planning and managing investments for entire regional transportation systems. Colorado DOT asked whether MPOs should be required to develop asset management plans if performance reporting is required to be split by full-State and MPO boundaries.

In response, FHWA notes that 23 U.S.C. 119(e)(1) requires States to develop risk-based asset management plans for the NHS. No other entities are required by statute to share the responsibility of developing and implementing asset management plans for the NHS. Therefore, no change has been made to section 515.3 in response to these comments. The FHWA recognizes that State DOTs are not the sole owners of the NHS, and acknowledges the role of other NHS asset owners in coordinating with State DOTs. The FHWA agrees that MPOs have a significant role in planning and managing investments. Their roles and responsibilities with regard to asset management plans are addressed in 23 U.S.C. 134(h)(2)(D) and 23 CFR 450.306(d)(4). These provisions require MPOs to integrate into the metropolitan transportation planning process the goals, objectives, performance measures, and targets described in other State transportation plans and transportation processes, including State asset management plans for the NHS. For further discussion of the role of MPOs and non-State owners of the NHS, see Section V, Asset Management Plan Treatment of NHS Pavements and Bridges Not Owned by State DOTs.

NPRM Section 515.005 (Final Rule Section 515.5)

Numerous commenters responded to FHWA's request for comments on the proposed definitions and suggestions for any additional terms that should be defined in the rule. The FHWA acknowledges these comments and appreciates the level of response.

The Geospatial Transportation Mapping Association (GTMA) supported the NPRM's proposed definitions for ''bridge,'' ''risk,'' and ''Statewide Transportation Improvement

Program.'' The FHWA acknowledges the comments and appreciates the support for those NPRM definitions. The remaining comments are discussed below. The comments are addressed under the terms to which the comments relate, in alphabetical order.

Asset

Six commenters provided input on the proposed definition of ''asset.'' The AASHTO and Connecticut and New Jersey DOTs stated that FHWA should include definitions of ''asset class,'' ''asset group,'' and ''asset sub-group'' in section 515.005 and use them consistently throughout the final rule. These commenters recommended the following definitions:

- Asset—Property that is owned, operated, and maintained by a transportation agency. This includes all physical highway infrastructure located within the right-of-way corridor of a highway. The term asset includes all components necessary for the operation of a highway including pavements, highway bridges, tunnels, signs, ancillary structures, and other physical components of a highway. Inclusion of property within the scope of this definition does not mean that it is a property subject to the asset management plan requirements of this part.
- Asset Group—A collection of assets that serve a common function (*e.g.,* roadway system, safety, IT, signs, lighting).
- Asset Class—A group of assets with the same characteristics and function (*e.g.,* bridges, culverts, tunnels, pavement, guardrail).
- Asset Sub-Group—A specialized group of assets within an Asset Class with the same characteristics and function (*e.g.,* concrete pavement or asphalt pavement).

Similarly, Colorado DOT requested that FHWA revise the definition of ''asset'' to reflect the definition provided in AASHTO's Transportation Asset Management Guide: A Focus on Implementation, 1st Edition.

The FHWA believes that the definition provided in AASHTO's Transportation Asset Management Guide, although correct and inclusive for AASHTO's purposes, goes beyond the physical assets that are the subject of asset management plans required by title 23 U.S.C. 119(e) and the definition of asset management in 23 U.S.C. 101(a). The AASHTO *Transportation Asset Management Guide, a Focus on Implementation* (2nd Edition) (AASHTO Guide) expands the definition of asset from ''physical highway infrastructure'' to a broader term, ''property.''

In addition, transportation agencies are not the sole owners of highway assets. Assets are owned, operated, and maintained by entities other than transportation agencies, such as cities. Therefore, FHWA has not changed the definition of ''asset'' in the final rule. The FHWA agrees it could be helpful to add definitions to section 515.5 in final rule for ''asset class,'' ''asset group,'' and ''asset sub-group'' because those terms are used in the final rule. Accordingly, FHWA added a definition for the term ''asset class'' to the final rule. The new definition incorporates the concepts in AASHTO's suggested definitions of ''asset class'' and ''asset group.'' The FHWA also added a definition of the term ''asset sub-group'' that adopts AASHTO's suggested definition for that term.

Oregon DOT asked about the intended meaning of the term ''right of way corridor'' in the NPRM's proposed definition of ''asset,'' and requested information on the relationship of the ''right-of-way corridor'' to the eligibility for funding of a highway or transit project in the same ''corridor'' of an NHS route. The commenter stated that if a State elects to undertake improvements to a parallel non-NHS route or a transit project within an NHS corridor that can be shown to provide benefits over and above improvements to the NHS itself, then FHWA should include language encouraging such undertakings. In response, FHWA notes that the issue of funding eligibility is beyond the scope of this rulemaking. Also, being parallel to an NHS route does not classify a route as an NHS route. However, if a State elects to undertake improvements to a parallel non-NHS route or a transit project within a NHS corridor that can be shown to provide benefits to the NHS itself, such as improved performance of the NHS, then the State DOT is encouraged to include such undertaking in its asset management plan.

The GTMA supported the proposed definition of ''asset,'' but requested clarification on whether ''ancillary structures'' refers to guardrail and light structures. The GTMA also stated that it would be helpful to know if ''other physical components of a highway'' includes pavement markings. The FHWA notes that AASHTO has defined ''ancillary structures'' as ''lower-cost, higher-quantity assets that also play an important role in the overall success of transportation systems: Assets such as traffic signs, traffic signals, roadway lighting, guardrails, culverts [20ft or less], pavement markings, sidewalks and curbs, utilities and manholes, earth retaining structures and environmental mitigation features.'' According to this definition, which FHWA accepts, guardrail, light structures, and pavement markings are considered to be ancillary structures.

New Jersey DOT stated that all roadways that do not specifically prohibit pedestrians should accommodate them, and the listing of components in the definition of ''asset'' should include ''sidewalks, if within the right of way.''

In response, FHWA notes it considers sidewalks to be among ''other physical components of a highway,'' but does not believe a revision to the definition in the rule is required because the rule is not intended to contain an exhaustive list of assets.

Asset Condition

Four commenters provided input on the proposed definition of ''asset condition'' as ''the actual physical condition of an asset in relation to the expected or desired physical condition of the asset.'' The AASHTO and Connecticut DOT said the definition of ''asset condition'' should be changed to remove the linkage to expected or desired physical condition. Similarly, New Jersey DOT suggested the removal of the word ''desired'' from the proposed definition because it implies a value judgment. It suggested the definition use the term ''target'' or ''minimum target condition'' instead. The GTMA suggested that expected condition of an asset requires the development of a life-cycle approach to asset management and recommended that the definition of ''asset condition'' be amended to mean ''the actual physical condition of an asset in relation to the expected or desired physical condition of the asset's useful life.''

After considering the comments, FHWA modified the definition of ''asset condition'' in section 515.5 to eliminate the phrase ''in relation to the expected or desired physical condition of the asset.'' The proposed definition included the phrase as a way to convey that actual asset condition has a role on setting future targets for asset condition. However, FHWA recognizes the actual physical condition of assets should be determined independent of what the expected or desired condition might be. As the comments illustrated, referring to the future condition in the definition could be interpreted differently than what FHWA intended.

Asset Management

Seven commenters provided input on the proposed definition of ''asset management.'' The GTMA supported the definition as proposed. Oregon and Minnesota DOTs said the rule should clarify that declining condition and performance of NHS and other transportation assets is an acceptable and realistic expectation in asset management plans. Maryland DOT suggested a definition that clarifies that the process for creating asset management plans is a decision-support tool, as opposed to the sole process upon which decisionmaking would rely. A few commenters provided input on the use of the term ''resurfacing'' within the definition. Washington State and South Dakota DOTs stated that ''resurfacing'' is a form of ''rehabilitation,'' not a type of ''replacement action.'' The AASHTO and Washington State DOT stated that FHWA should include operational methods, such as crack sealing, that can extend the life and performance of the pavement at a much lower cost than resurfacing. Similarly, Oregon DOT stated that the final rule should include language encouraging States to include operational activities (*e.g.,* traveler information systems, synchronized and adaptive traffic signal systems, advanced traffic, freight and incident management systems) as recognized activities to be considered in a State's asset management plan.

In response to the comments, FHWA notes it received similar comments on the need to allow for declining conditions in response to the proposed language in section 515.007(a)(1). The comments are addressed in the discussion of that section. The comments pertaining to the role of an asset management plan in project selection and other planning and programming decisions are similar to comments received in connection with proposed section 515.009(h). Those comments are addressed in the discussion of section 515.009(h).

Comments about ''resurfacing'' and other types of activities that commenters suggested FHWA include in the definition of ''asset management'' prompted FHWA to reconsider whether it would be useful to expand on the 23 U.S.C. 101(a)(2) definition of asset management, as was proposed in the NPRM. While the proposed sentence was intended to be illustrative, not exhaustive, the comments show the language generated concerns about the completeness and intended scope of the definition. As a result, FHWA decided to use the statutory definition of ''asset management'' *verbatim* in the final rule. This decision is based on the large number of activities that may fall within the statutory categories of ''maintenance, preservation, repair, rehabilitation, and replacement actions,'' and on the fact that there is variation in how individual States define their construction activities. With regard to inclusion of operational activities in a State's asset management plan, FHWA recognizes the importance of these activities to the performance of the NHS. However, these activities are beyond the scope of the States' asset management plans because the plans address the management of physical assets. The FHWA notes that the final rule allows States to include other assets, including those physical assets that support operational activities, in their plans.

Asset Management Plan

Seven commenters provided input on the proposed definition of ''asset management plan.'' The GTMA supported the definition as proposed. Maryland DOT suggested a revision to the definition to make explicit the flexibility required to deliver an asset management plan based on decisionmaking processes unique to each State DOT. The commenter noted that the final rule also should underscore the fact that an asset management plan is a living document, subject to ongoing updates and revisions. Oregon DOT stated that States do not manage their transportation systems solely to preserve or improve the physical condition of NHS highways and bridges, and States should be encouraged to extend consideration of condition and performance beyond that related exclusively to ''physical condition.''

In response to these comments, FHWA notes that State DOTs have flexibility to develop their own unique processes as long as they meet the minimum process requirements defined by section 515.7 of the rule. Section 515.13 acknowledges that the asset management plan is a living document by requiring State DOTs to update their asset management plans, at a minimum, every 4 years, and otherwise amending the plans as needed. The updated and amended plans must include the enhancements made to the asset management processes and the results of analyses based on updated data. The FHWA acknowledges that States do not manage their transportation systems solely to preserve or improve their physical condition. However, the definition of ''asset management'' in 23 U.S.C. 101(a) focuses on physical assets. Also, 23 U.S.C. 119(e) expressly addresses physical condition and performance of the NHS. Consequently, FHWA has not made a change to the definition in response to these comments.

The AASHTO and several State DOTs stated that the final rule should clarify that States would be free to develop asset management initiatives of their own design for non-NHS assets and would be free to address them any way that they want for their own purposes.[11] These commenters suggested revising the definition of ''asset management plan'' to make clear that it refers to the plan (or part of a broader asset management plan) that the State ''submits to FHWA for review under this part.'' Alaska DOT suggested that the proposed definition be revised by deleting most of the second sentence and part of the third, from ''and other public roads included in the plan at the option of the State DOT. . .'' up to ''achieve a desired level of condition and performance while managing the risks, in a financially responsible manner, at a minimum practical cost over the life cycle of its assets.''

In response to these comments, FHWA notes that nothing in the proposed or final rule prevents State DOTs from employing other management strategies for managing assets not included in the asset management plan required under 23 U.S.C. 119(e) and part 515. The FHWA notes that other public roads are an important part of any State highway network and may be included in the part 515 asset management plan if the State wishes. For these reasons, FHWA does not believe the comments warrant a revision to the definition of ''asset management plan'' proposed in the NPRM. This definition includes flexibility for States to elect to include other public road assets in their federally required plan, beyond the NHS pavements and bridges mandated by 23 U.S.C. 119(e) and this rule.

With respect to the comments relating to the term ''desired level of condition,'' those comments are similar to comments objecting to the word ''desired'' in other parts of the proposed rule. Several commenters requested the removal of the word ''desired'' from the rule, stating that it is ambiguous and implies a value judgment. The AASHTO and Connecticut DOT stated that FHWA should remove any reference to a ''desired'' condition, but if the terms remain in the final rule, FHWA should define the term ''desired condition'' as

[11] DOTs of ID, MT, ND, SD, and WY (joint submission); Wyoming DOT; Connecticut DOT.

the State-established targets for the asset group. New Jersey DOT suggested replacing the word ''desired'' with ''target,'' ''minimum target condition,'' ''optimal condition,'' or ''optimal target condition.''

In response, FHWA notes it used the word ''desired'' in the proposed rule to mean what the State DOT wants as an outcome. To avoid confusion over the intended meaning of the word, FHWA has replaced it in a number of places throughout the rule. In the definition of ''asset management plan,'' FHWA replaced the phrase ''desired level of condition'' with the more specific and focused phrase ''State DOT targets for asset condition.''

Budget Needs

Connecticut DOT requested a definition for ''budget needs.'' The FHWA considered this request and determined that no definition is needed for these commonly used terms. The concept of addressing budget needs is discussed in further detail in FHWA's responses to comments received on NPRM § 515.007(b) (bridge and pavement management systems).

Capital Improvement

A private citizen requested a definition for ''capital improvement.'' In response, FHWA notes the term is not used in the final rule. For that reason, no definition is needed in part 515.

Critical Infrastructure

Section 1106 of the FAST ACT amended 23 U.S.C. 119 by adding subsection 119(j) on critical infrastructure. The new subsection of the statute provides that State asset management plans may include consideration of critical infrastructure from among the facilities eligible under subsection 119(c), and authorizes the use of funds apportioned under section 119 for projects intended to reduce the risk of failure of critical infrastructure eligible under subsection 119(c). The statute defines ''critical infrastructure in 23 U.S.C. 119(j)(1). The FHWA is including these FAST Act amendments in this final rule. Accordingly, the statutory definition of ''critical infrastructure'' was added to section 515.5. Although State asset management plans may include consideration of critical infrastructure, how that is done should reflect sensitivity to potential security and related issues. Accordingly, FHWA is not asking that these critical assets be specifically identified as such in the asset management plan.

Desired State of Good Repair

The AASHTO and several State DOTs requested clarification of the term ''desired state of good repair'' and ''state of good repair.'' [12] The AASHTO, several State DOTs, and The city of Wahpeton, ND, said the final rule should change any and all proposed references to a ''state of good repair'' or a ''desired state of good repair'' to ''target'' or ''State target.'' [13] Similarly, a joint submission from five State DOTs, and an identical submission from Wyoming DOT, said vague terms and related requirements are unnecessary and, if they cannot be dropped entirely, they need to be reduced and defined in a way that will respect State judgments in managing their programs.[14] The AASHTO and Connecticut DOT said ''state of good repair'' is overly optimistic and does not consider the State's ability to determine investment strategies within available funding. Oregon DOT said focusing on the narrower goal of achieving and sustaining a state of good repair for an asset can lead to asset management decisions that are counter to or undermine the broader goals that an asset management plan was established to make progress toward.

In response to these comments, FHWA notes that the statutory definition of asset management in 23 U.S.C. 101(a)(2) includes the phrase ''. . . achieve and sustain a desired state of good repair. . . .'' In addition, the national goal for infrastructure condition is ''. . . to maintain the highway infrastructure asset system in a state of good repair.'' (23 U.S.C. 150(b)(2)). Therefore, in the final rule, FHWA has retained the proposed language in the definition of asset management (section 515.5), in the requirements established for the performance gap analysis (section 515.7(a), in plan content requirements for asset management objectives (section 515.9(d)(1), and in the plan content requirement for the discussion of investment strategies (section 515.9(f)(1)). However, FHWA has removed the phrases ''desired state of good repair'' and ''state of good repair'' from two places in the rule. Specifically, FHWA eliminated the term ''state of good repair'' from the definition of investment strategy in section 515.5, to better distinguish between the actual investment strategies and the outcomes of those strategies. Also, FHWA replaced the phrase ''measures and targets must be consistent with the objective of achieving and sustaining the desired state of good repair'' in section 515.9(d)(2) with ''measures and targets must be consistent with the State DOT's asset management objectives.'' This replacement was made based on the retained requirement in section 515.9(d)(1) that the asset management objectives discussed in the plan must be consistent with the definition and purpose of asset management, which includes achieving and sustaining the desired state of good repair. The FHWA decided not to define ''desired state of good repair'' because FHWA believes ''desired state of good repair'' is a concept tied closely to a State' goals for its transportation system, and that each State should define its ''desired state of good repair'' based on its own circumstances.

Financial Plan

California DOT and New Jersey DOT requested a definition for ''financial plan.'' New Jersey stated that their understanding of the language in the NPRM is that a financial plan includes the projected annual funding needed for identified asset classes or subgroup. Also, the agency stated that the financial plan would be supported by historical performance and funding data, as well as life cycle cost and risk analysis included in the plan. The FHWA agrees with this understanding. In response, the FHWA has added a definition for ''financial plan.'' In § 515.5 of the final rule, the term ''financial plan'' is defined as ''a long-term plan spanning 10 years or longer, presenting a State DOT's estimates of projected available financial resources and predicted expenditures in major asset categories that can be used to achieve State DOT targets for asset condition during the plan period, and highlighting how resources are expected to be allocated based on asset strategies, needs, shortfalls, and agency policies.''

Financially Responsible Manner

Seven submissions commented on use of the phrase ''financially responsible manner'' in the proposed rule. The term appears in proposed sections 515.005 (definitions of asset management and asset management plan) and 515.007 (introductory description for required processes). A joint submission from five State DOTs, and an identical submission from Wyoming DOT, said it is unclear

[12] AASHTO; DOTs of ID, MT, ND, SD, and WY (joint submission); Mississippi DOT; New Jersey DOT; Oklahoma DOT; Oregon DOT; Oregon DOT Bridge Section; Tennessee DOT; Vermont Agency of Transportation; Washington State DOT; Wyoming DOT.

[13] AASHTO; Alaska DOT; Connecticut DOT; New Jersey DOT; North Dakota DOT; South Dakota DOTs; City of Wahpeton, ND.

[14] DOTs of ID, MT, ND, SD, and WY (joint submission); Wyoming DOT.

what will be required to act in a ''fiscally responsible manner'' and asserted that the term and related requirement should be deleted.[15] South Dakota DOT called the term ''vague'' and said that if is not deleted from the rule, it should be defined in a way that will respect State judgment and allow States flexibility in managing their networks, systems, and programs. Other commenters (identified below) recommended the following definitions for the phrase ''financially responsible manner'':

- AASHTO and Connecticut DOT said financially responsible manner means that a State is deemed to be implementing an asset management plan in a financially responsible manner unless it is subject to denial of certification of processes under section 515.013 for specific requirement deficiencies pertaining to financial elements of the asset management plan and beyond the applicable cure period under 515.013(a).
- New Jersey DOT said financially responsible manner means that a State has demonstrated sufficient financial prudence in the development of its asset management plan, unless it is subject to denial of certification of processes under section 515.013 for specific requirement deficiencies pertaining to financial elements of the asset management plan and beyond the applicable cure period under 515.013(a).
- Maryland DOT said financially responsible manner means a State DOT's ability to manage its finances so it can meet its spending commitments, both now and in the future.

In response to these comments, FHWA notes that ''financially responsible manner'' refers to planning for the future and recognizes that there is a high correlation between how the funds are distributed on an annual basis and long-term performance. To be financially responsible, an agency should know what its goals and targets are, what levels of funding and income are expected to be available annually, what levels of expenditures are expected, and how to distribute the expected funding/income (budget) amongst various activities and discretionary items in the short- and long-term to meet the goals, targets, and needs of the traveling public. The FHWA disagrees with the view, expressed in the comments, that whether a State DOT will manage its system in a ''financially responsible manner'' can be determined based solely on whether FHWA has certified the State DOT's processes for developing an asset management plan. The FHWA does not believe a section 515.13(a) certification, which demonstrates that a State DOT's processes conform to the section 515.7 process requirements, serves as conclusive evidence of the State's behavior with respect to financial management.

After considering the comments received, FHWA has not added a definition for this term to the final rule because we believe that the plain meaning of the term is evident and sufficient for purposes of this rule. In addition, by not defining the term, the final rule provides flexibility for the States to address their individual circumstance when describing in their asset management plans how they will meet the ''financially responsible manner'' requirement.

Investment Strategy

Nine commenters provided input on the proposed definition of ''investment strategy'' as ''a set of strategies that result from evaluating various levels of funding to achieve a desired level of condition to achieve and sustain a state of good repair and system performance at a minimum practicable cost while managing risks.'' The GTMA supported the definition as proposed. The AASHTO, Connecticut DOT, and New Jersey DOT recommended that FHWA simplify the definition to reference a singular strategy rather than a ''set of strategies.'' Also, these commenters recommended that the investment strategy relate specifically to the targets established by the State DOT, rather than to ''state of good repair'' or some other condition level or system performance that is not defined. Finally, they said the definition needs to indicate that an investment strategy is constrained by the financial plan. Accordingly, the commenters suggested the following definition:

''Investment strategy means a strategy resulting from an analysis of funding availability to achieve the performance targets established by the State DOTs and constrained by the financial plan.''

Similarly, Alaska DOT said FHWA should remove all language after ''various levels of funding'' and replace it with ''to achieve the targets of the performance measures set in rulemaking.''

In response to these comments, FHWA notes that 23 U.S.C. 119(e)(2) states that ''a State asset management plan shall include strategies leading to a program of projects that would make progress toward achievement of the State targets for asset condition and performance of the National Highway System [NHS] in accordance with section 150(d) and supporting the progress toward the achievement of the national goals identified in section 150(b).'' Therefore, FHWA has retained the term ''set of strategies'' in the definition. In addition, the investment strategies must address more than just condition targets established by the State DOT. The strategies must also support the performance of the system as it relates to national goals. Risk analysis points to those strategies that can be selected to improve system performance and system resiliency through investment in physical assets. For example, if there is a need to replace bridges with inadequate height in a specific region due to frequent flooding, then the bridges are replaced not because of their deteriorated condition, but due to their adverse impact on mobility during the flood season. The system performance and how it relates to asset management plan is discussed in more detail in Section V, *System Performance, Performance Measures and Targets, and Asset management Plans.*

As discussed in connection with the definition of ''asset management plan'' above, a number of commenters opposed the use of the word ''desired'' in the proposed definition of investment strategies. In response to these comments, FHWA revised the definition of ''investment strategy'' in the final rule by replacing the phrase ''a desired level of asset condition to achieve and sustain a state of good repair'' with the phrase ''State DOT targets for asset condition.'' To clarify the intent of the rule, FHWA also revised the phrase ''system performance'' to read ''system performance effectiveness.'' These changes better align the regulatory language with the statutory language in 23 U.S.C. 119(e)(2) without repeating the statutory language in full. The final rule's definition of ''investment strategies'' uses the asset condition and system performance language as shorthand for the full requirements in 23 U.S.C. 119(e)(2), described above.

Finally, FHWA acknowledges strategies in an asset management plan are constrained by funding; it will not be possible to achieve the objectives of asset management unless the amount of funding an asset management plan recommends be distributed amongst various investment strategies reflects what is available to a State. However, FHWA does not believe that adding ''and constrained by the financial plan'' would add additional value to the definition, and such addition risks

[15] DOTs of ID, MT, ND, SD, and WY (joint submission); Wyoming DOT.

confusion with the concept of fiscal constraint in transportation planning carried out pursuant to 23 U.S.C. 134 and 135. Therefore, FHWA declines to add the phrase ''and constrained by the financial plan'' to the definition.

Commenters provided other suggestions for revising this definition. Connecticut and Hawaii DOTs recommended adding ''along with various maintenance or improvement actions'' after ''various levels of funding.'' CEMEX USA, Portland Cement Association (PCA), and the American Concrete Pavement Association (ACPA) recommended that the definition be amended to include different allocation of funding across activities, as well as various levels of funding.

In response to these comments, FHWA notes that the term ''investment strategies'' includes all actions, including various maintenance or improvement actions and activities, that lead ''to progress toward achievement of the State targets for asset condition and performance of the National Highway System . . . and supporting the progress toward the achievement of the national goals.'' The term also encompasses consideration of various allocations of funding. As a result, the FHWA has not made the changes suggested by these comments.

Life-Cycle Benefit Cost Analysis

Delaware DOT requested a definition for ''life-cycle benefit cost analysis'' (as opposed to life-cycle cost analysis (LCCA)). In response, FHWA notes that because the term is not used in the final rule, there is no need to define it in part 515.

Life-Cycle Cost

Several commenters provided input on the proposed definition of ''life-cycle cost'' as ''the cost of managing an asset class or asset sub-group for its whole life, from initial construction to the end of its service life.'' The GTMA supported the definition as proposed. The Northeast Pavement Preservation Partnership (NEPPP) and Tennessee DOT requested an explanation, definition, or example of ''end of service life.'' Maryland DOT also noted the undefined terms ''whole life'' and ''service life,'' and suggested that ''design life'' is more appropriate for the definition of ''life-cycle cost'' because variables are based on the desired level of asset performance.

In response, FHWA notes that ''whole life'' is a common term in asset management practice, and it means the entire life of an asset from inception (when it is placed into service) until its disposal. The FHWA realizes that definition of ''service life'' may differ from one State to another. Therefore, FHWA has replaced the term ''service life'' with ''replacement,'' so that ''life-cycle cost'' in section 515.5 ''means the cost of managing an asset class or asset sub-group for its whole life, from initial construction to replacement.''

With regard to the term ''design life,'' Maryland DOT described it as the time it will take for the structure to reach a minimum acceptable condition value. This generally applies to designing assets. However, there is no guarantee that assets live a normal life. There are environmental factors to consider that could terminate or shorten the life of assets prematurely or human interventions at appropriate stage of assets life that extend the asset life. The FHWA acknowledges that consideration of design life is important; however, FHWA continues to believe that the term ''whole life'' is more appropriate. As a result, no changes have been made to the definition as a result of this comment.

Life-Cycle Cost Analysis (LCCA)

Four commenters provided input on the proposed definition of LCCA. The GTMA supported the proposed definition. CEMEX USA, PCA, and ACPA stated that the proposed definition of LCCA is a major departure from FHWA's previous definitions of LCCA, which they said have always focused on a ''project level analysis'' and the determination of the most cost-effective option among different competing alternatives at the project level. These commenters made the following statements and recommendations:

- The rule attempts to use the proposed LCCA exclusively for a network-level analysis, which is unprecedented. Defining LCCA to be exclusively a network-level analysis is contrary to the law, established standard and practices, and will create confusion for State DOTs that properly use traditional LCCA.
- Having a programmatic tool to allocate funds is a good idea, but there are already proven tools, such as Remaining Service Interval (RSI), that fill this role.
- The proposed network LCCA is not a substitute for traditional LCCA because it cannot provide the ''dollars and cents'' information that allows agencies to quantify the differential costs of alternative investment options for a given project.
- Both a network-level programmatic tool and a project-level LCCA are needed, but they are not interchangeable and they are not a substitute for each other.
- The FHWA should define LCCA to be consistent with previous definitions and prescribe the historic use of LCCA as a project level analysis and should use RSI to conduct the network level analysis.

In response to comments relative to the use of RSI, FHWA notes that 23 U.S.C. 119(e) does not require or suggest that States use RSI (which promotes the application of a specific process) for conducting the network-level analysis; however, 23 U.S.C. 119(e)(4)(D) requires a State asset management plan to include the process they use for life cycle planning. In responses to other comments, it appears that there may be some misunderstanding among those who are most familiar with LCCA at the project-level, but may not yet have applied LCCA at the network-level. Part 515 does not specifically exclude project-level LCCA, or prohibit States from applying LCCA to specific projects. Part 515 simply extends the application of the LCCA beyond the project-level to the network-level in order to address the asset management requirements in 23 U.S.C. 119(e) by focusing on network-level analysis. FHWA agrees that both a network-level programmatic tool and a project-level LCCA are needed, and that they are not interchangeable and one does not substitute for the other.

The asset management plan's final product is a set of network-wide investment strategies to improve or preserve the condition of the assets and the performance of the NHS. These investment strategies should be integrated in the planning process to select projects. After projects are selected for implementation, designers conduct a project-level LCAA to select the most appropriate design alternative. To ensure that there is no confusion between project-level and network-level LCCA, FHWA has replaced the term ''life-cycle cost analysis'' in this rule with the term ''life-cycle planning'' (LCP). The term ''life-cycle planning'' was chosen because this term is in alignment with section 119(e)(4) and is intended to convey the same meaning as ''life-cycle cost analysis'' but at the network level. The LCP includes the three key elements (''planning,'' ''cost,'' and ''life-cycle'') that must be considered to manage assets through their whole life to achieve minimum practical cost.[16]

[16] For a discussion of network-level LCP, please see ''Highway Infrastructure Asset Management Guidance,'' UK Roads Liaison Group (May 2013), available online at: *http://www.highwaysefficiency.org.uk/efficiency-resources/asset-management/highway-*

Long-Term and Short-Term

Eleven commenters provided input on the use of the terms ''long-term'' and/or ''short-term'' in the proposed rule. The terms appeared in NPRM section 515.007(b)(4), in connection with standards for bridge and pavement management systems. The AASHTO, NEPPP, several State DOTs, and the city of Wahpeton, ND, requested that FHWA define or clarify the terms ''long-term'' and/or ''short-term.'' [17] Several State DOTs said these terms are unnecessary and might escalate the compliance burden on State DOTs. They recommended that if the terms are not removed, they need to be defined in a way that will respect State judgment and allow States flexibility in managing their networks, systems, and programs.[18] Commenting jointly, five State DOTs urged FHWA to delete all references to ''long term'' from the rule, or at least allow a State to limit the time frame to as short as the time horizon for the State's STIP.[19] The AASHTO recommended that the rule allow each State to determine the length of the term ''long-term.'' The AASHTO added that if FHWA clarifies the meaning other than by deferring to States, then the term should not be longer than what AASHTO recommended for the required duration of the asset management and financial plans. In contrast, New Jersey DOT recommended that a range be defined. For example, a long-range program could be one that is for a period greater than 14 years. In this context, a medium-range goal could be defined as 6–14 years, and short-range goals could be for 5 years or less.

After considering the comments, FHWA decided not to define the terms ''long-term'' or ''short-term'' in part 515. The FHWA believes that ''short-term'' and ''long-term'' are relative terms and should not be defined by referencing arbitrary numbers. However, the terms can be understood through their impact on the health of assets as they age. A significant portion of any highway infrastructure investment is comprised of assets with a long life span, such as bridges and pavements. The lives of pavements and bridges vary depending on type, location, and other factors; nonetheless, their life span is long enough to require taking a strategic approach for their management. Planning, forecasting conditions, and making assumptions, are necessary to develop strategies for long-lasting assets. Short-term approaches are normally based on approaches that may sound reasonable at the present time, but may not consider future needs or may not be the most cost effective treatment in the long term. Consequences associated with these future needs, including lack of a management plan as assets age or retire, have proven to be costly and reduce agencies' resources rapidly. The asset management plan is long-term, meaning that it includes strategic approaches that take aging assets and future needs into consideration. Part 515 requires that State DOTs develop a plan that, at a minimum, includes 10 years of information. This means that if bridge assets normally last for 70–100 years, only information covering the next immediate 10 year period is required to be included in the plan.

Maintenance Activities

A private citizen requested a definition for ''maintenance activities.''

In response, FHWA has not added a definition of this term in part 515 because the term is included in the definition of ''work type'' in this rule. The FHWA position with regards to the definition of various work type actions is discussed under ''Work Type'' in this section.

Minimum Practicable Cost

Six submissions commented on the use of the phrase ''minimum practicable cost'' in the proposed rule. The phrase appeared in NPRM section 515.005 (definitions of asset management, asset management plan, and investment strategy), section 515.007 (introductory language for process requirements), and section 515.009(d)(1) (content requirements pertaining to asset management objectives). The AASHTO and Connecticut DOT said a definition should be added to establish that any purported requirement that an asset management plan achieve its objectives at a ''minimum practicable cost'' over the life of an asset is not referring to a hypothetical absolute minimum cost. Instead, as referenced in the proposed definition of life-cycle cost analysis, these commenters felt that it should be clearly understood as referring to the State's having undertaken asset management ''with consideration for minimizing cost.''

A joint submission from five State DOTs, and an identical submission from Wyoming DOT, said there would always be an argument that a cost could be reduced, making the ''minimum practicable cost'' requirement a subjective judgment by FHWA and a potentially significant burden for States. South Dakota DOT said this ''vague'' term is unnecessary and, if not dropped entirely, it should be defined in a way that will respect State judgment and allow State flexibility in managing a State's networks, systems, and programs. The city of Wahpeton stated that use of the term ''minimum practicable cost'' seems to encourage a ''worst-first'' method of programming projects. The commenter stated that the benefit of the project also needs to be considered.

In response to these comments, FHWA notes that the definition of ''asset management'' in 23 U.S.C. 101 includes the term ''minimum practicable cost.'' For this reason, FHWA has retained the use of the term in the final rule. The FHWA notes that this term does not encourage the ''worst-first'' strategy. The FHWA added a definition of ''minimum practicable cost'' in section 515.5, defining it as ''lowest feasible cost to achieve the objective.'' The new definition makes it clear that the lowest cost action may not be a feasible action if it does not help States to achieve their objectives.

NHS Pavements and Bridges and NHS Pavement and Bridge Assets

The FHWA received comments asking for clarification of the scope of the terms ''NHS pavements and bridges'' and ''NHS pavement and bridge assets.'' These terms appear in a number of places in the proposed and final rule, and serve to define the assets to which the mandatory provisions of the asset management rule apply. The AASHTO and several State DOTs recommended the asset management rule adopt the same meaning as is given in FHWA's second performance measure rulemaking. Washington State DOT asked for clarification whether the term includes ramps that enter or exit the NHS.

In response to these comments, and to provide greater clarity in the final rule, FHWA added a definition in section 515.5 of the final rule. The definition is consistent with the definition used in the second performance measure rulemaking. The two terms are now defined as the ''Interstate System pavements (inclusion of ramps that are not part of the roadway normally travelled by through traffic is optional); NHS pavements (excluding the Interstate System) (inclusion of ramps that are not part of the roadway normally travelled by through traffic is optional); and NHS bridges carrying the NHS (including bridges that are part of the ramps connecting to the NHS).''

infrastructure-asset-management-guidance.html (as of March 2016).

[17] AASHTO, NEPPP, The City of Wahpeton, ND; Connecticut DOT; Oklahoma DOT; New Jersey DOT; Hawaii DOT; Maryland DOT.

[18] DOTs of ID, MT, ND, SD, and WY (joint submission); South Dakota DOT; Wyoming DOT.

[19] DOTs of ID, MT, ND, SD, and WY (joint submission).

Other Public Roads

Washington State DOT requested a definition for ''other public roads.''

The FHWA notes that the term ''public road'' is defined in 23 U.S.C. 101 as ''any road or street under the jurisdiction of and maintained by a public authority and open to public travel.'' The FHWA does not believe it is necessary to add a definition for ''other public roads'' to part 515. Based on the statutory definition above, the term ''other public roads'' as used in part 515 refers to any road or street, other than those on the NHS, under the jurisdiction of and maintained by a public authority and open to public travel.

Pavement Preservation

A private citizen requested a definition for ''pavement preservation''. The Federation for Pavement Preservation (FP2) also requested a definition for ''pavement preservation.''

In response, the term ''preservation'' is included in the final rule as a work type action. The FHWA position with regards to the definition of various work type actions is discussed under ''Work Type'' in this section. The FHWA has not added a definition of this term in part 515.

Performance

Oregon DOT requested a definition for ''performance.''

The FHWA does not believe there is a benefit to adding a definition of ''performance'' to part 515. A detailed discussion about the connections among system performance, performance measures and targets, and asset management appears in Section V of this preamble.

Performance Gap

Seven commenters provided input on the proposed definition of ''performance gap.'' The GTMA supported the proposed definition. New Jersey DOT requested that ''desired performance'' be changed to ''target performance.'' The AASHTO and the DOTs of Connecticut, Washington State, and Oregon recommended that FHWA include language in the definition to indicate that reducing the performance gap can also be achieved through other means, such as operations. Oklahoma DOT said the multiple meanings for the term ''performance gap'' are confusing, and it provided a suggested definition for ''condition gap'' as ''the gap between the current condition of an asset, asset class, or asset sub-group, and the targets the State DOT establishes for condition of the asset, asset class, or asset sub-group.'' This commenter suggested defining ''performance gap'' as ''the gap between the current performance and desired performance of the NHS that can only be achieved through improving the physical assets.''

In response, FHWA notes that the ''performance targets'' are addressed in the three FHWA performance measure rulemakings and are not directly addressed through asset management performance gap analysis.[20] The FHWA agrees that there may be several alternative ways to reduce performance gaps. After considering the comments, and particularly the suggestion for simplification, FHWA revised the definition of performance gap in the final rule to read as ''the gaps between the current asset condition and State DOT targets for asset condition, and the gaps in system performance effectiveness that are best addressed by improving the physical assets.''

Performance of the NHS

Six commenters provided input on the proposed definition of ''performance of the NHS.'' The GTMA supported the definition as proposed. New York State Association of Metropolitan Planning Organizations (NYSAMPO), Delaware DOT, Oregon DOT, and Tennessee DOT requested clarification on the intended meaning of ''effectiveness of the NHS,'' which is used in the proposed definition. Alaska DOT said the definition is too confusing and that NHS performance should be tied to the performance measures.

In response, FHWA notes that 23 U.S.C. 119 (e)(1) requires States to develop asset management plans to improve or preserve the condition of assets and the performance of the system. The FHWA clarifies that the term ''effectiveness of the NHS'' ties to the system performance, which is discussed in more detail in Section V, *System Performance, Performance Measures and Targets, and Asset Management Plans.* Effectiveness of the NHS refers to the cases in which the NHS is not performing as it was intended to. For example, if an Interstate highway in a metropolitan area is consistently congested, then it loses its effectiveness in facilitating timely delivery of people and goods. Therefore, adding an additional lane and bridge widening may become necessary to increase mobility. After considering the comments, FHWA decided to retain the proposed definition in the final rule.

Risk Management

Two commenters provided feedback on the proposed definition of ''risk management.'' The GTMA supported the definition as proposed. New York State DOT said that the rule does not adequately explain or define ''risk management,'' leaving the States to decide what this is and how it relates to asset management. The commenter said risk should be a part of an asset management program, but this concept needs to be explicitly defined and described by the final rule.

After considering these comments, FHWA decided the definition of ''risk management'' should remain as proposed. In the discussion of NPRM § 515.007(a)(3), this final rule provides a detailed discussion on the use of risk management in the development of an asset management plan.

Target

Minnesota DOT requested a definition for ''target.''

The FHWA does not believe it is necessary to define the word in part 515. ''Target'' is defined in 23 CFR 490.101 as ''a quantifiable level of performance or condition, expressed as a value for the measure, to be achieved within a specified time period required by the Federal Highway Administration.'' The FHWA believes that this definition is appropriate in the context of part 515. For NHS pavement and bridge targets required by 23 U.S.C. 150(d), the definition in § 490.101 is directly applicable. With respect to other targets State DOTs may include in their asset management plans, the same definition would apply except for the phrase ''required by the Federal Highway Administration.''

Work Type

Three commenters provided input on the proposed definition of ''work type,'' which is relevant to LCP and the development of a financial plan. The GTMA supported the definition as proposed. Tennessee DOT said FHWA should define each classification under the proposed definition of ''work type'' (maintenance, preservation, repair, rehabilitation, reconstruction, and upgrades). Oregon DOT said there are no universally agreed-upon meanings for several words used to define the activities undertaken to maintain or improve the condition and performance

[20] *See* ''National Performance Management Measures; Highway Safety Improvement Program'' (RIN 2125–AF49); ''National Performance Management Measures; Assessing Pavement Condition for the National Highway Performance Program and Bridge Condition for the National Highway Performance Program'' (RIN 2125–AF53); and ''National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program'' (RIN 2125–AF54).

of transportation assets. Oregon DOT suggested that FHWA should request that each State DOT provide a definition for terms used to describe asset management activities and budgetary expenditures.

In response, FHWA decided not to provide definitions for the individual activities that fall under ''work type,'' recognizing that there are differences among State DOTs in how they categorize, define, or differentiate one work type activity from another. The FHWA believes that State DOTs should define and explain in their asset management plans how they categorize and define their work type activities. To reduce the burden on the State DOTs, and to emphasize the network-level character of the asset management plan, FHWA has simplified the definition of ''work type'' in section 515.5 by limiting the types to five major categories: Initial construction, maintenance, preservation, rehabilitation, and reconstruction.

NPRM Section 515.007 (Final Rule Section 515.7)

Section 515.007 of the NPRM described the processes that State DOTs would be required to use in developing their asset management plans. These processes are intended to align with the minimum content elements 23 U.S.C. 119 requires in the asset management plan. The FHWA made a number of changes to section 515.7 in the final rule, including rewording, reorganizing, and renumbering its provisions. Table 1, shows the changes to the section numbering that occurred in the final rule.

The FHWA received several general comments on NPRM section 515.007. Oregon DOT said the proposed rule should establish general requirements limited to developing a program that meets State needs and allows States to demonstrate the success of their own systems to meet general performance criteria, instead of mandating specific requirements, such as performance gap analysis, life-cycle cost analysis, investment strategies, and developing STIP programs to support performance goals. Similarly, New Jersey DOT said that FHWA should focus on whether the State has an adequate plan with the proper elements, rather than requiring States to define processes for each element of the plan.

In response, FHWA notes that 23 U.S.C. 119(e)(4) requires a State asset management plan, at a minimum, to be in a form that the Secretary determines to be appropriate and include the following: A summary listing of the pavement and bridge assets on the NHS in the State, including a description of the condition of those assets; asset management objectives and measures; performance gap identification; life-cycle cost and risk management analysis; a financial plan; and investment strategies. The Secretary is required to establish in regulation the process to develop the State asset management plan described in 23 U.S.C. 119(e)(1). Moreover, 23 U.S.C. 119(e)(6)(A)(i) and (ii) require the Secretary review and certify the process used by the State to develop its Asset Management Plan. Because of the statutory basis of these requirements, FHWA has not revised this section in response to these comments.

New Jersey DOT supported FHWA's goal to promote asset management as a practice across State DOTs, but said FHWA should provide flexibility that encourages States to adopt asset management practices. The commenter said FHWA should reduce the focus on process development and process documentation and put more focus more on whether the State has an adequate plan. Similarly, Florida DOT said the rule should allow for sufficient flexibility in how State DOTs use decisionmaking ''processes'' and tools.

In response to these comments, FHWA notes that the process development and process documentation provisions in the rule are designed to implement the requirements in 23 U.S.C. 119(e)(8). The final rule provides flexibility to the State DOTs by recognizing the differences among State DOTs and allowing them to develop their own individual processes. However, State DOTs are required to address the minimum requirements included in § 515.7 to ensure the integrity of their asset management plans.

A comment received from AASHTO suggested that the NPRM proposal was insufficiently clear about what, if any, difference there is between § 515.007 and § 515.009. This comment suggested that AASHTO, and perhaps others, viewed the provisions as establishing duplicative asset management process requirements. In response, FHWA revised the final rule language in § 515.7 to emphasize that § 515.7 defines the analytical processes State DOTs must develop and use to prepare their asset management plans. Section 515.9 defines the minimum required form and content for the plans that State DOTs will produce using the processes described in § 515.7. The FHWA revised the second sentence of § 515.7(a) of the final rule to explicitly refer to ''the State DOT's process.'' The FHWA made similar clarifications in final rule §§ 515.7(b), 515.7(d), and 515.7(e). These changes underscore the purpose of § 515.7, which is to prescribe processes necessary to asset management plan development, as mandated by 23 U.S.C. 119(e)(8).

Hawaii DOT said some requirements for content to be included in the asset management plan are found in other NPRMs and thus seem to be missing. For example, the agency said that there is no discussion of data that supports the asset management plan and no discussion of when targets will be established.

In response, FHWA notes the State DOTs must use bridge and pavement management systems and their most current data for their asset management plans, as provided in § 515.7(g) of the final rule. Target-setting requirements for NHS pavements and bridges will be established as part of the second performance measure rulemaking. Part 515 does not include any provisions governing target-setting. With respect to other assets State DOTs may elect to include in their plans, FHWA expects State DOTs to use their best available condition data and set targets as they deem appropriate.

Oklahoma DOT said the term ''highway network system'' in NPRM § 515.007(a) should be clarified to address the NHS only, as specified in title 23.

In the final rule, FHWA has replaced the term ''highway network system'' in the first sentence in § 515.7 with ''NHS.''

NPRM Section 515.007(a)(1) (Final Rule Section 515.7(a))

Eighteen commenters addressed NPRM § 515.007(a)(1), which proposed requirements for the State DOT process for conducting performance gap analyses, and for identifying strategies to close gaps.

The GTMA supported the provision as proposed, but added that it is difficult to understand why a State would voluntarily include roads beyond the NHS in its plan if the State would be required to submit a gap analysis for those roads as proposed in § 515.007(a)(1)(i). Tennessee DOT asked how the process for conducting a gap analysis proposed in § 515.007(a)(1)(i) would be affected if a State chooses to include other public roads or assets in the asset management plan beyond the minimum required NHS pavements and bridges. Similarly, Alaska DOT requested FHWA amend proposed § 515.007(a)(1)(i) to delete the requirement that a State DOT include desired performance targets in the gap analysis for any other public roads that

it opts to include in its asset management plan.

In response, FHWA believes that performing gap analysis is a key step in developing an asset management plan, regardless of network type (*i.e.,* NHS or non-NHS). However, after considering the comments, FHWA agrees that it may be more effective overall to reduce the requirements applicable to voluntarily included assets. The FHWA has added § 515.9(l) to the final rule, which revises the requirements applicable if a State DOT elects to include other public roads or other assets in an asset management plan (*i.e.,* other than NHS pavements and bridges). The FHWA made the following conforming changes to other parts of the final rule.

- FHWA removed the language that was in NPRM § 515.007(a)(1)(i). Thus, final rule § 515.7(a)(1) no longer includes the sentence describing requirements for such voluntarily included non-NHS assets.
- The FHWA removed language in NPRM § 515.007(a)(1)(iii), which discussed gap identification between existing conditions and voluntarily included State DOT targets.
- The FHWA also eliminated the proposed language in NPRM § 515.007(a)(3)(vi) relating to other assets included in the asset management plan at the State DOT's option. This topic also is addressed in this final rule's discussion of comments on NPRM § 515.009(a), concerning asset management plan requirements for non-NHS assets voluntarily included in a State asset management plan.

Numerous commenters referenced the phrase in NPRM section 515.007(a)(1) that stated the purpose of the gap analysis is ''to identify deficiencies hindering progress toward improving and preserving the NHS and achieving and sustaining the desired state of good repair.'' The AASHTO and Minnesota and Oregon DOTs requested FHWA revise this phrase to specifically recognize the acceptability of strategies calling for a decline in the condition and performance of NHS and other transportation assets. Mississippi DOT recommended the asset management rule acknowledge and be consistent with terminology used in the performance management rule; Mississippi also noted that, based on funding restraints, the target asset condition may improve, stay constant, or decline. New York State DOT said the final rule should include specific language stating that, even with the implementation of asset management plans and programs, the condition of the physical assets may be declining. The commenter described this suggestion as consistent with the second performance measure rulemaking. Maryland DOT suggested the following definition for ''state of good repair: ''The benchmark used by a State to set the minimum threshold for the desired condition of existing transportation facilities and systems.''

In considering these comments, FHWA looked to 23 U.S.C. 119(e)(1), which requires States to develop risk-based asset management plans for the NHS to improve or preserve the condition of the assets. The FHWA recognizes that, due to the fiscal constraints and the need for trade-offs across assets, conditions of an asset may improve, stay constant, or decline. If, after undertaking asset management strategies, an asset condition continues to decline, but at a slower rate than prior to the implementation of those strategies, FHWA would consider this as an improvement even though the condition of the asset is still declining. However, the State DOT should explain in its asset management plan how these improvements or declines affect or impact their long-term goals of achieving and sustaining a state of good repair.

After considering these comments, FHWA revised the NPRM's phrase ''improve and preserve'' to read ''improve or preserve'' in the final rule. This aligns with the statutory language and better reflects the variability in possible actions by a State DOT. The FHWA has not otherwise revised the language in question. As discussed in the section-by-section discussion of NPRM § 515.005 (Desired State of Good Repair), FHWA has not defined ''state of good repair'' in the final rule.

New Jersey DOT said FHWA should prescribe what a gap analysis should entail and address, but State agencies should not have to develop a gap analysis process for FHWA approval.

In response, FHWA notes that 23 U.S.C. 119(e)(4)(C) requires a State asset management plan to include performance gap identification, and 23 U.S.C. 119(e)(6)(A)(i) and (ii) require the Secretary review and certify the process. The FHWA must do the process certification, but does not approve the results of an analysis performed with the process. Because of the statutory basis of these requirements, FHWA has not revised the final rule in response to the New Jersey DOT comments.

The AASHTO, Connecticut DOT, and New York State DOT said FHWA should clarify that nothing in the rule would prohibit a State from undertaking gap analyses beyond those required by the rule, such as a gap analysis between current condition and a concept other than the State's target.

In response, FHWA notes that State DOTs must meet the minimum requirements for performance gap analysis as outlined in section 515.7(a) of the final rule. However, States may go beyond the minimum requirements established in this rule in order to address their own unique needs.

North Carolina DOT said the requirements for gap analysis are not clearly defined in the NPRM and that State DOTs need more specific guidance to determine whether they can conduct this type of analysis.

In response, FHWA clarifies that gap analysis covers two areas: (1) A comparison of current condition with State DOT targets for NHS pavement and bridge asset condition; and (2) identification of changes in NHS pavement and bridge physical assets needed to support system performance. This information mainly can be gathered by reviewing other State plans. Examples of such plans include the HSIP, SHSP, and the State Freight Plan (if the State has one). For example, if one of these plans requires upgrading part of the NHS by adding truck lanes, then this must be incorporated into the gap analysis, and eventually the financial plan, because the new truck lanes would be added to the pavement inventory and should be maintained and preserved accordingly.

The FHWA revised the rule in response to these comments to clarify that the required gap analysis under § 515.7(a) relates to NHS pavements and bridges, and that the gap analysis for performance of the NHS under paragraph (2) of that section must include gaps that affect NHS pavements and bridges even though the gaps are not based on the physical condition of those assets. These requirements, and the reasons for them, are discussed in detail in Section V, *System Performance, Performance Measures and Targets, and Asset Management Plans.* The FHWA does not believe additional guidance for gap analysis is required at this time.

Hawaii DOT recommended that FHWA use the term ''factors'' instead of ''deficiencies'' in proposed § 515.007(a)(1).

In response, FHWA does not believe that the term ''factors'' conveys the same meaning as ''deficiencies'' and has therefore retained ''deficiencies'' in § 515.7(a) of the final rule.

Section 515.007(a)(1)(ii) of the NPRM stated that a State's process for preparing a gap analysis must address the ''gaps, if any, in the effectiveness of the NHS in providing for the safe and

efficient movement of people and goods where it can be affected by physical assets.'' The AASHTO and several State DOTs recommended deleting this requirement because it might require an analysis of gaps that are not fiscally constrained. These commenters stated that a State's performance targets should be the only benchmarks for gap or other analysis.[21] South Dakota DOT recommended that gap analysis address the difference between State targets and the existing or future asset condition determined by reasonable management strategies and available funding and reasonable funding forecasts.

In response to these comments, FHWA notes funding availability is relevant to investment strategies, but should not restrict State DOTs from identifying performance gaps. For example, if a State DOT is concerned about poor drainage on the Interstate and wishes to upgrade the drainage throughout the system, then the State DOT must identify it as a gap and include it in its performance gap analysis, regardless of funding availability. This information will provide decisionmakers with a better understanding of transportation needs. The FHWA also notes that when other State transportation plans identify strategies that may require an addition to physical assets or altering the existing physical assets to address gaps in the NHS effectiveness, then those strategies must be included in the asset management performance gap analyses. Section V, *System Performance, Performance Measures and Targets, and Asset Management Plans,* provides a detailed discussion of the connections among system performance, performance measures and targets, and asset management.

Delaware DOT and NYSAMPO asked FHWA to define or clarify the intended meaning of the term ''effectiveness of the NHS,'' which was used in proposed § 517.007(a)(1)(ii).

In response, FHWA clarifies that effectiveness refers to the capability of producing a desired result. For example, if a portion of the NHS is subject to excessive flooding during the spring with an adverse impact on the movements of people and goods, then the effectiveness of this portion of NHS comes into question and must be addressed. In § 515.7(a)(2) of the final rule, FHWA changed the phrase ''effectiveness of the NHS in providing for the safe and efficient movement of people and goods where it can be effected by physical assets'' to ''performance of the NHS.'' The definition of ''performance of the NHS'' appears in § 515.5, and remains as proposed in the NPRM. The use of ''performance of the NHS'' in this rule will provide greater clarity to State DOTs.

With regard to NPRM § 515.007(a)(1)(ii), Mississippi DOT stated that, except for the State's established performance targets for pavements and bridges, all of the other targets that would be required under § 515.007 are not yet defined. The agency asked how a State could conduct an objective gap analysis without clear definitions of the targets. The AASHTO and Connecticut DOT said proposed § 515.007(a)(1)(ii) is ''expansive'' in that it would require asset management plans to address freight and system performance targets that are currently undefined, which might require investments to assets other than highways and bridges to meet their target levels (*e.g.,* travel demand management and transit investments could be used to address highway reliability issues). These commenters asserted that the relationships between the system performance measures and program improvements are not well-established. They further argued that the provision would put greater pressure on State DOTs to include other assets (*e.g.,* signage and safety assets) for which robust inventory and condition assessment methods may not currently exist.

In response, FHWA notes that the term ''performance targets'' was not used in proposed § 515.007(a)(1)(ii), but was used in proposed § 515.007(a)(1)(i) and (iii), as well as in proposed § 515.007(a)(2)(iv). The term was intended as a general reference to performance targets for asset condition. To avoid confusion, this term is replaced with ''State DOT targets for asset condition for NHS pavements and bridges'' in the final rule in §§ 515.7(a)(1) and 515.7(b)(4). State DOTs are not required to address 23 U.S.C. 150(d) freight and system performance targets, which are part of FHWA's third performance measure rulemaking, in their asset management plans.

However, delivering on any transportation system performance goal will require effective management of the physical assets needed to deliver that performance. There are times when the reason for undertaking bridge or pavement work is to address system performance and not to improve condition. For example, a State DOT could decide to retrofit its bridges to reduce the potential impacts of seismic activity. This action directly ties to performance in the general areas of mobility and safety. Because the action affects NHS pavements and bridges, it must be included in the State DOT's gap analysis under § 515.7(a)(2) of the final rule. For a further discussion of this issue, see Section V, *System Performance, Performance Measures and Targets, and Asset Management Plans.*

NPRM § 515.007(a)(2) (Final Rule 515.7(b))

Section 515.007(a)(2) of the NPRM proposed requirements for each State DOT to establish a process for conducting LCCA for asset classes or asset sub-groups at the network level. Oregon DOT said that LCCA is a useful tool for comparing alternative solutions at the project level, but it has not been effectively demonstrated how the analysis could be applied to treatment options for asset classes at a program level. The agency said that the rule should be changed to include processes that have been shown to be effective for the purpose intended. Based on the assertion that network-level LCCA is not well understood by States, Applied Pavement Technology, Inc., suggested this analysis be referred to instead as a ''whole-life cost analysis.''

The PCA, ACPA, and CEMEX USA asserted that the network-level analysis called for in the proposed rule is not LCCA, but is actually a programmatic process similar to what is called Remaining Service Interval (RSI). The commenters added that although network-level LCCA (or RSI) has many virtues as a network or system-level analysis, it is not a substitute for traditional LCCA, because it cannot provide the ''dollars and cents'' information that allows agencies to quantify the differential costs of alternative investment options for a given project. The commenters recommended that FHWA define LCCA to be consistent with previous definitions and prescribe the historic use of LCCA as a project-level analysis. They also recommended that the proposed rule use RSI to conduct the network-level analysis.

The topics raised in these comments are addressed in the section-by-section discussion of NPRM § 515.005 (Life-cycle Cost Analysis). As discussed there, the comments led FHWA to change the term ''life-cycle cost analysis'' to ''life-cycle planning'' throughout the final rule. The FHWA plans to provide guidance to State DOTs on life-cycle planning.

[21] AASHTO; Alaska DOT; Connecticut DOT; DOTs of ID, MT, ND, SD, and WY (joint submission); Florida DOT; South Dakota DOT.

New Jersey DOT said States should not have to obtain FHWA's approval of its process for conducting LCCA. Rather, the commenter said that a State should perform an LCCA and provide that to FHWA.

In response, FHWA notes that 23 U.S.C. 119 (e)(6)(A)(i)(I) requires FHWA to certify whether a State DOT's processes comply with applicable requirements.

Mississippi and Oregon DOTs said the rule's network-level approach to asset life-cycle analysis contradicts the second performance measure rulemaking, and recommended that the proposed rule for the asset management plan and the performance measure rule should be consistent.

The FHWA does not believe that there is inconsistency between the two rules. In fact, a network-level approach to asset LCP is the key to setting reasonable and achievable targets.

Pennsylvania DOT asked if the intention is to ''compare one project vs. another, one type treatment vs. another or a bridge project vs. a pavement project.'' Oregon DOT said that FHWA should provide one example of a process for conducting LCCA for groups of assets as a starting point for States. California DOT asked FHWA to clarify in the final rule if the intent is for State DOTs to conduct a programmatic benefit-cost analysis of feasible actions over the life of the asset.

The FHWA clarifies that network-level LCCA, referred to as life-cycle planning in the final rule, consists of an approach to maintaining an asset during its whole life (*i.e.,* from construction to disposal). Section 515.7 requires State DOTs to consider, at a minimum, strategies that are included in part 515 under ''work type'' when conducting LCP. The intention is not to ''compare one project vs. another, one type treatment vs. another or a bridge project vs. a pavement project.'' For example, if a network consists of 1,500 miles of pavements, the agency should perform an analysis to decide how to manage its pavements most effectively over the long term. Most agencies use a combination of preservation, rehabilitation, and reconstruction activities. However, the percentage of funding allocated to each activity varies from State to State and depends on several factors, including available funding. This information is used for financial planning and programming and for developing investment strategies. The FHWA retains the proposed language in the final rule. The topic of LCP is discussed further under the section-by-section discussion of NPRM section 515.005 (Life-cycle Cost Analysis).

North Carolina DOT said that the requirements for LCCA are not clearly defined in the NPRM and that State DOTs need additional guidance (*e.g.,* checklists) to determine whether they can provide this type of analysis. Tennessee DOT asserted that the procedure for project-level LCCA is widely accepted, but there has been little or no guidance on how to conduct network-level LCCA. Specifically, the agency asked how States would establish an expected life of each asset.

The FHWA responds that not all State DOTs manage their assets the same way throughout the lifespans of those assets. Therefore, checklists should only be developed by States based on the processes they employ to manage their respective assets. States should establish their own methodology to establish the expected life for each asset. Historical data may be used to achieve that.

Washington State DOT supported the concepts in proposed section 515.007(a)(2). It encouraged FHWA to view a ''network'' as including multiple types of categorization (*e.g.,* expressing the average life-cycle cost of a network, sub-network, corridor, route, county, urban area, region, etc.). The agency said this type of economic performance measure provides important information regarding how effectively different parts of the network are being managed.

The FHWA acknowledges such practice could be useful. However, FHWA does not believe the rule should require the type of multilevel LCP analysis described in the comment. For this reason, the final rule retains the proposed language requiring an LCP process for network-level analysis, and FHWA leaves the definition of ''network'' to the State DOTs, as proposed in the NPRM.

Mississippi DOT referenced the discussion of proposed § 515.007(a)(2) in the preamble of the NPRM (80 FR 9231, 9233). This commenter said that the discussion regarding a ''strategic treatment plan'' appears to drill down to the project level, but elsewhere in the proposed rule, it is stated that the asset management plan would to be used for network-level analysis. It further commented that if the strategic treatment plan must consider specific treatment types, it leads the States toward a project-level approach, which is beyond the intended scope of the proposed rule.

The FHWA acknowledges these comments and emphasizes that the asset management plan is used for network-level analysis. The intent is not to drill down to the project level. A ''strategic treatment plan'' would address how assets are managed during their whole-life at the network level. The FHWA has revised the definition of ''work types'' to better align it with this network-level approach and reduce the burden on States. In addition, FHWA has removed the phrase ''including the treatment options for the work types'' from § 515.7(b)(3) of the final rule to clarify that the focus is not on project-level activities.

Section 515.007(a)(2) of the NPRM would allow a State DOT to propose excluding one or more asset sub-groups from its LCP under certain conditions. The PCA, ACPA, and CEMEX USA expressed concern that some States that have a small amount of concrete assets will exclude concrete pavement solutions. The commenters also asserted that this provision contradicts the requirements of 23 U.S.C. 119(e)(3), which directs the Secretary to encourage States to include all infrastructure assets within the right-of-way corridor in their asset management plans. Alaska DOT requested that FHWA eliminate the option to exclude asset sub-groups from the LCCA, but it did not provide a rationale for doing so. Hawaii DOT recommended using the term ''justifiable reasons'' instead of ''supportable grounds'' in the proposed rule language regarding this option to exclude asset sub-groups.

The FHWA clarifies that this provision is intended to reduce the compliance burden on States by giving them the flexibility to exclude asset sub-groups from network-level analysis if certain condition are met. The FHWA does not believe that there is a contradiction between proposed § 515.007(a)(2) and 23 U.S.C. 119(e)(3). The language of § 515.007(a)(2) does not encourage State DOTs to exclude any asset sub-groups or discourage them from including particular asset sub-groups in their asset management plans. In response to the comments, FHWA clarified the language describing the conditions under which a State DOT might exclude one or more asset sub-groups. In § 515.7(b) of the final rule, FHWA changed ''the cost impacts associated with managing the assets in the sub-group'' to read ''the low level of cost associated with managing the assets in that asset sub-group.'' The FHWA also changed ''supportable grounds'' to ''justifiable reasons.'' As discussed in the section-by-section discussion of NPRM § 515.005 (''Asset''), FHWA made revisions in the final rule with respect to definitions and terminology relating to assets, asset class, asset group, and asset sub-group. In conjunction with those changes, FHWA deleted from

§ 515.7(b) of the final rule the parentheticals concerning groups of assets, and changed the remaining references from ''sub-group'' to ''asset sub-group.''

Section 515.007(a)(2) of the NPRM included a requirement that a State DOT's life-cycle cost analysis process must include information on current and future environmental conditions. The GTMA said that it seems premature to require States to address the potential impacts of environmental conditions such as extreme weather, climate change, and seismic activity while FHWA is working to develop a better understanding of these potential impacts. Similarly, Applied Pavement Technology, Inc., said that it would be difficult enough for States to conduct a network-level life-cycle analysis, so it recommended that FHWA remove requirements for States to consider changes in demand and extreme weather events. Alaska DOT also requested removal of the rule language regarding consideration of changes in demand and environmental conditions. Colorado DOT requested that FHWA clarify the intent of this provision, and also asked if other DOTs are structured and staffed to meet this proposed requirement.

In response, FHWA believes it is important for the LCP process to have the capability to include changes in demand and environmental condition. The provision is essential to addressing system performance as required by MAP–21. As included in the AASHTO ''Asset Management Guide—A Focus on Implementation,'' an understanding of growth and future demand trends, and their impact on level-of-service, are important to making informed decisions on how to address future deficiencies and shortfalls of service. Similarly, an evaluation of future environmental conditions is important in order to address possible deficiencies or failures. This may require capital investment in new works involving newly created or expanded assets, or consideration of a range of ''non-asset'' solutions. As a result of the above considerations, FHWA has retained in the final rule the requirement that State DOT's must include information on current and future environmental conditions in their life-cycle planning process.

The FHWA notes that DOTs should take advantage of information and materials currently available; other research is currently ongoing and results will become available over time. In addition, FHWA, the Transportation Research Board, and some State DOTs have developed information on extreme weather, climate change effects and impacts, as well as options for improving resiliency that can serve as models for State DOTs. Agencies can refer to FHWA's Web site (*http://www.fhwa.dot.gov/asset*) for information and examples focused on assessing climate risks, as well as conducting vulnerability assessments and project-level assessments. Information on coastal concerns and temperature effects is sufficiently clear to warrant consideration and application. Information tied to precipitation and runoff in riverine environments is still evolving. For coastal areas, State DOTs may refer to FHWA's ''Hydraulic Engineering Circular No. 25—Volume 2, Highways in the Coastal Environment: Assessing Extreme Events (2014)'' for technical guidance on assessing future sea-level rise and storm surge impacts. The FHWA recognizes that for some parameters, such as precipitation and flow/runoff, sound scientific methods for assessing future conditions are still under development and will evolve over time. The FHWA plans to issue additional information and guidance to support States in addressing climate change and extreme weather in their asset management plans.

South Dakota DOT said that it uses historical weather data to update performance curves, which are used to project future condition and plan the timing of considered improvements. The agency said that as historical weather data includes more severe weather events or other possible effects of climate change, the performance curves will reflect that change. This commenter encouraged FHWA to add language to the rule stating that this practice would satisfy the rule's requirements. South Dakota DOT said that it lacks sufficient data to add a more formal consideration of climate change in its network-level LCCA.

In response, FHWA notes that the study of future environmental conditions is an evolving field. Updating weather-related databases on a regular basis to reflect the most recent observations is an important step. This practice may be sufficient for investments with short remaining service lives (*e.g.,* 10 to 15 years). However, this approach assumes that the future climate will match the past, which is unsupported by recent observations, particularly for temperature and sea-level variables, where some level of discontinuity or nonstationarity has already been observed. Because climate change is expected to cause future observations to differ from the past for some variables used in project design and maintenance, it is important to account for climate change in assessing the performance and investment needs/life cycles of transportation assets, and manage assets to meet performance goals under a range of future environmental conditions. As a result, no changes were made to the rule as a result of this comment.

Oregon DOT said that the proposed 10-year timeframe for asset management plans is much too short to account for things like climate change or seismic events.

In response, FHWA notes that the 10-year time frame referred to includes the investment strategies that a State plans to implement during the course of the State's 10-year asset management plan, and does not refer to the time period that States should consider for LCP to inform development of the investment strategies. While this rule does not establish a specific time frame for conducting LCP, FHWA notes that LCP in most, if not all cases, would look much further out than 10 years to cover the whole life of assets. The FHWA has not made a change to the language of the rule in response to these comments.

Texas DOT requested more details about the proposed LCCA requirements, and asked FHWA to disclose what would be the expected accuracy level for LCCA at the network level. This agency also asked if road user costs, benefits, and estimates of environmental effects should be considered in the analysis.

In response, FHWA notes that § 515.7(a)(2) of the final rule identifies minimum requirements to be included in the LCP process. Road user costs and benefits, and estimates of environmental effects are not included in minimum requirements. States, in their discretion, may include these additional factors. However, as a State DOT conducts its LCP, the State DOT should include future changes in demand; information on current and future environmental conditions including extreme weather events, climate change, and seismic activity; and other factors that could impact whole life costs of assets. The FHWA does not set a threshold for the accuracy of LCP at this point because States' maturity levels with regard to asset management practice and processes vary. The FHWA expects that as the maturity level increases, so will the level of accuracy.

Mississippi DOT said LCCA should include the salvage value, or the cost to re-construct the asset at the end of its service life. The agency said this value is often reduced or eliminated due to the period of time used for the analysis.

In response, FHWA notes that final rule § 515.7(a)(2) states the minimum

requirements for an LCP process that satisfies the requirements of section 119(e). State DOTs may choose to include additional information such as salvage value, but it is not required.

With respect to proposed § 515.007(a)(2)(i), New Jersey DOT suggested replacing the word ''desired'' with ''target,'' ''minimum target condition,'' ''optimal condition,'' or ''optimal target condition.'' As discussed in the section-by-section discussion of NPRM § 515.005 (Asset Management Plan), AASHTO and Connecticut DOT stated that FHWA should remove any reference to a ''desired'' condition, but if the terms remain in the final rule, FHWA should define the term ''desired condition'' as the State-established targets for the asset group.

In response, FHWA replaced the term ''desired condition'' with ''State DOT targets for asset condition'' in § 515.7(b)(1) of the final rule.

Proposed § 515.007(a)(2)(ii) would have required a State's process for LCP to include identification of deterioration models for each asset class or asset sub-group. The GTMA supported the provision as proposed. AASHTO and Connecticut DOT recommended that FHWA make this requirement optional for assets beyond those required by MAP–21. They expressed concern that requiring deterioration models for each asset class or asset sub-group would discourage State DOTs from voluntarily including other assets in the plans beyond the required pavements and bridges.

In response to these comments, FHWA notes that deterioration models are necessary to determine what strategies must be adopted to preserve or improve assets. However, in the final rule FHWA is not requiring deterioration models for assets beyond those required by 23 U.S.C. 119(e). The FHWA has modified the provision by adding a sentence to § 515.7(b)(2) of the final rule stating that the identification of deterioration models for assets other than NHS pavements and bridges is optional.

Oregon DOT said that the proposed rule should be revised to acknowledge that deterioration models for bridges are still in a state of development and that it will be many years before an accurate suite of deterioration models can be developed. This commenter asserted that the most likely way forward to develop effective deterioration models for bridges is the FHWA Long Term Bridge Program, but the commenter stated that those results will not be ready until far into the future. Likewise, North Carolina DOT said that simply developing accurate deterioration models for bridge assets has proven to be difficult and that it will take years to refine the models. According to this commenter, regional deterioration models for different climatic regions vary significantly.

In response to these comments, FHWA acknowledges that there is complexity involved in developing deterioration models. Methods for modeling bridge deterioration exist, but it is important for asset owners to refine, implement, and apply these methods using their bridge data and observed deterioration rates. The State models should be developed using a combination of historical data and engineering judgment, and should reflect the deterioration rates observed within localities or regions considering climate, bridge and element type, environment, and other factors. This is standard practice when implementing deterioration models. To account for the potential limitations of modeling, the information and recommendations that are supported by deterioration modeling (*e.g.,* preservation policies and bridge-level work programming) should be reviewed by State DOTs and revised as appropriate.

New Jersey DOT said proposed section 515.007(a)(2)(ii) would be ''onerous and burdensome'' if it is intended to require a State to document and provide its deterioration models as part of its asset management plan, rather than just acknowledging that the models will be the basis of the State's life-cycle cost estimation.

In response, FHWA clarifies that States do not need to include their deterioration models in detail in their asset management plans. However, the deterioration models are required to perform the required analysis, and a State DOT must identify the model(s) that are part of the State DOT's process for developing its asset management plan. State DOTs should include, as part of their process description, an explanation of how the selected model(s) provide insight into LCP, and why a certain type of management strategy is the most appropriate strategy at the time of asset management plan development.

As proposed in the NPRM, § 515.007(a)(2)(iii) would require a State's process for LCP to include potential work types and their relative unit costs across the whole life of each asset class or asset sub-group. The GTMA supported the provision as proposed. The AASHTO and numerous State DOTs said it would be unreasonable to require data at the granularity of ''relative unit cost'' for a specific work type, especially for system-level analysis. These commenters asserted that many State DOTs would have difficulty obtaining this type of information, because their current financial management systems for maintenance projects may not effectively capture the costs associated with specific work types.[22] Some of these commenters added that the proposed requirement would extend data compilation burdens on States to maintenance work, even though maintenance work is not generally eligible for Federal-aid funding.[23] Oregon DOT said that such information would likely be highly variable and valid only for particular circumstances and for a short period of time.

The FHWA believes that management of assets is achievable only if there is a reliable cost estimate for various investment strategies, including maintenance. With no reliable cost estimate for maintenance activities or other investment strategies, making tradeoffs among these strategies becomes impossible. Maintenance work may not be generally eligible for Federal-aid funding, but failure to address maintenance in a timely manner could result in premature failure of projects built with Federal-aid funding.[24] However, to reduce the burden on States, the FHWA has deleted ''treatment options for the work types'' from § 515.7(b)(3) of the final rule. Hence, the requirement for providing ''relative unit cost data'' applies only to the unit cost for the five specific strategies listed in the final rule's definition of work type: Initial construction, maintenance, preservation, rehabilitation, and reconstruction. The FHWA believes that all States can obtain this information, but acknowledges that some States may not be able to capture the cost information as effectively as others.

Oregon DOT asked if FHWA's expectation is that a State DOT will differentiate NHS pavements among pavement types and NHS bridges among sub-groups (*e.g.,* draw bridges, coastal bridges, and historic bridges) and then satisfy all the requirements discussed in proposed §§ 515.007(a)(2) through 515.007(a)(5).

In response, if States collect data in a way that can distinguish one asset sub-group from another, then they must satisfy all the requirements discussed in

[22] AASHTO; Connecticut DOT; DOTs of ID, MT, ND, SD, and WY (joint submission); South Dakota DOT; Texas DOT; Wyoming DOT.

[23] DOTs of ID, MT, ND, SD, and WY; South Dakota DOT; Wyoming DOT.

[24] Note State DOTs have a maintenance obligation as provided in 23 U.S.C. 116.

§ 515.7(b) of the final rule for all asset sub-groups. However, the processes addressed by final rule §§ 515.7(c) through 515.7(e) (*i.e.,* processes for developing risk management plan, financial plan, and investment strategies) should be done by asset class.

NPRM Section 515.007(a)(3) (Final Rule Section 515.7(c))

Seventeen commenters addressed proposed Section 515.007(a)(3), which requires each State DOT to establish a process for developing a risk management plan. New York State DOT agreed that risk management should be part of an asset management program, but the agency said that the concept of risk management needs to be explicitly defined and described in the final rule. North Carolina DOT said that the requirements for risk analysis are not clearly defined in the NPRM and that State DOTs need specifics to determine whether they can provide this type of analysis. Similarly, Texas DOT stated that FHWA should provide guidance regarding how to conduct the risk-based analysis and management based on the available resources for State DOTs. Virginia DOT said that FHWA should provide an example of how to conduct the risk management process, as well as an example of an acceptable risk management plan. The GTMA said that unless FHWA provides more details on what is expected from State DOTs, this provision would likely result in significant variety in the assessments reported. Fugro Roadware said that few States are actively applying risk-based asset management at the network level, and that the lack of risk-based solutions is also apparent internationally. Based on these assertions, the commenter suggested that FHWA provide additional guidance and/or training to more clearly explain what is expected of agencies.

In response, the FHWA realizes that the concept of network-level risk management is rather new to transportation agencies, and that the first risk management plan developed by some States may not be fully mature. However, 23 U.S.C. 119(e) requires a risk-based asset management plan that includes a risk-management analysis, and State DOTs must satisfy the minimum requirements established in this rule. The FHWA believes the final rule achieves a balance between the requirements of the law and the need to give State DOTs flexibility in addressing requirements pertaining to risk. The FHWA acknowledges the complexity of finding solutions to some risks, such as extreme weather events. Although these types of risks cannot be eliminated, measures should be taken to reduce their impacts.

The FHWA does not believe there is a present need for additional FHWA guidance on how to perform a risk management analysis. Information on that topic is available through several existing resources. The National Highway Institute offers a risk management training course (course number FHWA–NHI–136065), as well as several other courses that include risk management elements. In addition, the Web site of the FHWA Office of Asset Management includes a series of five risk management reports discussing the concept and specifics of risk management. Those reports are available at: *http://www.fhwa.dot.gov/asset/pubs.cfm?thisarea=risk.* Other reports are available through the National Cooperative Highway Research Program, such as NCHRP 25–25 ''Integrating Extreme Weather Into Transportation Asset Management.'' Publication of an additional report, NCHRP 08–93, ''Managing Risk Across the Enterprise: A Guidebook for State Departments of Transportation,'' is planned for 2016.

For these reasons, FHWA retained the substance of the proposed language in § 515.7(c) of the final rule. However, to clarify and simplify the rule, FHWA eliminated the phrase ''the NHS condition and effectiveness as they relate to the safe and efficient movement of people and goods'' and replaced that language with ''condition of NHS pavements and bridges and the performance of the NHS'' in § 515.7(c)(1) of the final rule.

The city of Wahpeton, ND, said that States do not have adequate knowledge of local risks and opportunities. This commenter added that compiling multiple local risk management practices into a cohesive ''one size fits all'' document would risk oversimplifying local complexities in managing non-State-owned NHS roadways.

In response, FHWA acknowledges that local governments may be vulnerable to risks specific to their area of jurisdiction and encourages State DOTs to coordinate with other NHS owners when developing their asset management plans.

Ten commenters addressed the proposed risk management process requirements pertaining to the inclusion of information from the MAP–21 section 1315(b) evaluations of facilities repeatedly damaged by emergency events. The AASHTO and several State DOTs urged FHWA to require inclusion of only a summary of the evaluation, and not the full evaluation. Illinois DOT remarked that FHWA should encourage State DOTs to include the evaluation, but not require it. Texas DOT stated that it is not clear what State DOTs would need to do in order to meet this requirement. Maryland DOT suggested that the evaluation be a part of the risk analysis process required for an asset management plan.

The FHWA believes it is crucial for asset management plans to include relevant MAP–21 section 1315(b) evaluation information and address the information in the asset management plan's risk analysis. The State DOT's asset management plan is a key mechanism for determining transportation needs and investment priorities. One of the primary intended outcomes of the MAP–21 section 1315(b) requirements is to help State DOTs make informed decisions on those issues. The FHWA believes requiring integration of the two processes is important to achieving the statutory purposes of both MAP–21 section 1315(b) and 23 U.S.C. 119(e). The FHWA agrees with commenters that the rule should require the inclusion in the State DOT asset management plans of only a summary of evaluation results. Because the proposed rule language already specified the use of a summary of the evaluations, FHWA makes no change to that portion of the rule.

The FHWA also agrees that the results of the evaluations are relevant to, and should be included in, the risk analysis required in asset management plans. In § 515.7(c)(1) and in § 515.7(c)(6) of the final rule, FHWA updated the regulatory reference to reflect the placement of MAP–21 section 1315(b) requirements in 23 CFR part 667. The FHWA also clarified the applicability language in § 515.7(c)(6) of the final rule. Under the final rule, State DOTs must include, at a minimum, summaries of the evaluation results relating to the State's NHS pavements and bridges. Because asset management plan requirements for non-NHS road, highway, and bridge assets appear in § 515.9(l) of the final rule, FHWA added language in final rule § 515.9(l)(6) clarifying the risk analysis for those assets includes summaries and consideration of the part 667 evaluations if available. The FHWA believes State DOTs should have some flexibility in how they implement this provision, and declines to provide detailed requirements in the rule for the content of the summaries. It will be sufficient if State DOTs ensure their summaries describe relevant evaluation information in sufficient detail to support the required consideration in the asset management plan risk assessment.

The city of Wahpeton, ND said FHWA should clarify that locally owned, non-NHS facilities are not subject to the asset management requirements of this rule simply because they may be included in a MAP–21 section 1315(b) evaluation summary.

In response, FHWA states the inclusion in an asset management plan of a general discussion of other infrastructure needs in the State, including needs identified through MAP–21 section 1315(b) evaluation work, does not make those other assets subject to asset management requirements in 23 CFR part 515. The FHWA points out MAP–21 section 1315(b) evaluation summaries are required in an asset management plan only for NHS pavements and bridges. A State DOT certainly may elect to include evaluation information on other roads, highways, or bridges in the State for the purpose of enhancing the usefulness of its asset management. Indeed, FHWA encourages State DOTs to include a summary of the overall results of the MAP–21 section 1315(b) evaluations in the asset management plan risk analysis if the State anticipates the evaluation results may affect either the selection of investment strategies in the asset management plan, or the State's ability to implement its investment strategies.

Several commenters asked FHWA to be more specific about the types of risks that States should consider when conducting the risk analysis. The NYSAMPO said it would be helpful if the rule provided a non-prescriptive list of risk elements that could be included. Fugro Roadware said that the rule should clearly outline which risks should be evaluated. The commenter recommended that agencies specifically evaluate the risk and variability associated with performance measures, deterioration models, rehabilitation costs, and specific project selections during the management process. The AASHTO and Connecticut DOT requested that FHWA clarify that the identification of which risks to address should be determined by each State DOT.

Hawaii DOT recommended that the risk identification include financial risk. Similarly, PCA, ACPA, and CEMEX USA proposed that financial risks, inflation risks, and other macro- and micro-economic risks be considered. These commenters also proposed that such risks be included in developing the financial plan, investment strategies, and the estimated cost of expected future work. They asserted that not accounting for inflation risks, as well as other financing risks and economic risks, would have a direct bearing on the decisions on how to minimize risk impacts and improve asset conditions.

Regarding environmental risks, Washington State DOT said that it is currently working to include resilience to extreme weather events as an integral part of its risk reduction efforts. In contrast, GTMA said that it seems premature to require States to address the potential impacts of environmental conditions such as extreme weather, climate change, and seismic activity while FHWA is working to develop a better understanding of these potential impacts. Similarly, South Dakota DOT recommended that FHWA reference proven procedures for forecasting the future environmental conditions mentioned in the NPRM. The agency said that if established procedures are not available, it would be premature to include this element in the asset management plan beyond a general discussion of how a State has considered environmental standards during design, life-cycle analysis, and risk analysis. Alaska DOT requested that FHWA delete any reference to environmental conditions in proposed § 515.007(a)(3)(i).

In response to these comments, FHWA notes proposed § 515.007(a)(3)(i) contains a non-prescriptive list of risks. Risks associated with current and future environmental conditions are included, in part, because these risks have the potential to create a large drain on resources if not considered in the context of the long-term life of bridges and pavements. Assessment of risks associated with current and future environmental conditions, similar to other risks, is essential to estimating long-term investment needs, and thus is essential to asset management plan development. In FHWA's experience, the types of risks to which States are susceptible varies from one State to another. The purpose of risk management is to identify events and situations that pose a threat to NHS condition and performance and address them to reduce or eliminate their impact. In addition, risk management can identify opportunities that could expedite an agency's progress toward improving or preserving the NHS and take advantage of them.

The National Highway Institute's asset management course categorizes risks as financial risks, hazard risks, operational risks, and strategic risks. Examples for each category are as follows:

- Financial risks: Economic downturn, budget uncertainty, sudden price increase, and change in inflation rate;
- Hazard risks: Seismic events, floods, and other extreme weather events;
- Operational risks: Lack of adequate maintenance, excess loading, scour, adequacy of roadside safety hardware (crash tested bridge railing), data quality, inaccurate asset inventory, asset failure, and lack of expertise; and
- Strategic risks: Environmental standards, changes in the make-up of the State legislature, and frequent changes in the agency leadership.

The FHWA recognizes not all States may be vulnerable to risks in all four categories. There also may be circumstances where States identify a particular type of risk outside of these categories. In the final rule, FHWA leaves it to the discretion of the State DOTs to determine how best to identify risks to their system. In response to the comments, FHWA modified the final rule to include examples of other risk categories in § 515.7(c)(1). The added examples are financial risks such as budget uncertainty, operational risks such as asset failure, and strategic risks such as environmental compliance.

Proposed § 515.007(a)(3)(iv) would require the process for developing the risk management plan to produce a mitigation plan for addressing the top priority risks. Alaska DOT requested FHWA delete this provision entirely, but it did not provide a rationale for doing so.

The FHWA believes that identifying risks without including options for addressing them would not provide sufficient information to State DOTs to permit them to develop the investment strategies required by 23 U.S.C. 119(e)(2). The FHWA retains the proposed language, now in § 515.7(c)(4) of the final rule.

NPRM Section 515.007(a)(4) (Final Rule Section 515.7(d))

Twenty-six commenters addressed proposed § 515.007(a)(4), which would require State DOTs to establish a process for developing a financial plan. The American Society of Civil Engineers (ASCE) supported the proposed requirement for a financial plan that would identify the annual costs to implement the asset management plan over a minimum 10-year period. This commenter endorsed the requirement that States estimate the value of their pavement and bridge assets and the needed investment levels necessary to maintain the value of those assets. According to this commenter, capitalizing road and bridge assets would underscore the fact that transportation infrastructure is not only a benefit for mobility, but also it

represents an increase in the wealth of localities, States, and the Nation.

The FHWA acknowledges this comment; no further response is required.

North Carolina DOT requested that FHWA make a clearer distinction between the purposes and contents of the financial plan and the investment strategies.

In response, the FHWA notes State DOTs are required under § 515.7 to develop processes for developing both a financial plan and for developing investment strategies. The process for developing a financial plan includes, but is not limited to, identifying resources and expenditures over a minimum of 10 years and demonstrating how resources should be distributed among various strategies to meet the performance goals and targets. By contrast, the investment strategies process is developed to ensure that the investment strategies, identified through financial planning, meet the requirements of § 515.9(f), and were influenced by the results of the required performance gap analysis, LCP for asset classes or asset sub-groups, risk management analysis, and anticipated available funding and expected costs of future work (*see* § 515.7(e)(1)–(4) of the final rule). For example, if pavement preservation is an investment strategy that the State must to pursue to reach a target of 72 percent of pavement in good condition, then the State must demonstrate that: (1) The pavement preservation strategy addresses § 515.009(f) requirements; and (2) selection of this strategy was driven by the State DOT's asset management processes. This can be accomplished by developing a simple table. Of course, State DOTs have the discretion to demonstrate this in other ways.

As proposed, § 515.007(a)(4) would require the financial plan process to identify annual costs over a minimum of 10 years. Many of the commenters addressing the minimum duration of the financial plan extended their comments to address the proposed minimum duration of the overall asset management plan. The duration for the asset management plan proposed in NPRM § 515.009(e) also is 10 years.

New York State DOT supported the proposed 10-year time horizon for asset management plans, stating that LCCA is not required for either Transportation Improvement Programs (TIP) or STIPs and having an asset management plan with a 10-year horizon would help to inform the project selection process with respect to the longer-term impacts of project choices. This DOT added that a 10-year time horizon would allow the asset management plan to be a cross-check between the STIP and States' and MPOs' long-range plans, which by law must have at least a 20-year horizon. Oregon DOT stated that it intends to prepare a plan that will cover at least 10 years, but it is not opposed to FHWA allowing plans to cover less than 10 years.

The FHWA acknowledges these comments, but does not believe any further response is required.

CEMEX USA, PCA, ACPA, and Colorado DOT recommended that FHWA increase the minimum duration to 20 to 30 years in order to coincide with the minimum time frame for the statewide long-range transportation plans in 23 U.S.C. 135(f)(1). These commenters added that if States are only required to provide asset management plans with a minimum 10-year period, they may not evaluate the long-term differences between alternate investment strategies and might overlook alternate strategies that yield longer-term benefits. The PCA and ACPA stated that whether States have little certainty about financial resources available in later years is a different, independent issue.

In contrast, AASHTO and several State DOTs recommended FHWA shorten the minimum time horizon for the financial plan and the overall asset management plan to 4 years, but asked FHWA to allow States the option to use any time period longer than 4 years.[25] These commenters stated that a 4-year duration would align better with the time horizons for STIPs, targets established under the second performance measure rulemaking, and State DOT performance plans. Some of these commenters added that a 10-year time frame would greatly exceed the length of a typical multiyear authorization bill and would require detailed financial projections beyond anything required by Congress.[26] Kentucky Transportation Cabinet said that 10-year projections for pavement conditions are not reliable assessments of needs, and a time span that goes beyond administration changes and the STIP is also unreliable for funding. It further commented that a shorter time span for long-term planning would provide more accountability. Similarly, the city of Wahpeton, ND, said that States should only be required to produce a financial forecast that aligns with its STIP. North Carolina DOT and Delaware DOT suggested a 5-year plan, and NEPPP stated that it could be argued that any plan beyond 6 years in duration would require too much guesswork to be relevant.

In summary, reasons offered by commenters for establishing a shorter duration for the financial plan and the overall asset management plan included:

- A 10-year time horizon is not consistent with existing and proposed Federal requirements for planning and performance management (*e.g.,* 4- or 5-year STIPs, 4-year targets for the national performance measures) (AASHTO and Arkansas and Connecticut DOTs);
- Any aspect of the asset management plan that goes beyond the length of the STIP becomes quite speculative, making the detail called for by the asset management plan proposed rule (with regard to funding) of limited if any value for decision support (AASHTO and DOTs of Arkansas, Connecticut, and Illinois);
- It is highly burdensome for a State to have to compile the information for a period of 10 or more years, and particularly troublesome as applied to years beyond the time period addressed in the STIP (AASHTO and Connecticut DOT);
- The uncertain funding environment at the Federal and State levels makes 10-year financial analyses of limited value (AASHTO and six State DOTs);[27]
- A 10-year time frame greatly exceeds the length of an anticipated multiyear authorization bill and would require detailed financial projections beyond anything required by Congress, adding substantial risk to financial forecasting (South Dakota DOT); and
- The intended annual costing/budget figures for a 10-year period will be filled with numerous variables, especially when it comes to maintenance activities (Tennessee DOT).

In response to the requests for a longer minimum duration for the financial plan, FHWA notes that the 10-year period referenced in proposed section 515.007(a)(4), like the 10-year period for the overall asset management plan proposed in section 515.009(e), is a minimum. The role of durations in asset management is discussed in the section-by-section discussion of NPRM section 515.005 (Long-term and Short-term). The 10-year minimums do not restrict State DOTs to a specific time frame for conducting LCP or other analyses. States may choose much

[25] AASHTO, Arkansas DOT, Connecticut DOT, Illinois DOT; North Dakota DOT; South Dakota DOT; DOTs of ID, MT, ND, SD, and WY (joint submission); Wyoming DOT.

[26] DOTs of ID, MT, ND, SD, and WY (joint submission); Wyoming DOT.

[27] AASHTO, Arkansas DOT, Connecticut DOT, Illinois DOT, North Carolina DOT; North Dakota DOT, Tennessee DOT.

longer time frames for their analyses. Furthermore, State DOTs are only required to include strategies in their asset management plans that they plan to implement during the 10-year timeframe for those plans.

Regarding requests for a shorter timeframe for the financial plan, FHWA believes that a financial plan covering 4- or 5-year periods would not allow for the strategic planning that is needed for the management of long-lived assets. The life-cycle of a bridge or pavement spans decades and that requires strategic understanding of the asset's life-cycle. A long-term financial plan provides ''advance warning'' to decisionmakers and allows them to plan years in advance for investments needed to sustain assets. The long-term perspective of the financial plan allows legislators and other decisionmakers long lead times to anticipate how to close financial gaps. Alternatively, the agency can decide whether to adjust condition targets. It also can lead to strategic decisions on how to manage revenue sources, such as bonds, to be timed strategically over a decade to provide revenues when most critically needed to sustain asset targets. Therefore, the longer timeframes for the asset management plan and financial plan are essential for incentivizing and documenting good asset management practices, and for keeping decisionmakers focused on sustaining assets. However, too long a period for the plans, such as 20 or 30 years, is likely to lose credibility because long-term revenue forecasting involves making many assumptions and uncertainty. Additionally, this may be a challenge in some cases because agencies cannot confidently predict asset conditions much beyond 10 years.

The FHWA believes that the 10-year period is long enough to illustrate the benefits of an LCP approach, but short enough to be credible. In addition, only a long-term financial plan can demonstrate how adequate preservation investment today pays future financial dividends and how underfunding of preservation in the early years of a plan stimulates compounding growth in backlogs of deferred maintenance that create serious future financial liabilities. The effects of sound preservation do not show up in the short-term, but only over the longer horizon. With a short-term horizon, an agency could ''save'' money by cutting preservation. Only over the long-term do the costs of deferred maintenance become apparent. The FHWA recognizes the risks involved with financial forecasting. However, periodic updates to the plan, as required under § 515.13(c) of the final rule, will reduce the financial risks to a great degree. As a result of the above analysis, FHWA *retained in the final rule the 10-year timeframe for the financial plan and the overall asset management plan.*

Proposed § 515.007(a)(4)(i) would require the financial plan process to include the estimated cost of expected future work to implement investment strategies contained in the asset management plan, by State fiscal year and work type. The AASHTO and Connecticut DOT said that the references to ''work type'' should be deleted, because analysis at that level would be inconsistent with a system-level analysis. Applied Pavement Technology, Inc. said that it is not clear what level of detail would be required to provide work types. The commenter asked if it would be sufficient to classify work types as preservation and rehabilitation, or if more detail (*e.g.,* chip seal, overlays) would be required. Oregon DOT said that without presentation of State targets that differ or go beyond Federal targets and consideration of other system components of interest to the State, the information required by this provision would do little to enhance the condition and performance of a State's transportation system. Oregon DOT added that the level of detail associated with satisfying this requirement would likely be challenging for all but a very few State DOTs.

The FHWA believes that inclusion of work types in the financial plan is necessary to demonstrate the impact that underfunding or overfunding of one particular work type would have on short-term and long-term asset condition. However, after considering the comments, FHWA agrees that the objective can be achieved using five basic work types (initial construction, maintenance, preservation, rehabilitation, and reconstruction), and that it is not necessary to require the more detailed level of information as proposed in the NPRM (*i.e.,* inclusion of treatment options). The FHWA agrees this revised approach is more consistent with a network-level approach to asset management. Thus, FHWA has simplified the definition of work type in § 515.5 of the final rule.

Regarding the requirement to use the State fiscal year, Oregon DOT said that it would be ''a bit unusual'' to require the use of State fiscal years in a Federal document prepared for Federal purposes. Hawaii DOT recommended that FHWA allow investment strategies to be listed by either State or Federal fiscal year.

In response, FHWA does not view financial planning in the context of asset management to be focused on Federal-aid funding versus State-funding of projects or programs. Instead, financial planning is intended to demonstrate how various funding scenarios, regardless of funding source, impact the long-term performance of various asset classes. It provides not only State DOTs, but also legislatures, with the information they need to make decisions about investment strategies that should be undertaken to meet a State's performance goals and objectives. The FHWA believes this is most achievable if the State fiscal year is used for the financial plan because the State fiscal year is generally used by State legislatures and State agencies. Thus, FHWA retains the proposed language in the final rule.

The AASHTO and Connecticut DOT asked FHWA to clarify the differences (if any) between the requirements in proposed § 515.007(a)(4)(i) and (ii). They asserted that, as proposed, the ''estimated cost of expected future work'' referenced in proposed paragraph (a)(4)(i) should be the same as the ''estimated funding levels that are expected to be reasonably available'' referenced in paragraph (a)(4)(ii). In other words, the work to be performed should align with the available funding.

To clarify the difference between the two paragraphs, FHWA offers the following example. Assume that an agency developed its first asset management plan in the year 2017. The plan indicates that the agency has set its target for pavements in good condition at 72 percent for the year 2023. To meet this target, the costs of pavement preservation and pavement rehabilitation were estimated at $25 and $70 million respectively. This was exactly the same as the ''estimated funding levels that were expected to be reasonably available.'' Four years later, the agency updates its plan, noting that its purchasing power has been reduced substantially because of the sudden rise in prices. In this case, the ''estimated funding levels that are expected to be reasonably available'' for pavement preservation and pavement rehabilitation (fiscal year 2023) remains the same while the cost of maintaining the 72 percent of pavements in good condition is escalating substantially. Therefore, either the agency has to lower its target or move funding from other assets to maintain the 72 percent target. In either case, the difference between the ''estimated cost of expected future work'' and the ''estimated funding levels that are expected to be reasonably available'' explains why targets were adjusted, or why it was necessary to move funding from one

asset category to another. After considering the comments, FHWA decided not to change the language in question.

Regarding proposed § 515.007(a)(4)(ii), Hawaii DOT recommended adding the word ''future'' to the reference to available funding.

In response, FHWA has modified § 515.7(d)(2) of the final rule to include the word ''future.''

Proposed § 515.007(a)(4)(iv) would require the financial plan process to include an estimate of the value of the agency's pavements and bridge assets and the needed annual investment to maintain the value of the assets. The State DOTs of Delaware, Maryland, and Missouri recommended that FHWA eliminate this requirement altogether. Delaware DOT said that the valuation methods currently in use (*i.e.,* initial cost, depreciated value, and replacement cost) all have serious drawbacks to their use in asset management. Maryland DOT and Missouri DOT added that, without consistent guidance, States would use vastly different valuation approaches, so the results would not be comparable from State to State. The AASHTO and Connecticut DOT asserted that estimating a value of the agency's assets would not be useful or desirable and recommended that FHWA simply require each State DOT to include a discussion of the needed annual investment to maintain its assets to meet the targets established in 23 CFR part 490 Subparts C and D. Similarly, Applied Pavement Technology, Inc. recommended that FHWA require State DOTs to estimate the annual investment needed to maintain the condition (rather than the value) of the network.

Kentucky Transportation Cabinet also questioned the benefit of valuing pavement and bridge assets, but it said that FHWA should provide the methodology for doing this calculation. Washington State DOT proposed allowing States to determine how to calculate the value and said that it would prefer to use the replacement value method for pavement assets. Hawaii DOT said the measure of success or effectiveness could be based on either the value or the condition of the asset. The agency recommended that State DOTs be offered a choice of which to use. Texas DOT asked FHWA if the phrase ''maintain the value of these assets'' in this paragraph means to maintain in current condition.

In response, FHWA states that the reason for inclusion of asset valuation in the asset management financial plan process is not to compare States to each other. Asset valuation serves several purposes, among which are accountability, transparency, and communication. Asset valuation is an essential tool in long-term financial planning which helps to realistically capture the monetary gain or loss incurred as a result of investment decisions. In the case of infrastructure assets, applying timely maintenance and preservation treatments slows the rate of deterioration and extends the remaining useful life, while delayed preservation and maintenance accelerate the deterioration and reduce the value of the asset.

Asset valuation also serves as an important tool for effectively communicating to the public, legislators, and other stakeholders the value of assets and the consequences of inadequate funding levels to maintain and preserve infrastructure assets. Without an understanding of the value of infrastructure assets, the public may be unable to appreciate their importance and the need for their long-term management. Meeting State targets established in 23 CFR part 490 Subparts C and D will not indicate whether the value of assets has been maintained or decreased, and will not necessarily convey the same message to the State DOTs' managers, public, and other stakeholders. For example, the percent of NHS pavements in good condition in a State could decrease over time while still exceeding the State's target. In this example, the State is still meeting its target, but the value of NHS pavement assets has decreased.

In addition, maintaining the asset condition above a certain threshold, although it may seem to be an indication of no loss in an asset value, fails to deliver the message when the condition changes slightly. For example, a drop in percentage of pavement in good condition from 92 to 91 may not seem a significant change, especially if the condition target is still met. However, when this 1 percent drop is expressed in terms of the asset value, its significance will be recognized instantly. There are many ways to estimate asset value. The FHWA leaves it to the State DOT to select the asset valuation methodology that suits it the best. Therefore, FHWA retains the proposed rule language in § 515.7(d)(4) of the final rule, except for a clarification that the requirements of this provision apply only to NHS pavements and bridges.

Two State DOTs commented on the NPRM preamble, recommending changes to the sentence that describes the purpose of the financial plan as being ''to ensure that the adopted strategies are not only affordable, but that assets will be preserved and maintained with no risks of financial shortfall.'' (80 FR 9231, 9240) Missouri DOT proposed the substitution of the word ''minimal'' for ''no,'' arguing that there is no way to ensure ''no risks.'' Maryland DOT suggested rewriting the sentence to read as follows: ''The purpose is to link a program of projects to the State DOT's constrained long-range planning process to ensure that the adopted strategies are appropriate and that assets will be preserved and maintained within identified financial constraints.'' Maryland DOT said that STIPs are already required to be fiscally constrained; therefore, any program noted within the asset management plan would be by definition ''affordable.'' The agency added that it would be neither practical nor possible to guarantee ''no risk of financial shortfall'' over a 10-year period, because too many variables remain outside of a State DOT's control.

In response, FHWA agrees that the word ''minimal'' is more appropriate than ''no'' in the above statement. However, because the statement in question appeared only in the preamble of the NPRM and not in the final rule, FHWA has made no changes as a result of these comments. Additionally, FHWA notes that long-range planning by States is not always fiscally constrained (23 CFR 450.216(m)), and that the purpose of the asset management financial plan is to determine the appropriate level of funding for various investment strategies to reach a certain level of asset performance over time. The FHWA agrees that the ultimate goal of asset management in general is to develop investment strategies that are used in the transportation planning process, to develop a transportation program that achieves the desired outcomes. Finally, FHWA notes this rule requires updates to the State DOT's asset management plan at least once every 4 years (final rule § 515.13(c)). This requirement should adequately capture the impact of financial shortfalls.

The NYSAMPO proposed FHWA add a reference to consistency with the revenue forecasting methodology used to develop the financial plans for MPOs' metropolitan long-range transportation plans.

In response, FHWA notes that State DOTs have discretion over their choice of revenue forecasting methodology, but FHWA encourages States to coordinate with MPOs when developing their asset management plan processes. The FHWA made no change in response to this comment. For more information on coordination with MPOs, toll

authorities, and other owners of NHS assets, see the section-by-section discussion of NPRM § 515.009(b).

NPRM Section 515.007(a)(5) (Final Rule Section 515.7(e))

Eight commenters addressed § 515.007(a)(5), which would require a State DOT to establish a process for developing investment strategies. The GTMA and Washington State DOT supported the provision as proposed. New Jersey DOT said that State DOTs should not have to outline every process; instead, FHWA should focus more on the outcomes from the processes. This same commenter also stated that the proposed rule expects States to offer investment strategies in multiple locations in the plan (*i.e.,* gap analysis, LCCA, and investment strategies). The agency suggested that the section of the asset management plan governed by proposed § 515.007(a)(5) should be where strategies are articulated.

In response, FHWA believes each asset management process in the rule is necessary to ensure that the outcome of asset management is sound and effective. The FHWA notes there is a difference between ''strategies'' and ''investment strategies.'' Strategies to address needs are identified through various analyses done using the processes developed for performance gap analyses, LCP, and risk analyses. Using the financial planning process, investment strategies and their corresponding level of investments are determined. For example, a State DOT might identify through its performance gap analysis that it needs to address poor drainage along the NHS. During development of the financial plan and investment strategies, this strategy must compete for funding with other strategies resulting from the three processes noted above. It may turn out that the State DOT decides to allocate funding to address the drainage issue along the NHS by reducing funding for several other areas.

After considering the comments, FHWA reworded the second sentence in final rule § 515.7(e) to clarify that the process for investment strategies must result in a description articulating how the investment strategies in the State DOT's asset management plan were influenced by the performance gap analysis, LCP, risk management analysis, anticipated available funding, and estimated costs of expected future work types associated with strategies based on the financial plan.

Maryland DOT suggested FHWA clarify that investment strategies are also influenced by non-data driven factors required to meet an agency's overall goals within a State's resource-related constraints.

In response, FHWA clarifies that all investments strategies must be outcomes of the processes identified in § 515.7. The situation raised by the Maryland DOT may be addressed in the risk analysis. ''Risk,'' as defined in this rule can include a wide range of issues and conditions that may influence decisionmaking. This is made clear in § 515.7(c)(1) of the final rule. As an example, a State DOT may choose to upgrade roads in an area that is slated for economic growth or to address environmental justice issues. However, these risks need to be addressed in the risk analysis and compete with other strategies during the development of the financial planning and investment strategies.

With respect to the first sentence in proposed § 515.007(a)(5), Hawaii DOT recommended adding the phrase ''leading to a program of projects that'' so that the provision would read as follows: ''A State DOT shall establish a process for developing investment strategies leading to a program of projects that meets the requirements in § 515.009(f).'' In response, FHWA is removing ''program of projects'' language from § 515.9(f) in the final rule to reduce the risk that the language would be misinterpreted. For consistency, FHWA declines to make the suggested change to the language of proposed § 515.007(a)(5). The change to NPRM § 514.009(f) is covered in the section-by-section discussion of that section.

Washington State DOT said that risk of investment type in the short- and long-term should be considered in determining investment choice and how rehabilitation should occur over time. The agency stated that available funding might impact the State's ability to select the most cost-effective strategy in lieu of one that is achievable. The DOT said that it intends to include in its risk management plan a discussion of the additional risks that were considered as part of these trade-off decisions.

In response, FHWA encourages State DOTs to go beyond the minimum requirements of §§ 515.7 and 515.9 when developing their processes and plans. However, the final rule gives State DOTs the discretion to decide whether to include such other considerations when developing their processes.

The FHWA received several comments on proposed § 515.007(a)(5)(iii), which would require State DOT asset management plan development processes to provide for inclusion of a description of how the investment strategies are influenced by network-level LCCA for asset classes or asset sub-groups. The PCA, ACPA, and CEMEX USA said that they do not believe that using LCCA would be the appropriate process to determine if an investment strategy is effective. The commenters asserted that LCCA involves a project-level comparison of the economic worth of competing treatment options for a given project. According to these commenters, what is needed for a network analysis is a forward-looking parameter such as RSI. They asserted that RSI provides predictive insight into the future condition at the network level based on projected performance of all projects in the investment strategy. The commenters also noted FHWA's significant emphasis on RSI and the depth of resources surrounding RSI and Pavement Health Track on FHWA's Pavements Web site (*http://www.fhwa.dot.gov/asset/software/index.cfm*). These commenters recommended that FHWA adopt RSI and use it at the network level to provide guidance on investment strategies.

In response, FHWA notes that 23 U.S.C. 119(e)(4) requires inclusion of life-cycle cost analysis in the asset management plan, which the final rule addresses in its LCP provisions. The FHWA believes network-level LCP is an appropriate method for identifying the needs of assets as they age in terms of identifying appropriate and cost-effective treatment strategies, and provides the input needed to determine investment strategies. This topic is addressed in the section-by-section discussion of NPRM § 515.005 (Life-cycle Cost Analysis). Further information on the topics raised by these comments also appears in the section-by-section discussion of NPRM § 515.007(a)(2).

NPRM Section 515.007(b) (Final Rule Sections 515.7(g) and 515.17)

Proposed section 515.007(b) described minimum standards for bridge and pavement management systems that State DOTs would use to analyze bridge and pavement data for the condition of Interstate highway pavements, non-Interstate NHS pavements, and NHS bridges. The FHWA is required by statute to establish the standards (23 U.S.C. 150(c)(3)(A)(i)). In the final rule, for reasons described below, FHWA removed the standards from § 515.7 and placed them in § 515.17. Table 1 shows the changes in section numbers in the final rule. Twenty-six submissions addressed proposed section 515.007(b).

In the NPRM, FHWA specifically requested comments on whether the proposed standards for bridge and pavement management systems are appropriate, and whether the rule should include any additional standards. The FHWA made a number of revisions to the standards in response to comments, as discussed below.

The AASHTO and the DOTs of Connecticut and Maryland said that the assets that are subject to the minimum system requirements should be consistent with the assets that are covered by the second performance measure rulemaking, which addresses NHS bridge and pavement conditions. The AASHTO and Connecticut DOT recommended that FHWA include language in this section of the rule stating that if a State DOT voluntarily includes other asset classes in its asset management plan, a similar management system is not required for those other assets. Kentucky Transportation Cabinet stated that FHWA proposed an unreasonable level of oversight by establishing standards and governance for ''every'' aspect of a management system. Alaska DOT asked FHWA to remove from the rule any requirements for management systems.

In response to these comments, FHWA notes that MAP–21 directed the Secretary, for the purpose of carrying out section 119, to establish minimum standards for States to use in developing and operating bridge and pavement management systems (23 U.S.C. 150(c)(3)(A)(i)). The standards identified in proposed § 515.007(b) are key to developing bridge and pavement management systems that can produce analyses important to the development of condition targets and asset management plans.

After considering the comments, FHWA recognizes that including the bridge and pavement management systems standards in the same section of the rule as the asset management plan process requirements could unnecessarily subject the State DOTs' systems to the certification process required under 23 U.S.C. 119(e)(6). The FHWA does not believe Congress intended the 23 U.S.C. 119(e)(6) process certification requirement to apply to State DOT implementation of the bridge and pavement management systems standards established pursuant to 23 U.S.C. 150(c)(3)(A)(i). For this reason, in the final rule FHWA relocated the bridge and pavement management systems standards to a separate section (515.17). The FHWA will apply its normal oversight procedures to State DOT implementation of § 515.17.

The FHWA did retain, in § 515.7(g) of the final rule, the requirement proposed in NPRM § 515.007(b) that States use bridge and pavement management systems meeting the adopted standards to analyze the condition of NHS pavement and bridge assets required to be in asset management plans. Section 515.7(g) of the final rule makes it clear the use of these, or other, management systems is optional with respect to any other assets a State DOT elects to include in its asset management plan. The FHWA also added language to § 515.7(g) to clarify that a ''best available data'' standard applies to the preparation of all asset management plans.

Mississippi DOT commented on the discussion of proposed § 517.007(b) in the NPRM's preamble (80 FR 9231, 9233). This commenter asked FHWA what is meant by the term ''related highway systems.''

The FHWA acknowledges this typographical error that should have read ''on related highway systems,'' meaning NHS and any other roads the State wants to include as part of its highway network (*i.e.,* the State highway network). Because this term is not used in the final rule, no changes were required as a result of this comment.

The AASHTO and the DOTs of Connecticut, Delaware, and Missouri said that FHWA should clarify that the minimum system requirements are at a system or asset class level, not at a project or asset sub-group level. The AASHTO and Connecticut DOT suggested the following wording: ''These bridge and pavement management systems are required at the system or asset class level, though they may include project level information at State option, and shall include, at a minimum, procedures and formats determined by the State for: . . .''

In response, although an asset management plan involves a network-level analysis, the management systems are used to provide information and decision support at both the network level and the project level. Network-level considers all assets within an asset class, while project-level considers singular bridges or pavement sections. The analyses performed by management systems can often be performed at both the network- and project- level, including multiyear needs determinations, and benefit-cost ratio over the life-cycle of assets. To be effective for the purposes of 23 U.S.C. 119, the management systems must include the ability to analyze the outcome of different network-level investment strategies and also make project-level recommendations in accordance with the selected strategy. Since management systems are often programmed with generalized information, rules, and procedures that can be applied to an asset class or asset sub-group as a whole, they may provide only preliminary project-level recommendations that need to be reviewed and refined as appropriate. Project-level preliminary engineering investigations and analyses often occur outside of a management system, providing additional information to support project-level decisionmaking. The FHWA made no change in the final rule as a result of these comments.

Two State DOTs asked about the use of Federal funds to acquire or develop bridge and pavement management systems that would comply with the proposed rule. Tennessee DOT simply asked what Federal funding will be available to the State to purchase or develop these systems. California DOT requested that the rule indicate that Federal funding sources may be used to fund such systems and the collection of required data for them.

In response, costs associated with development of a risk-based asset management plans and management systems are eligible for Federal-aid funding. Specifically, these costs are eligible for both NHPP and Surface Transportation Program (STP) funds pursuant to 23 U.S.C. 119(d)(2)(K) and 133(b)(8). These activities include data collection, maintenance, and integration and the cost associated with obtaining, updating, and licensing software and equipment required for risk-based asset management and performance-based management. (23 U.S.C. 119(d)(2)(K), and 133(b)(8). State Planning and Research funds may also be used as appropriate. (23 U.S.C. 505(a)(3)).

Georgia DOT asked for clarification regarding how the proposed minimum standards would affect States that already have a pavement/bridge management system. Connecticut DOT said that the standards for bridge and pavement management systems need to contain items that are readily accessible in systems that States are already using or are available for purchase. The commenter added that, if the systems currently available are incapable of meeting the standards, then the standards need to be adjusted to meet the available system capability. In addition, the commenter said the timeline for compliance with the rule should account for the time needed to get bridge and pavement management systems functioning at the appropriate level. Illinois DOT said FHWA assumed that if a State has licensed the AASHTO

Ware Bridge Management software, the State has fully incorporated the operation of the bridge management system into its programming process. However, according to the commenter, many States have lagged far behind full implementation, because they have been waiting for the actual mandate requiring the use of a bridge management system. Therefore, the commenter said that States need time to fully test the functionality of this new software before they can begin to integrate it into their planning and programming processes.

In response, FHWA acknowledges the comments and recognizes that some States may need to make changes to their management systems. The FHWA notes that pavement and bridge management systems focus on processes and analysis and include more than software (analysis tool). Purchasing and implementing software does not constitute compliance with the need for a management system. States need to implement bridge and pavement management systems that meet all of the requirements in § 515.17 of the final rule, and integrate them into their pavement and bridge programs. It is important that States are able to undertake analysis to determine the costs to manage their pavements and bridges; the costs are dependent on various factors, including the assets condition and deterioration. Finally, nothing in the final rule limits the State DOT's ability to change, upgrade, or revise the software tool at any point as long as the programs remain data-driven and achieve the overall goals set by the legislation.

The GTMA said that additional guidance needs to be developed to assist States in understanding which processes and technologies are acceptable for measuring the quality of bridge and pavement assets.

In response, FHWA acknowledges this comment, but notes that addressing processes and technologies for measuring the condition of bridge and pavement assets is outside the scope of this rule. This is issue is addressed in the second performance measure rulemaking.

The AASHTO and four State DOTs recommended the deletion of the word ''formal'' from the second sentence in proposed § 515.007(b), which would require formal procedures for meeting the systems management standards adopted in the rule.[28] They said the term ''formal'' is not defined and could be open to varying interpretations, including by FHWA Division Offices. They stated that if FHWA defines ''formal'' as being a single software program that meets all the proposed requirements, then no ''formal'' bridge management system currently exists. The commenters recommended FHWA remove the word ''formal'' and instead include language referencing a process, procedure, or framework that is used to address the six requirements in proposed § 515.007(b)(1)–(6). According to these commenters, this change would provide State DOTs with flexibility in developing their own approaches to address the six requirements.

The FHWA clarifies that the term ''formal'' means to have a documented procedure. The intent is for States to have a documented procedure to follow standards established in the rule. This documented procedure must describe how the elements that are basic to all management systems (*i.e.,* data collection, analysis, and reporting elements) lead to the outcome. It is important to realize that ''management systems'' does not refer only to software; it is any system that includes the three elements mentioned above. A State DOT may use in-house analytical tools to analyze data and produce reports, as long as those tools meet the standards adopted in this rule. As a result of the comment, FWHA changed ''formal procedures'' to ''documented procedures'' in § 515.17 of the final rule.

North Carolina and Texas DOTs commented generally that the outputs of bridge and pavement management systems need to be balanced with field knowledge, local conditions, and other considerations.

The FHWA agrees that that pavement and bridge management systems need to include field knowledge, local conditions, and other policy conditions as part of the process. However, it is essential that these be handled in a systematic and transparent manner.

Regarding forecasting of deterioration as specified in proposed § 515.007(b)(2), Washington State DOT recommended that deterioration models for the asset class and sub-group would be a sufficient level of modeling to determine if a bridge meets the performance targets.

In response, FHWA notes that deterioration models for the asset class and sub-group would be a sufficient level to determine if a bridge meets performance targets; however, the modeling needs to be able to compare deterioration as various investment strategies are implemented and evaluate their impacts on performance. In other words, the models could help determine how and where to expend bridge and pavement dollars to reach acceptable targets in a certain period of time. However, deterioration modeling also supports benefit-cost analysis over the life cycle of the assets, the identification of the most cost-effective work actions and work schedules for each bridge, and the outcome of performing different actions. Ultimately, this information is used in both network-level analysis and asset-level analysis and the identification of work actions and schedules. Deterioration models often can accommodate adjustments that account for an agency's historical data, observations, and expert judgment. The FHWA retains the proposed language in § 515.17(b) of the final rule.

In connection with the deterioration model provision in proposed § 515.007(b)(2), Tennessee DOT said that the current Pontis[29] software does not have deterioration forecasting capability. The agency added that although the next version will include that feature, the agency lacks experience and confidence in it.

The FHWA recognizes that some software systems may not have the capability for deterioration modeling today; however, States have procedures to address this issue. In some cases, these processes may not be formalized, but formalizing the process is important as States develop their bridge strategies.

Four commenters addressed the use of the term ''life-cycle benefit-cost analysis,'' which appeared in proposed § 515.007(b)(3). The AASHTO and the DOTs of Connecticut, Delaware, and Oregon said that FHWA should clarify if it meant to refer instead to LCCA. Maryland DOT and NEPPP asked FHWA to provide an example of what is meant by the term. Applied Pavement Technology, Inc., said that a pavement management system does not conduct a true life-cycle analysis and that conducting a benefit-cost analysis is sufficient for ensuring that optimal or near-optimal strategies are identified. This commenter suggested that ''life-cycle'' be dropped from the term. Montana DOT asked FHWA to revise the rule to clarify whether States would need only to have a process to verify and consider LCCA, or whether LCCA would need to be specifically housed within the pavement management program.

In response, the FHWA has modified the language in the final rule § 515.17(c) to eliminate the phrase ''determining the life-cycle benefit-cost analysis'' and replace it with ''determining the benefit-cost over the life cycle of assets.'' This

[28] AASHTO, Connecticut DOT, Delaware DOT, Missouri DOT, Oregon DOT.

[29] Pontis was an AASHTOWare™ Bridge Management software, which has been replaced by a new AASHTO product called (BrM).

change is made to clarify that the requirement in this part of the rule is different than LCCA/LCP analysis. The component parts of the required bridge and pavement management systems, including the determination of a benefit-cost ratio over the life cycle of assets for the purpose of evaluating alternative actions, are tools State DOTs will use to produce information to feed into asset management plan analyses such as the LCP. Thus, the management systems must have the ability to determine the benefit-cost ratio of alternative actions over an appropriate life-cycle period.

The AASHTO and Connecticut DOT asked FHWA to define the term ''budget needs,'' which appears in proposed § 515.007(b)(4). They said that the term should refer to the budget needed to achieve the targets established by the State DOT for NHS bridge and pavement condition (unless the State has voluntarily included additional assets in the plan).

In response, FHWA does not believe there is a benefit to defining ''budget needs'' in the rule. However, FHWA clarifies that the intent of the standards is that bridge and pavement management systems include the ability to identify short- and long-term budget needs for different network-level scenarios, ranging from the necessary annual budget to perform all actions that are beneficial (representative of an unconstrained budget) to the annual budget necessary to achieve minimum acceptable performance.[30] Within this range is the budget necessary to achieve the performance measure targets established by a State DOT in accordance with the second performance measure rulemaking. Consistent with § 515.17(e) of the final rule, management systems must include the ability to identify strategies that maximize overall program benefits by allocating funds and selecting work actions and projects within the limitations of available funding and performance objectives. Management systems must include the ability to demonstrate the benefits that can be gained from additional funding in terms of improved performance and reduced life-cycle costs. For these reasons, FHWA concludes the use of the term ''budget needs'' is appropriate, and that a range of budgets need to be considered in the analyses. The FHWA retained the language in § 515.17(d) of the final rule.

The AASHTO and the DOTs of Connecticut and Oregon asked FHWA to replace the phrase ''the optimal strategies'' in proposed § 515.007(b)(5) with ''a strategy.'' They said the use of ''optimal strategies'' could result in FHWA second-guessing State DOTs in terms of what is ''optimal.'' These commenters also said ''strategy'' should be used instead of ''strategies,'' because a strategy can have more than one element and the rule should not require multiple strategies. California DOT said that the proposed rule would ask States to minimize cost, minimize risk, and maximize condition, objectives that often compete for available funding. This agency asked FHWA to provide a more precise definition of what an ''optimal strategy'' is with respect to these three objectives. Fugro Roadware also asked FHWA to provide more definition on what is meant by ''optimal strategies.'' It recommended that FHWA require a multiyear optimization, including costs and benefits of feasible treatments. The commenter added that it is important to ensure that the program to maintain pavements and bridges is designed with a process that is capable of reviewing all available scenarios and determining the potential costs and benefits. Hawaii DOT recommended revising proposed § 515.007(b)(5) to include not just identifying, but also selecting projects; and to expressly state the process must result in outputs consistent with the objectives of the asset management plan.

After considering these comments, FHWA made several changes to clarify the objectives of the provision. The FHWA believes that it is the role of the State to determine to what extent various factors such as risk, condition targets, etc., contribute to optimization of its program. Also, the management systems should include the computational ability to identify optimum work actions and programs of projects subject to multiple constraints, performance objectives, and the goal of minimizing long-term cost and maximizing overall program benefits. This requires a multiyear, network-level analysis (network-level considers all assets within an asset class). However, FHWA recognizes that there are many challenges in defining ''optimal strategies'' where minimizing cost, reducing risks, and meeting State DOT targets for asset condition each contribute toward an optimum strategy. Realizing the complexity involved in reaching an appropriate balance among various factors influencing optimal strategies, FHWA has replaced the proposed sentence, and eliminated the word ''optimum.'' Section 515.7(e) of the final rule requires the systems to have the capability to determine strategies for ''identifying potential NHS pavement and bridge projects that maximize overall program benefits within financial constraints.'' The term ''financial constraints'' as used in this sentence means available funding.

Connecticut DOT said that management systems should be able to do cross-asset and trade-off analysis, because such analyses are an important piece of enterprise-wide asset management. The FHWA agrees that cross-asset tradeoff-analysis can be beneficial for coordinating total highway programs, determining performance measure targets, and allocating funding among different asset classes. However, at this point in time, FHWA is not specifying that these procedures need to be included in bridge and pavement managements systems, although it will be necessary for agencies to consider trade-offs when allocating funding.

The CEMEX USA, PCA, and ACPA said the pavement management systems should include all viable pavement solutions, both concrete and asphalt. They said that doing so would enhance uniformity among asset management plans, as well as increase the options that States will have in maintaining their pavement systems. The CEMEX USA said that evaluating all viable solutions can lead to competition between industries, which will lower a pavement's initial cost and life-cycle cost for the State.

In response, FHWA emphasizes that a State DOT's management systems must address the requirements outlined in § 515.17 of the final rule, but that State DOTs have full authority to determine the viable solutions for their pavements and bridges.

The city of Wahpeton, ND said that the proposed § 515.007(b) would require asset class models to meet all of the proposed requirements for management systems. The commenter said that this would not allow a local entity to take incremental steps in tracking and reporting asset management practices. According to the commenter, the proposed rule would discourage local entities from undertaking improvements to their asset management models.

The FHWA notes part 515 requirements apply only to States. However, other asset owners are encouraged to follow these requirements to the extent possible so that they can manage their assets systematically.

NPRM Section 515.007(c) (Final Rule Section 515.9(k))

Three commenters provided input on proposed § 515.007(c), which would require the head of the State DOT to approve the asset management plan.

[30] As noted above, network-level considers all assets within an asset class.

The AASHTO, Connecticut DOT, and Hawaii DOT recommended that FHWA move this requirement to § 515.9.

In response to these comments, FHWA has moved proposed § 515.007(c) to § 515.9(k) of the final rule.

NPRM Section 515.009 (Final Rule Section 515.9)

Section 515.009 of the NPRM contained the proposed provisions for the form and content requirements for State DOT asset management plans. Based on comments received in response to the NPRM, FHWA made a number of changes in the final rule, as discussed below. In addition, in response to changes to 23 U.S.C. 119(e) in the FAST Act, FHWA added new § 515.9(m). The language of the new section is taken directly from the statutory provision. Section 515.9(m) provides States may include in their asset management plans consideration of critical infrastructure from among those facilities in the State that are eligible under 23 U.S.C. 119(c). The term ''critical infrastructure'' is defined in § 515.5 of the final rule, using the definition provided in the FAST Act.

NPRM Section 515.009(a) (Final Rule Section 515.9(a))

Proposed § 515.009(a) would require State DOTs to treat assets voluntarily included in their asset management plans (*i.e.,* assets other than NHS pavements and bridges) in the same manner as the required NHS pavement and bridge assets. The FHWA received 18 submissions on this proposed requirement. Commenters included AASHTO, GTMA, NYSAMPO, and multiple State DOTs. All of these submissions said this provision would significantly discourage State DOTs from including other assets and asset classes in their required plans, and most of these commenters recommended that FHWA remove this requirement from the final rule.[31] Among these commenters, AASHTO and several State DOTs recommended that FHWA change § 515.009(a) by striking the second sentence and inserting the following: ''The State DOTs are encouraged to include other assets associated with public roads in its plan and if they do, are encouraged but not required with respect to such other roads to follow all asset management process and plan requirements in this part.''

In response, FHWA has removed the second sentence. As a result, State DOTs are no longer required to apply all asset management process and requirements to other public roads included in the plan. Reduced requirements for other public roads are now included in § 515.9(l). This is consistent with changes made in the final rule in response to similar comments on NPRM §§ 515.007(a)(1)(i), 515.007(a)(3)(vi), and 515.009(c).

Several commenters expressed concern over the phrase ''improve or preserve the condition of the assets'' in §§ 515.009(a) and 515.009(f)(2). The AASHTO and several State DOTs said current and proposed levels of Federal and State funding are insufficient to permit States to achieve progress in achieving all national transportation policy goals or to ''improve or preserve the condition of the assets and improve the performance of the NHS,'' and may only enable State DOTs to manage the decline of assets.[32] The NEPPP and several commenters asserted that declining asset condition and performance is an acceptable and realistic expectation, and a State effort to reduce or minimize the rate of decline is appropriate.[33] Delaware DOT suggested rewording § 515.009(a) to state that ''A State DOT shall develop and implement an asset management plan to achieve the State targets for asset condition and performance.'' Minnesota DOT said an asset management plan can be effective in providing the decision support tools necessary to ensure that both improving and declining asset conditions can be managed in a way that minimizes impacts on the traveling public. Oregon DOT said an asset management plan can help in making better decisions on the use of limited financial resources, but it cannot ensure that the level of available resources will be sufficient to avoid a decline in asset conditions or performance.

The FHWA received similar comments in connection with NPRM §§ 515.005 (Asset Management) and 515.007(a)(1). As in those cases, because of the statutory derivation of the phrase, FHWA retained ''improve or preserve the condition of the assets'' in §§ 515.9(a) and 515.9(f) of the final rule.

NPRM Section 515.009(b) (Final Rule Section 515.9(b))

Proposed § 519.009(b) described the types of assets for which State DOTs would have to create a summary listing in their asset management plans. In addition to comments asking about the proposed treatment of certain elements of highways and bridges, many commenters expressed concerns about the proposed requirements for State DOTs to address all NHS pavements and bridges, regardless of ownership. The issues relating to this latter set of concerns are discussed in Section V, *Asset Management Plan Treatment of NHS Pavements and Bridges Not Owned by State DOTs.* The detailed comments on proposed § 515.009(b), and FHWA's responses, appear below.

Several commenters, including AASHTO and several State DOTs, argued that States should not be held responsible for sections of the NHS that are not under their direct control. The State DOTs of Alaska, Maryland, Mississippi, and Tennessee opposed the requirement that States be held responsible for sections of the NHS that are not part of the State system, because the State DOT does not have jurisdiction to affect the planning or programming of projects on non-State DOT maintained NHS routes. Tennessee DOT said all accountability for these routes should fall on the jurisdiction responsible for them. Mississippi DOT said FHWA should either: (1) Not require the State DOT to include assets in the asset management plan for non-State DOT owned assets, or (2) provide provisions that local governmental jurisdictions develop and provide an asset management plan directly to FHWA for NHS routes under their jurisdiction. The NYSAMPO expressed concern about making State DOTs responsible for the entire NHS within State boundaries, regardless of ownership. Maryland DOT addressed this same issue more generally, asking that FHWA include language in the final rule that recognizes the reality that a State DOT may not have the authority to dictate the spending priorities or participation of non-State agencies. Oklahoma DOT recommended that FHWA require States only to make a good faith effort to obtain necessary data from other NHS owners.

In response, FHWA acknowledges States may face challenges in developing and implementing an asset management plan that includes NHS pavements and bridges owned by others. The FHWA anticipates State DOTs will need to consult the relevant entities (*e.g.,* MPOs, State DOTs, local transportation agencies, Federal Land

[31] AASHTO; Alaska DOT; Atlanta Regional Commission; Connecticut DOT; DOTs of ID, MT, ND, SD, and WY (joint submission); GTMA; Massachusetts DOT; Minnesota DOT; Montana DOT; New Jersey DOT; New York Association of MPOs; New York State DOT; North Carolina DOT; North Dakota DOT; Oklahoma DOT; South Dakota DOT; Washington State DOT; Wyoming DOT.

[32] Delaware DOT; Minnesota DOT; Texas, DOT; Oregon DOTs.

[33] Connecticut DOT, Maryland DOT, Minnesota DOT, Northeast Pavement Preservation Partnership, Oregon DOT, Texas DOT.

Management Agencies, tribal governments) as they consider factors outside of their direct control that could influence investment decisions. The statutory language requires States to develop asset management plans for the NHS pavements and bridge assets. No other entities are identified in the legislation to share the responsibility of developing a risk-based asset management plan for the NHS. In addition, FHWA has analyzed ownership for each State and found that the majority of the States own high percentages of assets on the NHS. While FHWA appreciates the comments, there is no provision in 23 U.S.C. 119(e) that would permit exclusion of NHS pavements or bridges not owned by the State.

The State DOTs of Maryland, Oregon, and Washington State said that FHWA should clarify the expected role and responsibilities of the owners of those NHS facilities that are not directly under State DOT control, such as MPOs, local jurisdictions, transportation stakeholders, and other interested parties in the development and implementation of an asset management plan. California DOT said communications with external transportation partners should be encouraged in the final rule. The NYSAMPO and Washington State DOT stated that MPOs should be involved, because they are responsible for planning and managing investment in the entire transportation system in their region, and they should understand how the data will be used to make investment funding decisions, prioritize projects, and preserve NHS assets. The city of Wahpeton, ND, said the State does not oversee the city's financial ''workings'' and added that compiling multiple local financing methods into a cohesive ''one size fits all'' document would risk oversimplifying local complexities in managing non-State-owned NHS roadways.

In response, FHWA points out 23 U.S.C. 119(e) does not distinguish between State-owned NHS facilities and NHS facilities owned by others. The FHWA agrees that MPOs should be involved and encourages their involvement. However, because the asset management statute specifies the State as the responsible entity, FHWA believes it is up to the State to develop the necessary relationships with other owners to permit the State to successfully develop its required asset management plan (*see* discussion under NPRM § 515.007(f)). In the event that other NHS owners decide to develop their own asset management plans, the details of how these plans should be integrated into the State DOT's NHS asset management plan should be developed by the involved entities.

The NYSAMPO said that making the State DOT responsible for the entire NHS regardless of ownership may skew the entire asset management process, and the commenter proposed that the rule specify a cooperative approach to target-setting among all the NHS owners in a State. North Carolina DOT agreed that new processes for coordination would be required, and recommended that the State DOT set targets and then seek concurrence from the MPOs. Mississippi DOT asked how States would determine reasonable performance targets for routes that are not maintained by the State DOT. North Carolina DOT stated that, for its system, it makes the most sense for the State DOT to set targets and seek concurrence from the MPOs.

In response, FHWA clarifies that requirements relating to setting State and MPO performance targets under 23 U.S.C. 134 and 23 U.S.C. 150(d) are outside the scope of this rulemaking. The FHWA is establishing those requirements in separate rulemakings for performance measures and planning.[34]

Several commenters expressed concern about the amount of State resources that would be required for data collection (which would be the foundation for the summaries required by § 515.009(b)). Mississippi DOT said the cost of collecting data on NHS routes not owned by a State will result in fewer dollars available to maintain critical infrastructure, specifically in the form of substantial coordination with local government and MPOs and investment of man-hours. This commenter said that, in most cases, the historical performance data on routes that are not maintained by the State DOT are not available for a true gap analysis. The agency also said that common practice for non-State maintained NHS routes is to evaluate condition through sampling procedures, not through full coverage evaluation.

The FHWA acknowledges the extent of effort involved with network-wide data collection for developing a risk-based asset management plan. As previously stated, the asset management statute, 23 U.S.C. 119(e), requires the States to develop and implement asset management plans for the NHS pavements and bridges. Nothing in the statute authorizes FHWA to exempt those parts of the NHS not owned by States from the requirements of part 515. State DOTs have an obligation under the asset management rule to gather the data needed for the required analyses, and to use the best available data. While it may take some time for State DOTs to develop mature data-gathering capabilities for asset management, there are existing and developing resources State DOTS may use for this purpose. These include existing State and local data for NHS pavements and bridges, the existing National Bridge Inspection and Highway Performance Monitoring System, and the data State DOTs will collect to fulfill the section 150 performance management requirements for NHS pavements and bridges.

New Jersey DOT suggested that FHWA allow States more time to compile the data that would be required by the rule (*e.g.,* financial data, funding plans, and performance data).

In response, FHWA notes that the final rule contains revised compliance timelines and FHWA believes that the final rule provides for sufficient time to compile data. The time frame for asset management development and submission is discussed in the section-by-section discussion of NPRM § 515.011(a).

With regard to proposed § 515.009(b)'s requirement for a summary listing of pavements on the Interstate System, pavements on the NHS (excluding the Interstate), and bridges on the NHS, AASHTO and several State DOTs recommended that FHWA clarify in the final rule that the assets required to be included in the asset management plans are only those for which State DOTs must establish targets under 23 CFR 490.[35] Washington State DOT asked if the terms ''Interstate highway pavements'' and ''non-Interstate NHS pavement'' would include ramps that enter or exit the NHS. This commenter also asked if bridges at the State's ferry terminals

[34] The FHWA has undertaken three separate rulemakings to implement performance management requirements. The first is ''National Performance Management Measures; Highway Safety Improvement Program'' (RIN 2125–AF49); the second is ''National Performance Management Measures; Assessing Pavement Condition for the National Highway Performance Program and Bridge Condition for the National Highway Performance Program'' (RIN 2125–AF53); the third is ''National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program '' (RIN 2125–AF54). The FHWA, together with the Federal Transit Administration, recently completed rulemaking on transportation planning, ''Statewide and Nonmetropolitan Transportation Planning; Metropolitan Transportation Planning (FHWA RIN 2125–AF52).

[35] AASHTO, Connecticut DOT, Maryland DOT, Minnesota DOT, Missouri DOT, Oregon DOT, Northeast Pavement Preservation Partnership.

should be included in its asset management plan.

In response, FHWA agrees with the commenters that more clarity is needed on these issues. The FHWA modified the final rule by defining the term ''NHS pavements and bridges'' in § 515.5. The term ''NHS pavements and bridges'' is defined for purposes of this rule to mean Interstate System pavements (inclusion of ramps that are not part of the roadway normally traveled by through traffic is optional); NHS pavements (excluding the Interstate System) (inclusion of ramps that are not part of the roadway normally travelled by through traffic is optional); and NHS bridges carrying the NHS (including bridges that are part of the ramps connecting to the NHS). The FHWA used the added definition in final rule § 515.9(b), which requires a summary listing of NHS pavements and bridges. As a result of these changes, the assets States must include in the summary listing align well with the assets for which States must collect pavement and bridge data under 23 CFR part 490. The FHWA made similar changes in § 515.9(d)(2)–(3). With respect to ferry systems, all bridges carrying the NHS must be included in the asset management plan, including bridges that are at the terminus of the NHS connecting to the ferry system. Many types of ramps are excluded under the adopted definition of NHS pavements and bridges, but FHWA notes all ramps are assets, and FHWA encourages States to include them in their asset management plans even when not required to do so.

In the NPRM, FHWA asked if States should be required to include tunnels in their asset management plans. The West Piedmont Planning District Commission supported the inclusion of tunnels in State asset management plans (*e.g.,* include tunnel assets and condition data in the summary listings) because the structural vulnerability or failure of tunnels can have catastrophic consequences to the safety of the traveling public and commerce. However, AASHTO and multiple State DOTs said FHWA should not yet require tunnels to be included.[36] The AASHTO and the DOTs of Connecticut and Tennessee stated that the rule should provide that tunnels need not be included in asset management plans until sometime after the effective date of anticipated new tunnel inspection rules. The AASHTO said that until those rules are finalized, financial plans and investment strategies with respect to tunnels would be ''quite speculative.'' Michigan DOT said inspection results, inventories, forecasting models, and other analytical tools for tunnels are not nearly as mature as those for bridges. Delaware DOT stated that the inclusion of tunnels should be optional, as MAP–21 only requires bridges and pavements to be included.

After considering the comments above and 23 U.S.C. 119(e)(4), FHWA has determined that inclusion of tunnels in a State's asset management plan is optional at this point.

NPRM Section 515.009(c) (Final Rule Section 515.9(c))

Twenty-one submissions addressed proposed § 515.009(c), which encourages State DOTs to include all other NHS assets within the NHS right-of-way in their plans, and provides that if a State DOT decides to include other NHS infrastructure assets (*e.g.,* tunnels, ancillary structures, signs) in its asset management plan, the State DOT would have to evaluate and manage those assets consistent with the provisions of part 515. As proposed, § 515.009(c) also stated the same requirements would apply to assets on non-NHS public roads. This language was similar to proposed language for § 515.009(a), which would have required the State DOT to apply all requirements in part 515 to any other public roads the State DOT elected to include in its asset management plan. Most comments on § 515.009(c) [37], like the comments on proposed § 515.009(a) [38], said this provision would discourage State DOTs from voluntarily including additional assets in their asset management plans. Many commenters encouraged FHWA to eliminate these requirements from the rule.

Delaware DOT said the proposed requirements would result in States developing one asset management plan to meet the requirements of the regulations (including only pavements and bridges) and a second asset management plan to manage other infrastructure assets. Several of these commenters urged FHWA to encourage, but not require, States to comply with the rule's asset management process and plan requirements if they elect to include other NHS assets in their plans.[39] The NYSAMPO said imposing the same requirements for all assets included in the asset management plan would present State DOTs with a disincentive to go beyond the minimum and proposed that FHWA develop a less prescriptive approach to managing assets off the NHS. The AASHTO and multiple State DOTs asked FHWA to clarify in the final rule that States are free to develop asset management initiatives for assets not covered by the FHWA rule and are free to address them any way that they desire for their own purposes.[40]

Tennessee DOT stated that the body of the proposed rule only refers to pavements and bridges and asked if FHWA intends the management strategies and analysis to also apply to the other items listed in the proposed definition of ''asset.'' The GTMA stated that it is difficult to understand how an effective asset management plan could exclude significant assets utilized on the NHS, such as tunnels, signs, other roadside hardware, and pavement markings. This commenter raised the possibility of providing additional financial incentives for States that develop more comprehensive asset management plans. Similarly, ASCE urged all States to include in their plans other NHS assets, such as tunnels and other safety-related assets, in order to make the plans more comprehensive NHS management plans.

As discussed in the section-by-section discussion of NPRM § 515.009(a), after considering the comments on this topic, FHWA revised the final rule. Section 515.9(c) of the final rule encourages States DOTs to include in their asset management plans all other NHS assets located within the NHS right-of-way. The FHWA also encourages State DOTs to voluntarily include other public roads assets. However, FHWA removed the requirement for asset management plans to subject discretionary assets to the same requirements applicable to NHS pavement and bridge assets. Instead, in § 515.9(l) of the final rule,

[36] AASHTO, Connecticut DOT, Delaware DOT, Maryland DOT; Michigan DOT, Oregon DOT; South Dakota DOT; Tennessee DOT, Washington State DOT.

[37] AASHTO; Alaska DOT; Connecticut DOT; Delaware DOT; DOTs of ID, MT, ND, SD, and WY (joint submission); Kentucky Transportation Cabinet; Massachusetts DOT; Minnesota DOT; Mississippi DOT; Montana DOT; New Jersey DOT; Oklahoma DOT; Oregon DOT; South Carolina DOT; South Dakota DOT; Washington State DOT; Wyoming DOT.

[38] AASHTO; Alaska DOT; Atlanta Regional Commission; Connecticut DOT; DOTs of ID, MT, ND, SD, and WY (joint submission); GTMA; Massachusetts DOT; Minnesota DOT; Montana DOT; New Jersey DOT; New York Association of MPOs; New York State DOT; North Carolina DOT; North Dakota DOT; Oklahoma DOT; South Dakota DOT; Washington State DOT; Wyoming DOT.

[39] AASHTO, Connecticut DOT, Mississippi DOT, Missouri DOT.

[40] AASHTO; Connecticut DOT; Alaska DOT; Atlanta Regional Commission; DOTs of ID, MT, ND, SD, and WY (joint submission); GTMA; Massachusetts DOT; Minnesota DOT; Montana DOT; New Jersey DOT; New York Association of MPOs; New York State DOT; North Carolina DOT; North Dakota DOT; Oklahoma DOT; South Dakota DOT; Washington State DOT; Wyoming DOT.

FHWA adopted reduced requirements applicable to such discretionary assets.

Under the reduced requirements, if a State DOT includes discretionary assets (*i.e.,* assets other than NHS pavements and bridges), the State DOT does not have to apply the plan development processes in § 515.7 to those discretionary assets. The State DOT has discretion to determine the appropriate performance targets and measures, as well as the level of comprehensiveness of the asset management analyses, for those assets. The State DOT must describe the asset management decisionmaking framework used for those discretionary assets. At a minimum, the State DOT must address the items listed in § 515.9(l)(1) through (7), at a level of effort consistent with the State DOT's needs and resources. The required items are: (1) A summary listing of the discretionary assets, including a description of asset condition; (2) the State's performance measures and condition targets for the discretionary assets; (3) performance gap analysis; (4) life-cycle planning; (5) risk analysis; (6) financial plan; and (7) investment strategies for managing the discretionary assets.

The FHWA believes it may be useful to provide an example of a less rigorous analysis that a State DOT could perform, following the asset management framework for discretionary assets in § 515.9(l) of the final rule. Assume a State DOT decides to include all signs on State roads in its asset management plan. The sign inventory indicates that there are 10,000 signs that range in age from new to 15 years old, but resources are not available to undertake a condition assessment annually. However, with input from maintenance and other staff, it has been determined that the State should replace the signs every 12 years because, beyond 12 years, there are risks as signs begin losing reflectivity and cannot be seen satisfactorily in all weather conditions. Therefore, the State DOT determines that the whole life of its signs is 12 years. The only maintenance activity pertaining to signs is to wash the signs once a year after winter time. The risks associated with signs are identified as crashes, public confusion due to missing signs or lack of visibility of worn signs, and public complaints. Based on input from the maintenance office, the cost to replace 1/12 of the signs annually is known, and this information should be added to the asset management financial plan. This type of analysis could be broken down further by the type of sheeting, manufacturer, or which direction the sign was facing, if the State DOT wished to do so.

New Jersey DOT asked FHWA to clarify that a State can include in its asset management plan bridges over NHS roadways without having to include the associated roadway at either end of the bridge. A private citizen asserted that asset management plans need to identify the maintenance needed to provide for pedestrian and bicycling circulation and safety.

In response, FHWA notes that if States decide to include non-NHS bridges they are not required to include the roadways at either end of these bridges because the said roadways are not considered to be a part of the bridge structure. With regard to the maintenance needed to provide for pedestrian and bicycling circulation and safety, FHWA acknowledges this comment and believes that infrastructure assets must be maintained appropriately to ensure safe circulations.

NPRM Section 515.009(d)(1) (Final Rule Section 515.9(d)(1))

Six submissions addressed § 515.009(d)(1), which requires State asset management plans to include a discussion of asset management objectives. The GTMA supported the provision as proposed. The AASHTO and the DOTs of New Jersey and North Dakota asked FHWA to remove the phrase ''desired state of good repair'' from § 515.009(d)(1) and everywhere else it appears in the proposed rule. Tennessee DOT asked who would define the desired state of good repair, and added that if it is FHWA, then FHWA should define the term. Alaska DOT asked FHWA to remove the last sentence from § 515.009(d)(1). The sentence requires asset management plans to be ''consistent with the purpose of asset management, which is to achieve and sustain the desired state of good repair over the life cycle of the assets at a minimum practical cost.''

In response, FHWA notes that the regulatory language is consistent with the definition of asset management in 23 U.S.C. 101(a)(2). The FHWA believes State DOT asset management plan objectives must be consistent with this purpose, as stated in the rule. Nonetheless, consistent with the discussion under NPRM § 515.005 (Desired State of Good Repair), FHWA also believes ''desired state of good repair'' is tied to States' goals and should be defined by the State DOTs. As a result, FHWA retained the proposed rule language in § 515.9(d)(1) of the final rule, but looks to State DOTs to establish the meaning of ''desired state of good repair'' in their jurisdictions.

NPRM Section 515.009(d)(2) (Final Rule Section 515.9(d)(2))

Twenty-four submissions addressed § 515.009(d)(2), which would require State asset management plans to include a discussion of asset management measures and targets, including those established pursuant to 23 U.S.C. 150 for pavements and bridges on the NHS. Many of these commenters, including AASHTO, NEPPP, and multiple State DOTs, said the rule should be revised to clarify that targets may call for improving, constant, or declining conditions and performance.[41] They said current and proposed funding levels may be insufficient to stop the decline of the conditions of key assets. Montana DOT said all of the rules related to national performance management should clearly describe that individual States are responsible for setting their performance targets, and that these targets may reflect declining conditions.

The FHWA acknowledges these comments, but notes the issue of target setting is not within the scope of this rule. The FHWA is addressing target setting in the second performance measure rulemaking. The topic of declining asset condition is further addressed under the section by section discussion of § 515.7(a)(1).

The FP2, NEPPP, and several State DOTs said the proposed rule, in conjunction with the second performance measure rulemaking for bridge and pavement condition, would promote a ''worst-first'' approach to asset management.[42] Oregon DOT said the rule should be revised to clarify the intent of managing using a preservation approach, in which extension of service life is measured, or to confirm a ''worst-first'' approach is intended, which it said is not consistent with a ''financially responsible manner.''

In response, FHWA notes that the second performance measure rulemaking establishes requirements for State and MPO target setting. While FHWA understands State's fears of a ''worst-first'' management approach, FHWA believes that States will have the

[41] AASHTO; Alaska DOT; Connecticut DOT; DOTs of ID, MT, ND, SD, and WY (joint submission); Maryland DOT; Mississippi DOT; Missouri DOT; Montana DOT; New Jersey DOT; New York State DOT; Northeast Pavement Preservation Partnership; South Dakota DOT; Vermont Agency of Transportation; Washington State DOT; Wyoming DOT.

[42] FP2; Maryland DOT; Michigan DOT, Mississippi DOT; New York State DOT; Oregon DOT; Oregon DOT Bridge Section; Northeast Pavement Preservation Partnership.

ability to apply sound asset management principles, including preservation activities, to planning and programming even with minimum condition requirements under part 490. The FHWA agrees that meeting all targets is not an easy task. However, a financial plan can help the State DOT find the right balance amongst various investment strategies, so the targets are met. States should use their financial plan as a tool to decide if they need to make adjustments to their targets so that the funding distribution does not have an adverse impact on other assets. The FHWA did not make any changes to the final rule in response to these comments.

Proposed § 515.009(d)(2) allows State DOTs to include measures and targets the State has established for the NHS beyond those established pursuant to 23 U.S.C. 150. Mississippi and North Carolina DOTs said there would be little or no incentive for States to exceed the minimum requirements of the proposed rule and include their own measures and targets. Texas DOT asserted that assets cannot be managed for two different targets because that could lead to different fund allocations.

In response, FHWA clarifies that State DOTs are not required to exceed the minimum requirement, which is to include asset management measures and State DOT targets for NHS pavement and bridges, including those established pursuant to 23 U.S.C. 150. Inclusion of other State specific measures and targets provides States with an opportunity to address their unique needs within one single plan. To clarify the intent of § 515.9(d)(2), FHWA revised the first sentence of paragraph (d)(2) to refer to ''State DOT targets for asset condition.'' The FHWA also revised the sentence to clarify the requirement is limited to State DOT measures and targets for NHS pavements and bridges.

Oregon DOT said the final rule should provide additional flexibility to States in the use of the performance measures and targets they have developed and proven. The agency stated that it has developed its own internal bridge and pavement measures and processes, and it believes that its approach to measuring and evaluating bridges is superior to the proposed national performance measure. The agency added that the inclusion of State-developed performance measures could provide useful comparisons or provide ''best practices'' examples for other State DOTs. South Dakota DOT agreed, recommending that the rule should allow States to continue to use existing, established management systems that have a proven track record and to supplement those systems with the national performance measures. This agency asserted that revamping its asset management systems to prioritize the national performance measures would create a significant amount of work and would cause its existing asset management system to be less effective. Similarly, South Carolina DOT asserted that most State DOTs would continue to use their existing performance measures for the condition of pavements and bridges, and the cost of complying with the proposed rule could be ''disproportionate.'' The NEPPP and Maryland DOT asked what a State DOT would do if its own measures conflict with the measures established pursuant to 23 U.S.C. 150.

In response to these comments, FHWA notes that, even though some State DOTs feel that their own approach is superior to national performance measures, they are still required by 23 U.S.C. 150 to set targets for national performance measures established in 23 CFR part 490. However, in this asset management rule, State DOTs have been given flexibility to include their own measures and targets as well. States are free to maintain and use their own measures in whatever way they wish as long as they comply with the part 515 and part 490 requirements.

Oregon DOT criticized the proposed rule for excluding from consideration in State asset management plans the national performance measures to be established for the Interstate and the NHS. This agency said that excluding these measures would reduce the value and benefit of developing and using the proposed asset management plan. Tennessee DOT said this proposed requirement seems contradictory to the proposed rule's definition of ''performance of the NHS,'' which specifies that the term does not include the performance measures under 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V).[43]

In response to these comments, FHWA notes § 515.9(d)(2) requires the State DOTs to include measures and targets related to 23 U.S.C. 150(c)(3)(A)(ii)(I)–(III). Those are the measures and targets relating to the condition of NHS pavements and bridges. The measures and targets FHWA has not required State DOTs to include in their asset management plans are those in 23 U.S.C. 150(c) relating to performance of the Interstate System or performance of the NHS (excluding the Interstate System). The FHWA does not believe there is a contradiction in this approach. The asset management rule does not exclude the NHS performance as it relates to physical assets. As discussed in Section V, *System Performance, Performance Measures and Targets, and Asset Management Plans,* and in the section-by-section discussion of NPRM § 515.007(a)(2), NHS performance is addressed through the asset management analyses, particularly the risk and gap analyses, as well as through other performance-related activities. For example, to improve safety, the SHSP might have identified what physical changes may be necessary to improve the NHS performance. These changes, when substantial, are incorporated into asset management plans to account for their impact on future condition targets and maintenance cost.

Hawaii DOT commented that FHWA did not discuss in the NPRM when targets would be established or when the State DOT would be establishing a desired level of performance and state of good repair.

The FHWA notes the timing for 23 U.S.C. 150 targets is addressed in the second performance measure rulemaking. The FHWA has eliminated the term ''desired level of performance'' from the final rule, and the term ''state of good repair'' is discussed in the section-by-section discussions of NPRM § 515.005 (Desired State of Good Repair) and NPRM § 515.007(a)(1).

Texas DOT asked whether States would need to include long-term targets in addition to the proposed 2-year and 4-year targets developed for the national performance measures.

The FHWA notes that asset management is a long-term plan to achieve long-term objectives; therefore, setting long-term targets is inherent in developing asset management plan. As FHWA stated in the preamble of the NPRM for the second performance measure rulemaking, ''[i]t is important to emphasize that established targets (2-year target and 4-year target) would need to be considered as interim conditions/performance levels that lead toward the accomplishment of longer term performance expectations in the State DOT's long-range statewide transportation plan and NHS asset management plans.'' (80 FR 326, 342). The 2-year target and 4-year targets developed pursuant to 23 U.S.C. 150 are not substitutes for long-term targets.

[43] Those provisions require national performance measures for performance of the Interstate System and performance of the NHS (excluding the Interstate System. The FHWA is establishing those measures through the third performance measure rulemaking, ''National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program'' (RIN 2125–AF54).

NPRM Section 515.009(d)(3) (Final Rule Section 515.9(d)(3))

Section 515.009(d)(3) proposed a requirement that State asset management plans must include a discussion of the summary listing of the State's Interstate pavement assets, non-Interstate NHS pavement assets, and NHS bridge assets. This provision also requires the plan to include a description of the condition of those assets. The provision applies to the above-mentioned assets regardless of ownership. The GTMA supported the provision as proposed. The AASHTO and several State DOTs said it should not be the responsibility of a State DOT to include information about assets that they do not own and asked FHWA to limit this requirement only to the assets owned by State DOTs.[44]

In response, FHWA revised the first sentence of the section to read ''A summary description of the condition of NHS pavements and bridges, regardless of ownership.'' The changes simplify and clarify the provision, and align with 23 U.S.C. 119(e).

Texas DOT asked FHWA to provide more details on what State DOTs would need to include in the summary listings. South Dakota DOT recommended that FHWA provide an example of a summary listing.

In response, FHWA explains that the summary listing must include the best available quantity and condition data for NHS pavements and bridges. At a minimum, State DOTs can look to the data required by 23 CFR part 490. The FHWA will not provide a specific format for the summaries, or specify content other than that addressed in § 515.9(b)(1) through (3) of the final rule. State DOTs may include other condition data they feel is applicable to their asset management plans. Summary condition descriptions can be developed in various ways, and there are already examples of draft asset management plans available that show how States are addressing the summaries (*see* FHWA Asset Management Web site at *http://www.fhwa.dot.gov/asset/plans.cfm*). The FHWA made no changes to the rule in response to these comments.

South Dakota DOT recommended deleting ''where applicable, the description of condition should be informed by the evaluation required under § 515.019.''

In response, FHWA looks to the purpose of 23 U.S.C. 119(e), the asset management statute, and the purpose of MAP–21 section 1315(b), which mandates the evaluations. After considering the comment, FHWA decided to retain the requirement for State DOTs to take information from the evaluations into account when preparing the condition descriptions required under § 515.9(d)(3). Information from the evaluations would be important components of an overall condition description. The FHWA has revised the sentence in question to update the reference to the final location of the 1315(b) regulations, in 23 CFR part 667.

In connection with the provision in proposed § 515.009(d)(3) (fifth sentence) regarding the collection of data from other NHS owners, Hawaii DOT recommended changing the sentence to include data collection for non-NHS assets and to qualify the sentence with the phrase ''as applicable.''

In response, FHWA supports the concept of promoting collaborate and cooperative data collection efforts for all asset. However, the inclusion of non-NHS assets in the State DOT asset management plan is optional under part 515. Therefore, State DOTs have discretion about whether to include non-NHS assets in their plan, and how to coordinate with non-NHS asset owners. For NHS bridge and pavement assets, the collection of data is not optional, so FHWA has not adopted the suggestion to qualify the obligation by adding ''as applicable'' to the sentence. The FHWA retained the proposed rule language on coordinated and collaborative data collection, but has relocated the language to § 515.7(f) in the final rule because of its connection to plan development processes. The relocated language requires State DOT asset management plan development processes to address how the State DOT will obtain the necessary data from other NHS owners in a collaborative and coordinated effort. This provision recognizes State DOTs will need to determine what process for data collection works best in their individual situations.

Consistent with the decision to address requirements for voluntarily included assets in § 515.9(l), FHWA removed the third sentence in NPRM § 515.009(d)(3), on the treatment of voluntarily included assets.

NPRM Section 515.009(d)(5) (Final Rule Section 515.9(d)(5))

Two submissions addressed proposed § 515.009(d)(5), which requires State asset management plans to include a discussion of LCCA. Washington State DOT said it would probably not be able to ascertain deterioration rates or conduct LCCA for non-State owned assets within the 18-month phase-in timeframe outlined in proposed § 515.011. The agency said that it believes the intent of MAP–21 is for State DOTs to meet minimum requirements and begin making progress over the first 4 years after rulemaking to fully satisfy the requirements of proposed § 515.009.

In response, FHWA recognizes a lack of previous years' condition data would be a major challenge in determining deterioration rates. In cases where the State DOT does not have enough data, the State DOT should use engineering judgment to determine deterioration rates. However, FHWA expects that after three data reporting cycles under 23 CFR part 490, State DOTs will be able to develop preliminary deterioration models to conduct LCP. In addition, FHWA adopted an implementation schedule for this rule intended in part to provide State DOTs with time to gather data, and develop the needed processes and analytical capabilities (*see* discussion in Section V, *Implementation Timeline for Asset Management Requirements*).

The ASCE endorsed the use of LCCA at the project level and said the proposed rule is ''vital'' to making LCCA a standard practice in every State DOT. The commenter added that asset management plans provide a new tool to States for LCCA implementation and hopes that it will become ''the standard'' in any capital programming process.

The FHWA acknowledges this comment, and encourages States to use project-level LCCA in their project-development activities. However, the requirement in this rule is for network-level analysis. The FHWA changed the reference from LCCA to LCP in the final rule to make this clearer. The section-by-section discussions of NPRM § 515.005(Life-cycle Cost Analysis) and NPRM § 515.007(b) contain further information on this topic.

NPRM Section 515.009(d)(6) (Final Rule Section 515.9(d)(6))

Five submissions addressed proposed § 515.009(d)(6), which requires State asset management plans to include a discussion of a risk management analysis, including the results of the periodic evaluations under proposed § 515.019 (evaluation of alternatives to roads, highways, and bridges that are repeatedly damaged by emergency events). Alaska and South Dakota DOTs said that FHWA should delete any reference to proposed § 515.019.

In response, FHWA believes that, to increase system resiliency and protect investments made in the facilities

[44] AASHTO, Alaska DOT, Arkansas DOT, Connecticut DOT, New Jersey DOT, Mississippi DOT.

subject to MAP–21 Section 1315(b), it is important to consider the results of the periodic evaluations when conducting risk analysis. After considering the comments, FHWA decided to retain the requirement for State DOTs to include a discussion of the results of the evaluations relating to NHS pavements and bridges. The FHWA has revised § 515.9(d)(6) to update the reference to the 1315(b) evaluation regulations, which are now located in 23 CFR part 667.

The ASCE approved of the proposed rule's emphasis on resiliency and said States should identify the risks associated with current and expected future environmental conditions and should propose a mitigation plan for addressing their top priority risks. Similarly, Vermont Agency of Transportation said flood damage is a ''huge'' risk and liability that needs to be managed. A private citizen stated that, in addition to environmental conditions, the risk management analysis should take into consideration risks associated with possible economic scenarios and the impacts of asset preservation and capital improvement strategies.

The FHWA agrees that it is important for the risk management evaluation, including the mitigation plan, to consider the full range of risks that could threaten assets over their life cycle. This consideration should include future environmental conditions and may also address risks associated with future budgets, economic growth, tax revenue, and the impacts of asset preservation and capital improvement strategies, among other factors. These comments did not require any change in the final rule.

NPRM Section 515.009(d)(7) (Final Rule Section 515.9(d)(7))

Several submissions addressed proposed § 515.009(d)(7), which would require State asset management plans to include a discussion of the financial plan. For the reasons discussed in the section-by-section discussion of NPRM § 515.007(a)(4), FHWA made no change to § 515.9(d)(7) in the final rule.

NPRM Section 515.009(d)(8) (Final Rule Section 515.9(d)(8))

Section 515.9(d)(8) requires State asset management plans to include a discussion of investment strategies. Georgia DOT said the investment strategies would need to be coordinated with the financial plan and coordinated through the State's planning process. The agency added that the strategies would also need to be consistent with newly implemented State requirements.

In response, FHWA notes that one of the national goal areas is infrastructure condition—to maintain the highway infrastructure asset system in a state of good repair. The FHWA believes that investment strategies to improve or preserve NHS pavements and bridges must be developed through asset management plans, and be integrated into long-range transportation plans. For these reasons, FHWA agrees with the commenter that the development of the 10-year asset management plan for the NHS should be coordinated with both the metropolitan and statewide transportation planning processes. The FHWA agrees that the asset management plan for the NHS would need to be implemented consistent with State requirements, but with the understanding that Federal requirements as described in this final rule must also be met. The FHWA concluded no revision is needed in § 515.9(d)(8). The integration of asset management plans into transportation planning is discussed further in the section-by-section discussion of NPRM § 515.009(h).

Michigan DOT expressed concern about the impact the proposed rules would have on the level of investment in assets not covered by the asset management plan (*i.e.,* non-NHS assets) by driving funding away from these assets.

In response, FHWA believes the appropriate level of investment for assets is tied to the targets that a State sets. States should use their financial plan as a tool to decide if they need to make adjustments to their targets so that the funding distribution does not have an adverse impact on other assets.

NPRM Section 515.009(e) (Final Rule Section 515.9(e))

Eighteen submissions addressed proposed § 515.009(e), which requires a State's asset management plan to cover at least 10 years. Several commenters requested a shorter or longer minimum duration for the plan. These comments are detailed and discussed in the section-by-section discussion of § 515.7(a)(4). As stated there, FHWA believes the 10-year minimum reflects an appropriate balance of considerations, and FHWA made no change in response to these comments.

South Dakota DOT expressed concern that § 515.009(e) and (f) could be interpreted as requiring a 10-year STIP, and recommended that FHWA modify the verbiage or add clarification stating this is not the intent.

The FHWA responds that an asset management plan is not a program of projects and should not be confused with the STIP. The FHWA notes that § 515.9(e) and (f) neither state, nor imply, that a 10-year STIP is needed. The FHWA did revise the first sentence in § 515.9(f) by deleting the phrase ''leading to a program of projects'' and rewording the remainder of the sentence, which avoids any potential for an interpretation that the sentence refers to the STIP in any manner.

NPRM Section 515.009(f) (Final Rule Section 515.9(f))

Eleven commenters provided input on the requirements for investment strategies in § 515.009(f). The AASHTO and the DOTs of Connecticut and South Dakota said the asset management plan should be a system-level plan based on expected funding the State can allocate to the NHS. These commenters recommended that the final rule replace ''set of investment strategies'' in proposed § 515.009(f) with ''State-determined strategies.''

In response, FHWA clarifies that the State DOTs are charged with developing asset management plans, and therefore it is the State DOTs that will determine the investment strategies to include in the plans. The FHWA retains the language in this final rule.

Oregon DOT commented on problems it foresaw with the proposed requirement that a State DOT's investment strategies would have to meet all the requirements in § 515.009(f)(1)–(4). Oregon's specific concern focused on how this would affect proposed § 515.009(g), which requires the asset management plan to include a discussion of how the analyses required under § 515.007 support the plan's investment strategies. Oregon DOT said a State should have no difficulty in showing how its investment strategies help make progress toward the achievement of the national goals and State DOT goals, but it would be difficult or nearly impossible to describe how State strategies satisfy all of the requirements in paragraphs (f)(1) through (4) of § 515.009. The DOT asserted that, for example, if a State DOT were to limit its consideration only to alternatives that improve the physical condition of transportation assets, it would limit its ability to achieve maximum progress in achieving State targets for the condition and performance of its transportation system. The commenter said State DOTs need the flexibility to use measures and processes that they have found to work best for them.

In response, FHWA believes clarification is needed. Paragraphs (f)(1) through (4) of § 515.9 embody requirements based on the definition of

asset management in 23 U.S.C. 101(a)(2) and requirements in 23 U.S.C. 119(e)(1) through (2). The State DOT asset management plans, including the investment strategies, must meet those statutory requirements. However, after considering the comments, FHWA modified the first sentence in § 515.9(f) to read ''[a]n asset management plan shall discuss how the plan's investment strategies collectively would make or support progress toward'' the items specified in paragraphs (f)(1) through (4). The FHWA modified paragraphs (f)(1) through (4) to align with this new wording. The FHWA also removed the second sentence in § 515.9(g), pertaining to required descriptions of how the plans satisfy requirements in § 515.9(f)(1) through (4). The FHWA concluded the language was not necessary because it was duplicative of the language in § 515.9(f).

The AASHTO and the DOTs of Connecticut, New Jersey, Oregon, and North Dakota took issue with use of the term ''desired state of good repair'' in proposed § 515.009(f)(1). The AASHTO and Connecticut DOT said the final rule should change all references to a ''state of good repair'' or a ''desired state of good repair'' to references to ''State target.'' Oregon DOT said focusing on the narrower goal of achieving and sustaining a state of good repair can lead to asset management decisions that undermine the plan's broader goals.

As discussed in the section-by-section discussion of NPRM § 515.005 (Desired State of Good Repair), FHWA retained the term in § 515.9(f)(1) of the final rule.

Several State DOTs said § 515.009(f)(1) and (2) imply there are sufficient resources to maintain current assets in a ''state of good repair,'' while also improving the conditions of the NHS, which may not be possible.[45] California DOT said if the intent is to define fiscally constrained strategies, then FHWA would need to add provisions to recognize all potential condition outcomes including levels below the established baseline. The commenter noted that Caltrans requested that clarification be made between the strategies of ''improve'' and ''make progress toward goals.''

The FHWA agrees with the comments relative to § 515.9(f)(1). As discussed above, FHWA modified § 515.9(f)(1) to make it clear that the requirement is to make or support progress toward achieving and sustaining the desired state of good repair. This revision acknowledges that the ''desired state of good repair'' may or may not happen with the implementation of the State's first asset management plan, but certainly progress toward a ''desired state of good repair'' is achievable. With regard to § 515.009(f)(2), FHWA believes that Federal funds, even though insufficient to address all needs, must be spent in a way that, at a minimum, reduces the asset deterioration rate; hence, to improve the condition. The FHWA's interpretation of the word ''improve'' is discussed in the section-by-section discussion of NPRM § 515.007(a)(1).

Maryland DOT and NEPPP said proposed § 515.009(f)(2) and (f)(3) could conflict with the measures that may be required by FHWA's second performance measure rulemaking if a State DOT's targets are for declining performance. As discussed in the section-by-sections discussions of NPRM §§ 515.005 (Asset Management), 515.007(a)(1), and 515.009(d)(2), FHWA disagrees with the comments because a performance decline could be considered improvement if a State succeeds in slowing the rate of deterioration.

Regarding proposed § 515.009(f)(3), Oregon DOT said the targets for asset condition and performance in accordance with 23 U.S.C. 150(d) extend beyond those established for pavement and bridges and include a directed consideration not only of Interstate and NHS performance measures that previously were to be excluded, but also of measures to be established for highway safety, congestion mitigation, air quality, and national freight movement. Oregon DOT asked if the required set of established and discussed strategies needs to address these additional considerations. Similarly, regarding proposed § 515.009(f)(4), Oregon DOT said the national goals identified in 23 U.S.C. 150(b) extend beyond infrastructure condition and will require the discussion of asset impacts that were not to be included during the completion of earlier requirements.

In response, FHWA notes the requirement is only to discuss how investment strategies collectively would make or support progress toward the outcomes listed in paragraphs (f)(1) through (4) of § 515.009. As discussed in Section V, *System Performance, Performance Measures and Targets, and Asset Management Plans,* and in the section-by-section discussion of NPRM § 515.009(d)(2), an asset management plan may address highway safety, congestion mitigation, air quality, and national freight movement in several ways without including any discussion of the 23 U.S.C. 150(d) performance targets for these areas. After considering the comments, FHWA determined the comments did not require any change in the final rule.

The NEPPP stated that the requirements in § 515.009(f)(4) (progress toward national goals in 23 U.S.C. 150(b)) cannot be met, because the measures that may be required by FHWA's second performance management rulemaking might promote ''worst-first'' repair strategies and thus conflict with asset management strategies.

The FHWA disagrees for several reasons. First, FHWA does not believe minimum condition requirements in 23 CFR part 490 will conflict with the use of sound asset management principles. Second, § 515.9(f)(4) of the final rule requires asset management plans to make or support progress toward the achievement of the national goals identified in 23 U.S.C. 150(b). Requiring progress toward the national goals is not the same as requiring achievement of the goals. As previously noted, even investment strategies that result in declining conditions may produce overall improvements in the system. The national performance goals include safety, infrastructure condition, congestion reduction, system reliability, freight movement and economic vitality, environmental sustainability, and reduced project delivery delays. The FHWA believes individual investment strategies relating to the physical condition of NHS pavements and bridges often will support progress toward more than one of the national goals. The national goal for infrastructure condition is to maintain the highway infrastructure asset system in a state of good repair. The FHWA does not believe that requiring the recipients of Federal-aid highway funds to make highway infrastructure investments that contribute to achieving or maintaining a state of good repair is encouraging a ''worst first'' approach.

NPRM Section 515.009(g) (Final Rule Section 515.9(g))

Five submissions addressed proposed § 515.009(g), which would require State DOTs to include in their asset management plans a description of how the analyses required under § 515.007 support the State DOT's investment strategies. Under the proposed language, the plans would also require a description of how the strategies satisfy the requirements in § 515.009(f)(1) through (4).

New Jersey DOT requested that FHWA define what ''strategies'' are being referred to in this context.

[45] DOTs of California, Connecticut, Minnesota, Texas, and North Dakota.

In response, FHWA modified § 515.9(g) to read as follows: ''A State DOT must include in its plan a description of how the analyses required under § 515.7 (such as analyses pertaining to life cycle planning, risk management, and performance gaps) support the State DOT's asset management plan investment strategies.''

North Carolina DOT said State law requires the agency to use its current project prioritization process for its STIP, and it is unclear whether the current STIP process would disagree with the asset management analysis, particularly on a short-term basis. This commenter asked if FHWA would grant waivers for States that have STIP processes defined in State law and, if so, for how long. Additionally, the DOT asked what would be the next steps if FHWA identifies potential conflicts between the DOT's 3-year maintenance plan and its asset management plan analyses.

In response, FHWA notes that asset management plan requirements under 23 U.S.C. 119(e) and this final rule do not impose any project selection requirements on State DOTs. In addition, the implementation timeline for asset management requirements under this final rule provides ample time for States to take action to adjust their STIPs and maintenance plans if they decide such action is needed. There is nothing in 23 U.S.C. 119 that gives FHWA legal authority to waive asset management requirements. The FHWA made no change in the final rule as a result of these comments.

As noted in the section-by-section discussion of NPRM § 515.009(f), in connection with that section and proposed § 515.009(g), Oregon DOT said it would be difficult or nearly impossible to describe how State strategies satisfy all of the requirements in § 515.009(f)(1) through (4), as would be required by proposed § 515.009(g). The DOT asserted that, for example, if a State DOT were to limit its consideration only to alternatives that improve the physical condition of transportation assets, it would limit its ability to achieve maximum progress in achieving State targets for the condition and performance of its transportation system. The commenter said State DOTs need the flexibility to use measures and processes that they have found to work best for them.

In response, as stated in the section-by-section discussion of NPRM § 515.009(f), FHWA revised the language in § 515.9(f) to clarify the requirements, and to remove the duplication in proposed § 515.009(g) pertaining to satisfying § 515.009(f) requirements.

NPRM Section 515.009(h) (Final Rule Section 515.9(h))

Twenty commenters provided input on proposed § 515.009(h), which would have encouraged each State DOT to select projects for inclusion in the STIP to support its efforts to achieve the goals listed in § 515.009(f). The AASHTO and numerous State DOTs stated that the final rule should clarify that project selection and target-setting are not within FHWA authority and would violate the State's sovereign right to select projects for the STIP.[46] The AASHTO recommended that FHWA replace ''A State DOT should select'' with ''A State DOT may select'' in this section to emphasize State discretion for project selection and clarify that this section does not require that the STIP consist entirely of ''such projects'' or that all such projects be included in the STIP.

Several commenters provided input on the relationship between the STIP and the asset management plan. The AASHTO and several State DOTs said the final rule should clarify that the STIP is where individual projects are identified, not in the asset management plan.[47] The State DOTs of Illinois, Maryland, North Dakota, and South Dakota stated that asset management plans are decisionmaking tools that provide information to consider while developing a STIP, but they should not be the final and primary mechanism in generating a STIP and project selection. Maryland and Oregon DOTs said asset management plans should not create a separate process for developing an independent list of federally funded projects to be undertaken by a State. Mississippi DOT stated that review of the STIP at a project level should not be the measure by which State agencies are held accountable; the State's ability to achieve agreed-upon performance targets should be used to measure the effectiveness of the State's asset management plan. Referencing the NPRM discussion of the requirements in proposed § 515.009(h) (80 FR 9231, 9234), Mississippi DOT said this requirement may be interpreted to mean that the State DOT may be required by FHWA to exclude projects that are not identified by the asset management plan. The agency stated that would appear to overstep the requirements for development of a network-level asset management plan. Washington State DOT asked what would be the State DOT's role in the selection of projects on NHS assets not owned by the State. North Carolina DOT expressed concern that the asset management plan would be required to include ''strategies leading to a program of projects.'' The commenter asked if waivers would be available for States that have STIP processes defined in State law.

As discussed in the section-by-section discussion of NPRM § 515.009(g), nothing in 23 U.S.C. 119(e) or this regulation alters the role of the State in selecting projects for Federal-aid funding. The asset management plan required by 23 U.S.C. 119(e) does not create a separate process for developing federally funded projects. In reality, it adds to the comprehensiveness of the current transportation planning processes. The asset management plan is developed to improve or preserve the condition of the assets and the performance of the system.

After considering the comments, FHWA modified § 515.9(h) by eliminating the project selection language in question, and instead including a requirement that a State DOT must integrate its asset management plan into the State DOT's planning processes that lead to the STIP, to support the State DOT's efforts to achieve the goals in § 515.9(f). This integration language parallels the language in §§ 450.206 and 450.306 of FHWA's recently amended planning rule in 23 CFR part 450. Those planning provisions require States to integrate into the statewide transportation planning process other State plans and processes, including the NHS asset management plan. The requirement for integration under this final rule and the planning rule is the same. ''Integration'' in this context means a State DOT must consider its asset management plan, including the investment strategies in the plan, as a part of the decisionmaking process during planning. Because this requirement is for consideration of the State's asset management plan, which is not project-specific, there is no reason a State DOT would need a waiver based on STIP project selection procedures contained in State law.

Oklahoma DOT recommended FHWA delete § 515.009(h) from the rule because the goal of developing an asset management plan should be to set risk-mitigation strategies that go beyond a list of specific projects.

The FHWA agrees that the risk-mitigation strategies are important, but believes the goal of developing an asset

[46] AASHTO, Alabama DOT; Connecticut DOT; Florida DOT; Delaware DOT, North Dakota DOT; South Dakota DOT; Vermont DOT, Washington State DOT, Wyoming DOT; DOTs of ID, MT, ND, SD, and WY (joint submission).

[47] AASHTO, Arkansas DOT, Connecticut DOT, Florida DOT, Missouri DOT.

management plan goes beyond setting risk-mitigation strategies. According to 23 U.S.C. 119(e)(1), asset management plans are to improve and preserve the condition of the assets and the performance of the system. The FHWA does not believe the purposes of the asset management statute can be fulfilled unless State DOTs consider their asset management plans during planning, including the programming of projects in the STIP.

NPRM Section 515.009(i) (Final Rule Section 515.9(i))

Eight submissions addressed proposed § 515.009(i), which requires a State DOT to make its asset management plan available to the public. Maryland DOT, PCA, and ACPA supported the provision. The AASHTO supported providing the asset management plan to the public, provided that nothing else in the rule would create any new or additional public involvement requirements. The GTMA commented more generally that the proposed rule would create greater transparency and would make it more difficult for States to ''water down or hide'' their data from the public. Minnesota DOT said that it would satisfy the public availability provision with its existing planning processes because its transportation asset management plan is designed for, and intended as, an input to those processes. Oregon DOT suggested that there should be a more developed process to ensure full and regular participation of interested stakeholders and the public, as well as coordination of the asset management plan with other State and metropolitan planning processes and plans. New Jersey DOT asserted that this provision would cause States to limit the scope of assets included in their plans, arguing that that the public availability of an asset management plan should be left to the States ''to the extent practicable.'' Oregon DOT asked for an example of an asset management plan that is in a format that is easily accessible to the public.

The FHWA notes that State DOTs have discretion to communicate with their stakeholders and the public in ways other than what is required by § 515.9(i). Public availability of an asset management plan is necessary to both educate the public as to why a particular type of investment is needed and to gain public support for long-term investment strategies. After considering the comments, FHWA has retained the proposed rule language. In response to the comment asking for an example of a format readily accessible to the public, FHWA points to examples of several drafts and uncertified plans, prepared prior to the date of this final rule, that are available at: *http://www.fhwa.dot.gov/asset/plans.cfm.*

NPRM Section 515.009(j) (Final Rule Section 515.9(j))

Six submissions provided input on the statement in proposed § 515.009(j) that inclusion of performance measures and State DOT targets in the plan does not relieve the State DOT's of any responsibilities under for fulfilling performance management requirements, including 23 U.S.C. 150(e) reporting. Alaska DOT requested clarification regarding what the Section 150 measures are, since this section is not part of this rulemaking. Colorado DOT said that more guidance is needed on how DOTs are expected to report on performance. The agency stated that 23 U.S.C. 150(c)(3)(A)(ii)(IV) and (V) (regarding performance measures for the NHPP) make a clear distinction between performance and condition, as do the definitions. Minnesota DOT recommended that FHWA consider aligning the timing of the asset condition performance reporting requirements prescribed in the pavement and bridge conditions rule (2- and 4- years) with the planning horizon of the asset management plan (a minimum of 10 years) and other planning documents. New York State DOT said FHWA should clarify how the NPRM performance measures will be reported, including which ones, if any, will need to be included in the asset management plan. Oregon DOT stated that the establishment of an extensive and detailed listing of requirements demonstrates the difficulties involved and discourages the inclusion of additional assets, further reducing the benefit and value of an asset management plan. It argued that, rather than discouraging States from presenting their performance measures and targets, FHWA should encourage States to present the measures they have developed and implemented and discuss the benefits they have realized using such measures and targets.

In response, FHWA notes that the statement is simply intended to make it clear that discussion of NHS pavement and bridge condition targets in an asset management plan does not fulfill performance management requirements. The performance management reporting requirements for NHS pavements and bridges are established through the second performance measure rulemaking, which also addresses the national performance measures and targets relating to the condition of NHS bridges and pavements. That rulemaking incorporates the reporting requirements in 23 U.S.C. 119(e)(7) and (f) relating to required performance measures and targets, and reporting requirements in 23 U.S.C. 150(e) relating to the effectiveness of the asset management plan's investment strategy document for the NHS. With regards to the timelines, FHWA has developed the implementation timeline in coordination with the performance measure rulemakings in order to ensure consistency and to develop the most feasible timelines while satisfying the time requirements of 23U.S.C. 119 and 150.

State DOTs are not required to submit reports on either condition or performance under part 515. The requirement in part 515 is that State DOTs include summaries of the condition of their NHS pavements and bridges in their asset management plans and take that information into account in their asset management plan.

In response to comments concerning the inclusion in the asset management plan of measures and targets other than those for NHS pavements and bridges developed pursuant to 23 U.S.C. 150, FHWA notes § 515.9(d)(2) provides the State DOT's may include other measures and targets for the NHS that the State DOT established through pre-existing management efforts or develops through new efforts. If a State DOT chooses to include assets other than NHS pavements and bridges in its plan, § 515.9(l) of the final rule requires the State DOT to include measures and targets the State DOT develops for those assets. In the final rule, FHWA has clarified in § 515.9(j) that the phrase ''State DOT targets'' means the required targets for NHS pavements and bridges established pursuant to 23 U.S.C. 150.

Michigan DOT said the rule should not limit the ability of State DOTs to manage pavements and bridges in a way that recognizes the integrated nature of their function and service. The agency noted that while an asset management plan is an important tool for organizing the systematic management of assets, it should not restrict the ability of transportation agencies to make investment decisions, even when those decisions are not in perfect alignment with the plan.

Because FHWA interprets this comment to pertain more directly to the implementation requirements in § 515.13 of this rule, these comments and FHWA's responses are included in the section-by-section discussion of NPRM § 515.013(c).

NPRM Section 515.011 (Final Rule Section 515.11)

Section 515.011 of the NPRM contained provisions for a proposed phased implementation of asset management plans, as well as proposed procedures for the statutorily required FHWA certification and recertification of State DOT asset management plan development processes and the annual FHWA determination whether State DOTs have developed and implemented asset management plans consistent with 23 U.S.C. 119. The FHWA made a number of changes to § 515.11 in the final rule in response to comments, as discussed below.

NPRM Section 515.011(a) (Final Rule Section 515.11(a))

In the NPRM, FHWA proposed a deadline for submission of the first asset management plan of 1 year after the effective date of the final asset management rule (NPRM §§ 515.011(a) and 515.013(a)). Because FHWA was aware of the potential difficulties State DOTs might have if a complete plan were required at the 1-year milestone, FHWA included proposed phase-in provisions in NPRM § 515.011. The FHWA specifically requested comments on whether the proposed phase-in was desirable and workable (80 FR 9231, 9243 (February 20, 2015)). Because comments on both § 515.011(a) and § 515.013(a) addressed implementation timing for asset management plans, FHWA consolidated the comments on the two sections and addresses them below. This topic also is discussed in Section V, *Implementation Timeline for Asset Management Requirements.*

Nineteen commenters provided their views on the language in proposed § 515.013(a) that would have set the general plan submission deadline and would have required State DOTs to submit a State-approved asset management plan no later than 1 year after the effective date of the final rule. Fourteen of those commenters, including 11 State DOTs, GTMA, Atlanta Regional Commission, and Fugro Roadware opposed the proposed 1-year deadline. Many of these commenters cited concerns that 1 year would not be sufficient to develop the asset management plan.[48] Fugro Roadware and the DOTs of California and New Jersey suggested a deadline of 2 years. The GTMA suggested 18 months. Alaska DOT suggested a deadline of October 1, 2018. Illinois DOT said that States need time to fully test the functionality of new software before they can begin to integrate it into their planning and programming, which could delay the development of the asset management plan and reinforces the need for flexibility in the rule regarding deadlines for process certification and plan consistency reviews.

Atlanta Regional Commission and the State DOTs of Connecticut, North Carolina, and Oklahoma argued that FHWA should establish a single deadline for the implementation of the rule, but that FHWA should wait until all MAP–21 performance measurement requirements are in place. North Carolina DOT supported a single implementation date, with the initial plan due 2 years following the date of final rulemaking. Maryland DOT suggested that the single deadline be set for 1 month after the STIP submission date. Several State DOTs expressed concern that this rule along with the various NPRMs on performance measures begin to create an onerous program. Georgia, Montana, and New York State DOTs said FHWA should coordinate the reporting deadlines for all of the rules to reduce the burden on States. The NYSAMPO, several State DOTs, and several planning organizations recommended a single final effective date for FHWA's three performance measure rulemakings, and the planning rulemaking.[49] Oregon DOT said FHWA should implement the new rules with common effective dates and allow a State to request an extension, so long as the State is able to show that it is working toward compliance. Oklahoma DOT contended that a comprehensive asset management plan cannot be developed without all criteria required for consideration within the asset management plan, noting that several NPRMs that could affect the development and submission of asset management plans are currently pending (*e.g.,* freight movement, congestion, and the Congestion Mitigation and Air Quality Improvement Program). The commenter recommended that the asset management plan be required for submission 1 year after the effective rule date establishing all performance measures and standards.

Sixteen commenters provided input on the phase-in option for the initial asset management plan, as described in proposed § 515.011(a). Several State DOTs supported the proposed phase-in approach.[50] The AASHTO, GTMA, and other State DOTs supported the phase-in approach, but suggested that the proposed timeframe would be too short or would lack flexibility.[51] The GTMA requested that State DOTs be granted an additional 6 months for each of the required submittal deadlines.

New Jersey DOT stated that the phase-in period should be extended due to the significant work load and learning curve for State DOTs in establishing processes and developing asset management plans. Similarly, Washington State DOT and Tennessee DOT said the deadlines outlined in § 515.011 would be insufficient to bridge gaps, collaborate with State MPOs, develop and implement the business process, hire and train employees, and collect all required data that would be required to comply with the rule. Tennessee DOT said a time frame of 30 months would be more feasible. Michigan DOT said a phase-in approach is necessary but expressed confusion about the process proposed in the rule, especially by the interaction of this rule and the second performance measure rulemaking. Michigan DOT indicated that the phase-in requirements force States to invest heavily in an initial asset management plan that is of little value and said a more appropriate time frame for a revised plan should be determined after careful review of the time required for States to build their investment programs around the national performance measures for pavements and bridges (no less than 2 years, but likely closer to 4 years). The ASCE said State use of the short phase-in option for asset management plan development should be rare and only utilized in extreme circumstances. Alaska DOT and Atlanta Regional Commission said the proposed phase-in approach would unnecessarily complicate the process.

In response to these two groups of comments, FHWA believes there are three conditions that have substantial impacts on the ability of State DOTs to develop asset management plans that comply with 23 U.S.C. 119. First, the rulemaking establishing performance measures for NHS pavements and bridges needs to be completed well in advance of the deadline for submission of the first complete asset management plan.[52] Otherwise, State DOTs will not

[48] Alaska DOT, Atlanta Regional Commission, California DOT, Connecticut DOT, Fugro Roadware, GTMA, Illinois DOT, Kentucky Transportation Cabinet, Mississippi DOT, New Jersey DOT, North Carolina DOT, Oklahoma DOT, Oregon DOT, South Carolina DOT.

[49] Alaska DOT, Atlanta Regional Commission, Connecticut DOT, New York State Association of MPOs, North Carolina DOT, Oregon DOT.

[50] Arkansas DOT, Connecticut DOT, Delaware DOT, Georgia DOT, Missouri DOT, Oregon DOT.

[51] AASHTO, GTMA, New Jersey DOT, Michigan DOT, Oklahoma DOT, Tennessee DOT.

[52] State DOTs have 1 year from the effective date of the rulemaking to establish their section 150(d) targets (23 U.S.C. 150(d)(1)).

have their 23 U.S.C. 150(d) targets for NHS pavements and bridges in place and available for inclusion in their asset management plans. The FHWA considers the section 150(d) targets for NHS pavements and bridges a critical part of the plans. Second, State DOTs need to have FHWA-certified plan development processes in place. Without certainty about the acceptability of the selected processes for developing the asset management plan, it will be difficult for a State DOT to develop a fully compliant asset management plan. Third, the State DOTs need time to ensure they are gathering appropriate data for use in their asset management plans.

While FHWA attempted to address these issues in the NPRM, the comments convinced FHWA that adjustments are needed in the final rule. However, FHWA does not believe a single final effective date for the performance measure rulemakings and the asset management plan rulemaking is either achievable or helpful to the overall schedule for implementation of asset management requirements. In light of the comments and what FHWA now knows about the schedules for the two final rules, FHWA decided to defer the effective date of this rule to October 2, 2017. All deadlines under the final asset management rule, part 515, measure from that effective date. The FHWA chose to defer the effective date based on FHWA's determination that State DOTs would not be able to comply without the extra time. The FHWA decided it cannot set timelines for implementation of asset management requirements that are so short as to force State DOTs to incur penalties for non-compliance under 23 U.S.C. 119(e)(5) or MAP–21 section 1106(b).[53]

The FHWA believes it is important to adopt a regulation that promotes successful implementation of asset management and performance management requirements in the Federal-aid highway program. The FHWA retained the phase-in approach in the final rule, but modified the provisions in both § 515.11 and § 515.13 to clarify the deadlines, the requirements for the initial State DOT asset management plans, the certification and recertification procedures for State DOT processes, and the submission requirements for consistency determinations. Under the final rule, all submission deadlines for the initial and the first fully compliant asset management plans are in § 515.11(a), and the rule's effective date appears in § 515.3.

Based on the October 2, 2017, effective date for this rule, and an anticipated 2016 effective date for the second performance measure rulemaking addressing pavement and bridge conditions on the NHS, § 515.11(a)(1) of the final rule sets a deadline of April 30, 2018, for the submission of an initial asset management plan. That same section provides FHWA will use the processes described in the initial plan for the plan development process certification review required by 23 U.S.C. 119(e)(6) and § 515.13(a) of the final rule. Section 515.11(a)(2) of the final rule sets a deadline of June 30, 2019, for submission of a fully compliant asset management plan, together with State DOT documentation demonstrating the State DOT has implemented the plan. That same section also provides FHWA will use that submitted plan and documentation to make the first required consistency determination under 23 U.S.C. 119(e)(5) and § 515.13(b) of the final rule. Section 515.11(c) summarizes the elements that must be included in the State DOT-approved asset management plan submitted by June 30, 2019. These timelines provide State DOTs substantial lead time, before the first submission deadline, to develop asset management processes and to improve data-gathering capability if necessary.

Texas DOT said it is unclear how the phase-in approach will be accomplished since projects have already been committed under the old Highway Bridge Program, some of which could be as much as 10 years out.

The FHWA notes that an asset management plan is focused on strategies that lead to projects, and planning processes must be followed to develop such projects. Once the asset management plan is in place, it would be appropriate for States to consider whether the projects that were recommended in older program documents are consistent with the asset management plan's investment strategies.

Georgia DOT said States with existing initial asset management plans should be allowed additional time as needed to modify the existing document if it does not immediately meet guidance.

In response, FHWA believes that the timeline for developing asset management plans provides adequate time for States to develop their first plan or modify their existing asset management plan.

NPRM Section 515.011(b) (Final Rule Section 515.11(b))

NPRM § 515.011(b) described the proposed requirements for initial asset management plans submitted under the phase-in provision. Regarding the proposed language requiring the initial plan to contain measures and targets for assets covered by the plan, NEPPP asked what should be done if the State's targets conflict with the national goals.

In response, FHWA notes that the topic of target setting is addressed in the second performance measure rulemaking. However, it is evident from a review of 23 U.S.C. 150 that performance management requirements, including national measures and State DOT performance targets for those measures, are intended to result in State DOT investments that make progress toward the national goals in section 150(b). The FHWA acknowledges that, due to financial constraints and the need for trade-offs across assets, the condition of an asset may improve, stay constant, or decline (*see* the section-by-section discussion of NPRM § 515.009(a) in this preamble). However, that is not the same as a State DOT adopting section 150(d) targets that conflict with the national goals. It is not clear to FHWA how a State DOT target that is consistent with a national measure established under 23 U.S.C. 150 could be inconsistent with a national goal.

Two commenters referred to the proposal in § 515.011(b) to permit State DOT to use the best available information to meet the requirements of §§ 515.007 and 515.009 in the initial plan. Washington State DOT said this could give FHWA broad leeway to certify the process and determine consistency in accordance with § 515.013, but also allow implementation of the gap analysis mentioned in § 515.007. Hawaii DOT asked what specific requirements in §§ 515.007 and 515.009 are being referred to.

In response, FHWA states the intent of the provision was to require State

[53] Section 119(e)(5) requires, beginning with the second fiscal year after the final asset management rule is effective, FHWA to determine whether each State DOT has developed and implemented an asset management plan consistent with section 119. Eighteen months after the performance management rule for pavement and bridge conditions, ''National Performance Management Measures; Assessing Pavement Condition for the National Highway Performance Program and Bridge Condition for the National Highway Performance Program'' (RIN 2125–AF53), is effective, MAP–21 section 1106(b) requires FHWA to decide whether each State DOT has established the required 23 U.S.C. 150(d) performance targets and has a fully compliant asset management plan in effect (MAP–21 section 1106(b)(1)). Both statutes impose a penalty if the State DOT has not met those requirements. The MAP–21 section 1106(b) permits FHWA to extend the 18-month compliance deadline if the State DOT has made a good faith effort to establish the asset management plan and set the required targets (MAP–21 section 1106(b)(2)). There is no extension or waiver provision for 23 U.S.C. 119(e)(5).

DOTs to submit complete proposed processes for asset management plan development, but to allow State DOTs to in all other respects use best available information to prepare the initial plan. Because FHWA added a provision in § 515.7(g) of the final rule on use of best available data for all asset management plans, FHWA removed the sentence in question from the initial plan provision in § 515.11(b). With respect to consistency determinations, the first consistency determination pursuant to § 515.13(b) of the final rule will occur after the June 30, 2019, deadline for a fully compliant asset management plan.

Washington State DOT also commented on the data provision in NPRM § 515.011(b). It noted that obtaining the necessary data from other NHS owners is a significant amount of work, which includes collecting data that, in many cases, does not currently exist.

In response, FHWA notes this topic is discussed in detail in Section V, *Asset Management Plan Treatment of NHS Pavements and Bridges Not Owned by State DOTs.* In the event that State DOTs are not able to perform a thorough analysis in an asset management plan due to lack of required data, it is best to discuss this matter in the gap analysis section of the plan. For example, newly identified NHS routes or the use of deterioration models for the entire NHS system may not be possible because the minimum three data points to develop a preliminary deterioration curve are not available. However, State DOTs should do their best to perform a complete analysis of the entire NHS and include the findings in their plans.

One commenter, NEPPP, raised questions about the fourth sentence in proposed section 515.011(b), which called for the initial plan's investment strategies to support progress toward the achievement of national goals and made the requirement for inclusion of the State DOT's 23 U.S.C. 150(d) targets in the initial plan subject to a timing condition. The NEPPP asked why a State would establish targets at least 6 months before the deadline, stating that States would be dis-incentivized to submit early, because they would then have to address those targets.

In response, FHWA notes the intent of the provision is to allow State DOTs to omit their 23 U.S.C. 150(d) performance targets for NHS pavements and bridges if the 23 U.S.C. 150(d)(1) deadline for State DOT establishment of those targets does not allow at least 6 months for the State DOTs to incorporate the targets into their asset management plans. To clarify this, the FHWA restructured and revised the sentence in question. The final rule separates the topic of initial plan requirements for investment strategies from the topic of initial plan requirements for inclusion of section 150(d) performance targets for NHS pavements and bridges. The final rule language on targets more clearly articulates that State DOTs must include section 150(d) targets for NHS pavements and bridges in their initial asset management plans only if the first target-setting deadline established in 23 CFR part 490 for NHS pavements and bridges occurs at least 6 months before the initial plan submission deadline of April 30, 2018.

Two submissions addressed the provision in proposed § 515.011(b) that would give State DOTs the option to exclude from their initial asset management plans the LCCA, risk management analysis, and financial plan. The AASHTO agreed with this provision as proposed. Washington State DOT asked if the initial plan requires all of the elements under § 515.009 to be complete, stating that it proposes to identify gaps in the initial plan using the NCHRP Asset Management Gap Analysis Tool and will evaluate gaps to improve its performance management processes.

In response, as stated in § 515.11(b), the initial asset management plan must include descriptions of all the State DOT's § 515.7 asset management development processes, because FHWA will use that information for the required process certification review. However, State DOTs do not need to include any information or discussion in the initial plan for one or more of the following analyses: LCP, risk management analysis, and the financial plan. Using the NCHRP Asset Management Gap Analysis Tool to identify gaps in State's processes supports § 515.7, and it certainly helps State DOTs to improve the maturity of their asset management plan for the next submission. The FHWA decided these comments did not require any revision to § 515.11(b).

Several commenters noted incorrect cross-references in § 515.011(b). The AASHTO and Connecticut DOT asserted that the cross-reference in § 515.011(b)(3) to § 515.007(a)(7) appears to be incorrect and should instead reference § 515.007(a)(4). Oregon DOT said that the discussion of this section in the NPRM's preamble (80 FR 9231, 9251) contains three incorrect references to non-existent subsections of the proposed rule: §§ 515.007(a)(6), 515.007(a)(7) and 515.007(a)(8). Oklahoma DOT pointed out other incorrect references to other sections containing LCCA, risk management analysis, and financial plan.

In response, the FHWA appreciates the comments and has addressed the incorrect cross-references.

NPRM Section 515.011(c) (Final Rule Section 515.11(c))

Proposed § 515.011(c) would have established requirements for State DOT submission of updated, fully compliant asset management plans by a date not later than 18 months after the final rule for the second performance measure rulemaking. As proposed, § 515.011(c) would have allowed FHWA to extend the submission deadline if the FHWA had not certified the State DOT's asset management processes at least 12 months before the deadline. Regarding the proposed § 515.011(c) requirement to amend the initial plan to meet all plan requirements, AASHTO and Connecticut DOT recommended flexibility to account for unintended consequences or other unknowns associated with developing the asset management plans and integrating the bridge and pavement targets. Fugro Roadware said that most States will likely require the optional extension of the amendment deadline of up to 12 months and recommended to set the base time period for 24 months and also to maintain the optional 12-month extension.

The FHWA included the proposed extension because of the degree of uncertainty at the time of the NPRM about the timing of certain milestones critical to the development and implementation of asset management plans. This included the effective dates for this final rule and for the final rule in the second performance measure rulemaking for NHS pavements and bridges. Because FHWA now has greater certainty about those matters, FHWA establishes a specific date (June 30, 2019) by which States must submit fully compliant plans (*see* final rule § 515.11(a)(2)). The final rule also uses the deadline for submission of the initial asset management plan (April 30, 2018) as the date from which FHWA and State DOTs will measure the statutory time periods for the various steps for asset management process certification (*see* final rule §§ 515.11(a)(1) and 515.13(a)). For that reason, much of proposed § 515.011(c) is no longer needed, leading FHWA to modify the provision in the final rule. The FHWA removed language in first sentence concerning the submission date for a complete plan, and revised the first sentence for flow and consistency with new § 515.11 (a)(2). The final rule does not include an

extension provision for submission of fully compliant asset management plans because the submission deadline of June 30, 2019, is designed to give State DOTs more than adequate time to develop their complete plans using approved processes and their initial 23 U.S.C. 150(d) targets for the condition of NHS pavements and bridges.

NPRM Section 515.013 (Final Rule Section 515.13)

Section 515.013 of the NPRM contained proposed provisions addressing the statutorily required certification and recertification of State DOT asset management plan development processes, and the annual FHWA consistency determination required under 23 U.S.C. 119(e)(5). In response to comments, FHWA made a number of changes to § 515.13 in the final rule, including reorganizing and renumbering its provisions. Table 1 shows the changes in numbering. The FHWA discusses the comments, and the changes made in response to those comments, below.

The FHWA received several general comments on proposed § 515.013. Montana DOT stated that FHWA should clarify that investment decisions and judgments made by State DOT's in the asset management plans would not be within the scope of FHWA's review of State asset management plans. Georgia and Virginia DOTs urged FHWA to provide further clarification on what constitutes a certified asset management plan, the difference between certification and the consistency determination, and the criteria the FHWA will use in reviewing and approving the discretionary components of a State's plan.

In response, FHWA clarifies that certification is to verify that the asset management plan processes were developed according to the process requirements of 23 U.S.C. 119(e) and § 515.7 of this rule. This is discussed in more detail under the discussion of NPRM § 515.013(b) below. The consistency determination, as required under 23 U.S.C. 119(e)(5), is to verify that the State has developed and implemented an asset management plan consistent with section 119(e) and part 515. This includes consideration of whether: (1) The asset management plan was indeed developed based on the certified processes; and (2) the investment strategies were, in fact, implemented. The FHWA will review, but not approve or base a consistency determination on, the discretionary components of a State's plan. The FHWA added language to this effect to § 515.13(b) of the final rule. This topic is discussed in more detail in the section-by-section discussion of NPRM § 515.013(c). If State DOTs choose to include discretionary assets in their asset management plan, they are required to comply with § 515.9(l) of the final rule. Non-compliance with § 515.9(l) will result in FHWA asking States to remove non-compliant discretionary components before FHWA makes a consistency determination.

The AASHTO suggested that FHWA indicate that State DOTs should use current data available to the State DOT when developing the plan.

The FHWA clarifies that State DOTs are to use the best available data when developing asset management plans. This topic is discussed in more detail in the section-by-section discussion of NPRM § 515.009(b).

Washington DOT stated that FHWA should not take a stringent approach for certification or the consistency determination during the initial phase-in period, and instead should recognize that the asset management development processes may evolve as data is collected and analyzed.

As discussed under NPRM § 515.011(a) and (b), FHWA realizes that during development of the initial plan all the required data may not be available. The initial plan is the simply the first step, although a very important step, toward developing a complete plan. Therefore, the final rule retains a phase-in-approach that allows State DOTs to exclude from the initial plan one or more of the necessary analyses with respect to LCP, risk management, and financial planning. However, the initial plan must include all asset management processes required under § 515.7, and that initial plan will be the basis for the first FHWA process certification decision under § 515.13(a) of the final rule.

NPRM Section 515.013(a) (Final Rule Section 515.11(a))

As described in the section-by-section discussion of NPRM § 515.011, FHWA placed all provisions on the deadlines for submitting an initial asset management plan and a fully compliant asset management plan in § 515.11(a) of the final rule. As a result, FHWA removed the language in NPRM § 515.013(a) from the final rule and renumbered the remaining paragraphs. In addition, FHWA modified the title for the section to clarify the section covers asset management plan process certification and recertification, and annual consistency reviews. All comments on the NPRM language pertaining to the deadline for the first asset management plan are addressed in the section-by-section discussion of NPRM § 515.011(a).

NPRM Section 515.013(b) (Final Rule Section 515.13(a))

This section addresses process certification and recertification under 23 U.S.C. 119(e)(6). Proposed § 515.013(b) outlined how FHWA would certify a State's processes under 23 U.S.C. 119(e)(6). In the NPRM, FHWA specifically requested comments on the proposed process certification processes. Oregon DOT generally supported the certification process. Several State DOTs urged FHWA to provide more details about the certification process, especially regarding the criteria to be used for certifying State processes and whether FHWA Headquarters or Division Offices will do the certification.[54] Maryland and South Dakota DOTs said the FHWA Division Offices should approve the States' plans. The AASHTO and the State DOTs of Vermont and Wyoming urged FHWA to allow 180 days for State DOTs to coordinate with the other agencies and MPOs in developing the process. Alaska DOT urged FHWA to remove the certification language completely. New Jersey DOT said that a plan should be certified as long as it addresses the requirements.

In response to these comments, FHWA revised the language in this provision to simplify and clarify the certification and recertification processes implementing 23 U.S.C. 119(e)(6). The FHWA revised the approach to the initial certification and recertification. In the final rule, § 515.13(a) provides FHWA will treat the State DOT's submission of its initial State-approved asset management plan under § 515.11(b) as the State DOT's request for the first certification of the State's DOT's asset management plan development processes under 23 U.S.C. 119(e)(6). Section 515.13(a) of the final rule provides State DOTs must resubmit their asset management plan development processes for a new process certification at least every 4 years, consistent with final rule § 515.13(c).

The FHWA retained language from the proposed rule that specifies when FHWA does process certification, FHWA will consider whether the State DOT's processes meet the requirements established in part 515 (*see* final rule § 515.13(a) and (a)(1)). In practice, this means FHWA will consider how the State DOT's processes align with the

[54] Colorado DOT, Connecticut DOT, Georgia DOT, Maryland DOT, Missouri DOT, North Carolina DOT, Tennessee DOT, Texas DOT.

requirements in § 515.7. The FHWA also retained, with revisions, the language in proposed § 515.013(b)(2) (*see* final rule § 515.13(a)(2)). The first change is the insertion of a sentence relocated from proposed § 515.011(a). The sentence provides that FHWA, upon request of the State DOT, may extend the 90-day period for a State DOT to cure any deficiencies in its asset management plan development processes. The second change is the addition of language that reflects the provision in 23 U.S.C. 119(e)(6)(C)(i) that stays all penalties and other legal impacts of a denial of certification during the established cure period.

The FHWA will administer the certification process through its Division Offices, and those offices will be responsible for issuing process certifications and consistency determinations under § 515.13. The Division Offices and FHWA Headquarters will work together to help ensure consistency in interpretation and application of asset management requirements. The timing provisions adopted in the final rule give State DOTs until April 30, 2018, to develop their asset management plan development processes. The FHWA believes this timeline is responsive to the commenters' concerns about the time needed for coordination of proposed processes.

NPRM Section 515.013(c) (Final Rule Section 515.13(b))

Proposed § 515.013(c) described how FHWA would make annual determinations of consistency under 23 U.S.C. 119(e)(5). The State DOTs of Missouri, Oregon, and Vermont opposed the proposed annual determination of consistency, and urged FHWA to conduct the review every 2 years instead. North Carolina DOT asserted that annual determination of consistency should not be required if the certification process is not changed.

In response, FHWA notes that, under 23 U.S.C. 119(e)(5), FHWA must make an annual consistency determination beginning the second fiscal year after the asset management rule is effective. The FHWA has no authority to eliminate this requirement.

In the NPRM, FHWA proposed making its first consistency determination not later than August 31 of the first fiscal year after the effective date of the final rule. This was to give a State DOT time to adjust its program in the event the State DOT receives a negative determination and the Federal share for NHPP projects and activities is reduced on October 1 of the following fiscal year. The FHWA requested comments on whether this time period is needed, and whether the proposed 30-day period between the determination and the start of the next fiscal year is sufficient. The AASHTO and several State DOTs opposed the NPRM's proposal to have only 30 days between the determination of consistency and the start of the next fiscal year. Most of the commenters suggested a 60-day period, and another suggested up to 90 days.[55]

In response, FHWA revised the first sentence of § 515.13(b) of the final rule to adjust the time period. For the first consistency determination, FHWA must notify the State DOT not later than August 31, 2019, of the FHWA's determination. The FHWA retained August 31 for the first consistency determination because the use of an earlier date would require FHWA to set the deadline for submission of a fully compliant asset management plan at a correspondingly earlier date than June 30, 2019. For the reasons, discussed in more detail in the section-by-section discussion of NPRM § 515.011(b), FHWA decided to give State DOTs as much time as possible to prepare their first fully compliant plans. After 2019, the final rule provides FHWA will notify the State DOT of FHWA's consistency decision not later than July 31 each year.

The AASHTO expressed concern that the NPRM did not propose any language that would allow the State DOT to appeal, rebut, or correct any findings in the consistency determination. The AASHTO pointed out that a negative determination could be based on inaccurate or outdated information. In response, FHWA added a new provision, § 515.13(b)(3), giving the State DOT an opportunity to cure deficiencies FHWA specifies as the basis for a negative consistency determination. If FHWA makes a negative consistency determination, the State DOT has 30 days to address the deficiencies by either providing additional information showing the FHWA negative determination was in error, or showing the State DOT has corrected the problem(s) that caused the negative determination. The FHWA also added a new sentence to § 515.13(b) of the final rule, specifying the FHWA consistency determination notice will be in writing and, in the case of a negative determination, will specify the deficiencies the State DOT needs to address.

[55] AASHTO, Connecticut DOT, Georgia DOT, Michigan DOT, Oregon DOT, Tennessee DOT, Texas DOT.

Proposed § 515.013(c) focused the consistency determination on plan development and plan implementation. In the NPRM, FHWA requested comments on the processes proposed. (see 80 FR 9231, at 9243, published on February 20, 2015). In part, this was in recognition of the importance of the consistency provisions to the potential assessment of asset management plan-related penalties (*see* section-by-section discussion of NPRM § 515.015). The FHWA also requested comments on methods for determining asset management plan implementation, as part of the NPRM's discussion of penalties under proposed section 515.015. (see 80 FR 9231, at 9244, published on February 20, 2015). The FHWA received a number of comments on plan implementation in response to the two requests. The FHWA consolidated those plan implementation comments and its responses, in this section.

The AASHTO suggested FHWA clarify the scope of review FHWA will use for consistency determinations. Montana DOT stated that FHWA should clarify that investment decisions and judgments made by State DOT's in the asset management plans would not be within the scope of FHWA's review of State asset management plans. The AASHTO and the State DOTs of Florida, Illinois, and Maryland argued that reporting the achievement of performance targets should be sufficient to demonstrate successful implementation of the asset management plan. The AASHTO and the State DOTs of Alabama, New Jersey, and Minnesota urged FHWA to clarify in the rule that the consistency determination will not impinge upon the State's authority over project selection. Michigan DOT said the rule should not limit the ability of State DOTs to manage pavements and bridges in a way that recognizes the integrated nature of their function and service. It further stated that while an asset management plan is an important tool for organizing the systematic management of assets, it should not restrict the ability of transportation agencies to make investment decisions, even when those decisions are not in perfect alignment with the plan.

Seven commenters addressed FHWA's request for comments on whether, as part of the implementation determination, the rule should specify one or more methods State DOTs could use to identify projects that would make progress toward achievement of the States' targets for asset condition and performance of the NHS, in accordance with 23 U.S.C. 150(d), and supporting

progress toward the national goals identified in 23 U.S.C. 150(b). The AASHTO and the State DOTs of Connecticut, Georgia, and Maryland urged FHWA to grant States flexibility to establish methods to identify projects that meet 23 U.S.C. 119(e)(2) requirements. New Jersey DOT stated that none of the alternative methods are necessary. Tennessee DOT commented that that a list identifying which programs were selected based on the asset management plan may be too simplistic, as categorizing projects as entirely bridge or pavement may be difficult. Fugro Roadware argued that the rule should give States flexibility to demonstrate implementation.

Six commenters addressed FHWA's request for comments on whether there are other possible approaches to determining whether a State has implemented its asset management plan. Georgia DOT suggested using the AASHTO Guide and including an implementation plan as one possible approach. Michigan DOT suggested that the asset management plan include a section that addresses implementation. Tennessee DOT urged FHWA to specify a method for calculating what percentage of a project can be counted toward a pavement or bridge project, as these types of repairs or reconstruction may be grouped with other system improvements. Oregon DOT encouraged FHWA to limit demonstration of consistency to having State DOTs submit an annual list of projects with a narrative describing how the projects are consistent with the asset management plan or are in accordance with another option proposed by a State DOT (and agreed to by FHWA). Maryland DOT suggested that demonstration toward performance targets is sufficient. Fugro Roadware stated that the rule should give States flexibility to demonstrate implementation.

Five commenters addressed FHWA's question on whether there may be any problems that State DOTs might anticipate in identifying projects that meet the requirements of 23 U.S.C. 119(e)(2) and ideas for resolving any anticipated problems. Georgia DOT commented that it uses lump-sum funding for pavement preservation and resurfacing, so specific projects may not be identified in the STIP unless they are larger, standalone efforts. Therefore, funding locations instead of specific projects may be an alternative methodology to meet the goal of this requirement. Tennessee DOT said that sometimes it is more advantageous to perform maintenance on a pavement or bridge as part of a larger project, even if it is not included in the asset management plan, and asked whether such a project would be considered non-compliant. The AASHTO noted a potential problem related to FHWA's role regarding the STIP, and urged FHWA to make clear in the final rule that FHWA will ensure that State DOTs implement the required asset management processes, but FHWA will not dictate project selection. Connecticut and Delaware DOTs did not foresee any problems. However, Connecticut DOT remarked that it may take time for States to achieve a well-functioning asset management system, and suggested that the rule make allowances during the initial period for States to reevaluate and modify their management systems accordingly.

Oklahoma DOT asked for further clarification of § 515.015(a) concerning implementation of asset management plans.

The FHWA appreciates these responses, and the concerns reflected in the responses. After considering these comments, FHWA decided to revise the section, which is § 515.13(b) in the final rule, to include more detailed provisions concerning the scope of the consistency determination and how the determination will be made. New language makes it clear the consistency determination is not an approval or disapproval of strategies or other decisions contained in the plan. The revisions include the addition of two paragraphs describing the consistency determination review criteria for plan development and plan implementation. Section 515.13(b)(1) of the final rule provides FHWA will review the State DOT's asset management plan to ensure that it was developed with certified processes, includes the required content, and is consistent with other applicable requirements in 23 U.S.C. 119 and part 515. Section 515.13(b)(2) of the final rule establishes that State DOTs must demonstrate implementation of an asset management plan that meets the requirements of 23 U.S.C. 119 and part 515. The final rule permits State DOTs to determine the most suitable manner for documenting and demonstrating implementation. State DOTs must submit documentation of implementation not less than 30 days prior to the deadline for the FHWA consistency determination. The State DOT must use current and verifiable information. The submission must show the State DOT is using the investment strategies in its plan to make progress toward achievement of its targets for asset condition and performance of the NHS, and to support progress toward the national goals identified in 23 U.S.C. 150(b).

In adopting an implementation test that focuses on investment strategies, FHWA declined commenters' suggestions that FHWA use achievement of condition targets as proof of plan implementation. There are two primary reasons for this decision. First, progress toward condition targets is reported on a 2-year cycle, not annually. Thus, the reporting cycle does not support using achievement of 23 U.S.C. 150(d) performance targets as the deciding factor in the annual consistency determination. Second, achievement of a State DOT's 23 U.S.C. 150(d) targets for NHS pavement and bridge conditions does not, by itself, demonstrate the State DOT has implemented the investment strategies in its asset management plan.

With respect to the requirement State DOTs use the investment strategies in their asset management plans, new § 515.13(b)(2)(i) in the final rule reflects FHWA's view that the best evidence of plan implementation is that, for the 12 months preceding the consistency determination, the State DOT funding allocations are reasonably consistent with the investment strategies in the State DOT's asset management plan. This type of demonstration takes into account the degree of alignment between the actual and planned levels of investment for various work types (*i.e.,* initial construction, maintenance, preservation, rehabilitation and reconstruction). Section 515.13(b)(2)(ii) of the final rule provides that, if a State DOT deviates from the investment strategies in its plan, FHWA may nevertheless find the State DOT has implemented its asset management plan if the State DOT shows the deviation was necessary due to extenuating circumstances beyond the State DOT's reasonable control. One example might be a sudden increase in material prices that has an impact on delivery of the entire program, forcing the State DOT to divert more funds to projects already underway. Table 2 shows possible scenarios when FHWA determines consistency under § 515.13(b) of the final rule:

TABLE 2

	Consistency with part 515	Alignment between the actual and planned level of investment for various work types	Circumstances leading to a diversion from the financial plan	Consistency determination
Year X	Met	Met	NA	There is consistency.
Year X	Met	Not Met	Justification was provided and was accepted by the FHWA.	Consistency is granted due extenuating circumstances.
Year X	Met	Not Met	Justification was provided, but was not accepted..	There is no consistency.
Year X	Not Met	NA	NA	There is no consistency.

With regard to the suggestion FHWA require the State DOTs to include an implementation plan in their asset management plans, FHWA responds that the plan's investment strategies should serve that purpose. The FHWA agrees that investment strategies typically will be at the asset class level, not the project-level. With respect to Connecticut DOT's concern it may take some time for States to reevaluate and modify their management systems to adequately service asset management plan needs, FHWA notes State DOTs may move forward immediately with whatever work may be needed to develop or modify their management systems, so that they are prepared to use them to produce the fully compliant asset management plan due on June 30, 2019.

In sum, § 515.13(b) of the final rule reflects FHWA's expectation that asset management plans will address both the condition of the NHS bridges and pavements and the performance of the NHS, to meet the requirements of 23 U.S.C. 119(e)(2). The State asset management plan is a tool to arrive at investment strategies that best addresses a State's unique situation. During the plan development, State DOTs will consider potential strategies and their associated pros and cons. The inclusion of strategies which are more risk-based than condition-based allows States to conduct a comprehensive analysis before making decisions about which investment strategies to include in its asset management plan. Therefore, FHWA sees no reason for a State's funding allocations not to be in alignment with its asset management plan. However, FHWA recognizes there may be unforeseeable circumstances that force a State to deviate from the asset management plan. In such cases, if adequately justified in accordance with § 515.13(b)(2)(ii), FHWA will not penalize a State DOT for a deviation from its asset management plan's investment strategies.

NPRM Section 515.013(d) (Final Rule Section 515.13(c))

Proposed § 515.013(d) described the requirements for plan updates and amendments to the plan, and the recertification process. Texas DOT urged FHWA to provide a definition or examples of ''minor technical corrections'' made to the plan, and asked if this included updates to the costs of pavement maintenance and rehabilitation projects. Oregon DOT suggested that FHWA define a ''material impact'' that would precipitate an amended asset management plan, and also provide guidance on the amendment process and requirements. The NEPPP said FHWA should clarify the difference between the documentation that would be required every year for a consistency determination and the documentation that would be required every 4 years for recertification of the State DOT's asset management plan development processes.

In response to these comments, FHWA first notes the final rule provides clarification on documentation and other consistency and process certification matters as discussed in the section-by-section discussion of NPRM § 515.013(a) and (b). After considering the comments, FHWA decided to revise the regulatory language to clarify the requirements in § 515.13(c) of the final rule. The FHWA revised the recertification language in first sentence and relocated that material to final rule § 515.13(a) (*see* section by section discussion of NPRM § 515.013(b)). The FHWA revised the remainder of § 515.13(c) of the final rule, to more clearly address the requirement for updates. Section 515.13(c) of the final rule provides State DOTs must update their asset management plans and asset management plan development processes at least every 4 years, beginning on the date of the initial FHWA certification of the State DOT's processes under § 515.13(a) of the final rule. Section 515.13(c) of the final rule retains the requirement, proposed in NPRM § 515.013(d), that whenever the State DOT updates or otherwise amends its asset management plan or its asset management plan development processes, the State DOT must submit the revised document to FHWA for a new process certification and consistency determination at least 30 days prior to the deadline for the next FHWA consistency determination under final rule § 515.13(b).

The FHWA also retained language excepting minor technical corrections and revisions with no foreseeable material impact from the submission requirement. The phrase ''minor technical corrections'' applies to corrections that do not require an adjustment to either investment strategies or level of investment on various work types. For example, updating the pavement performance curves with more accurate data could result in changing the levels of investment for pavement preservation and rehabilitation. However, updating data for just one single bridge is not likely to have a foreseeable ''material impact'' (*e.g.,* a significant impact on analysis results) if a State owns 500 bridges).

NPRM Section 515.015 (Final Rule Section 515.15)

Sixteen commenters addressed proposed § 515.015, which describes the statutory penalties that would be imposed on States that do not develop and implement an asset management plan consistent with the requirements of 23 U.S.C. 119 and the proposed rule, or do not adopt targets as required by 23 U.S.C. 150(d). The GTMA, New York State DOT, and Oregon DOT supported the provision as proposed. Several commenters suggested changes to the penalty provision. The AASHTO and the State DOTs of Colorado, Connecticut, and Virginia urged FHWA to delay penalties until the first recertification process. Maryland DOT remarked that FHWA should allow States more time to coordinate the internal and statewide processes associated with developing the asset

management plan. The NYSAMPO urged FHWA to work with States to address deficiencies and only issue penalties as a last resort. Tennessee DOT suggested that FHWA develop a method for giving States partial credit for improvements in progress so they are not penalized while major projects are underway but not yet completed. Virginia DOT asked for clarification of when the 18-month time period to develop and implement an asset management plan, mentioned in proposed § 515.015(b), would begin.

In response, FHWA notes the penalty provisions are statutory. The penalty under 23 U.S.C. 119(e)(5) applies if a State has not developed and implemented an asset management plan consistent with applicable requirements by the stated deadline. The transition provision penalty under MAP–21 section 1106(b) applies if the State has not adopted its 23 U.S.C. 150(d) targets, or does not have an approved asset management plan in place, by the statutory deadline. The FHWA does not have legal authority to eliminate or waive the penalty provisions. However, the penalty provision under MAP–21 section 1106(b) does permit FHWA to extend the time for compliance with that section if the State DOT has made a good faith effort to establish an asset management plan and its 23 U.S.C. 150(d) performance targets for NHS pavements and bridges. The first date the penalty under 23 U.S.C. 119(e)(5) will apply is October 1, 2019, because under the final rule, State DOTs are not required to submit a fully compliant asset management plan until June 30, 2019. The first penalty date under MAP–21 1106(b) is 18 months after the effective date of the final rule for the second performance measure rulemaking.

The FHWA recognizes many elements must come together, and many entities must cooperate with the State DOT, to create a fully compliant asset management plan. As discussed under NPRM § 515.011(a), the final rule provides State DOTs with a substantial amount of time to address the coordination, process development, data collection, target-setting, programming, and other tasks that are necessary to the development and implementation of a fully compliant asset management plan. In addition, both the process certification and consistency determination provisions in § 515.13 of the final rule provide State DOTs with the opportunity to cure deficiencies before a penalty takes effect.

To further address the comments received, FHWA clarified the timing for the first penalty by revising § 515.15(a) to insert the actual first penalty date of October 1, 2019. This replaces the NPRM's more general language relating to the penalty beginning the second fiscal year after the effective date of this rule. The FHWA also revised the last clause of that section to better align with the statutory language specifying the penalty is a reduction in Federal share for ''any project or activity carried out by the State in that fiscal year.'' Similarly, FHWA made clarifying revisions in § 515.15(b), which implements the penalty provision in MAP–21 section 1106(b).

The FHWA reworded § 515.15(b)(1) to clarify the applicability of the provision and specify when the penalty, if triggered, would terminate. Under § 515.15(b)(1) of the final rule, the FHWA will not approve projects using NHPP funds on or after the date 18 months after the effective date of the 23 U.S.C. 150(c) final rule in the second performance measure rulemaking unless the State DOT has developed and implemented an asset management plan that is consistent with the requirements of 23 U.S.C. 119 and this part, and established the performance targets for NHS pavements and bridges required under 23 U.S.C. 150(d). If this penalty is triggered, and FHWA must suspend NHPP funding approvals, and the penalty will terminate once the State DOT has developed and implemented an asset management plan that is consistent with the requirements of 23 U.S.C. 119 and this part and established the performance targets for NHS pavements and bridges required under 23 U.S.C. 150(d). As MAP–21 section 1106(b) is a transition provision, once the State has met the requirements of that statute, there is no further risk of triggering the section 1106(b) penalty. In § 515.15(b)(2), FHWA revised the wording by changing ''extend the 18-month period'' to ''extend the deadline,'' and clarified the phrase referring to the performance targets for NHS pavements and bridges required under 23 U.S.C. 150(d).

The FHWA received a number of comments under this section relating to how FHWA might determine whether a State DOT has implemented its asset management plan. Plan implementation is relevant to both the consistency determination under § 515.013 and penalties under § 515.015. The comments on this topic are discussed in the section-by-section discussion of NPRM § 515.013(c).

Hawaii DOT suggested that FHWA fund an emergency project at the reduced Federal share when a State DOT must implement a project due to an emergency event but the emergency response funds are not available and the State does not have access to enough non-Federal funds.

In response, FHWA notes that this comment appears to relate to eligibility and Federal share under the Emergency Relief Program in 23 CFR part 668, and thus relates to matters outside the scope of this rulemaking.

Oregon DOT asked for clarification of the role of FHWA Division Offices and Headquarters staff in making decisions related to the asset management plan and imposing penalties.

The FHWA will administer the certification process through its Division Offices. The Division Offices will be responsible for issuing process certifications and consistency determinations under § 515.13. The Division Offices and FHWA Headquarters will work together to help ensure consistency in interpretation and application of asset management requirements.

NPRM Section 515.017 (Final Rule Section 515.19)

Twelve commenters addressed proposed § 515.017, which described practices that State DOTs would be encouraged to consider to support the development and implementation of asset management plans. The GTMA strongly supported the provision as proposed. However, most of the commenters addressing this section said this section consists of non-prescriptive guidance and is therefore inappropriate to include in a regulation. They suggested that FHWA omit the provision from the final rule and instead provide separate guidance.[56] The AASHTO and Connecticut DOT expressed concern that if § 515.017 remains in the final rule, FHWA could pressure States to take non-required steps that are set forth in the section. New Jersey DOT did not ask for this section of the proposed rule to be deleted, but instead asked FHWA to clarify in the final rule that this section simply provides suggestions and would not impose any additional requirements on State DOTs.

In response, FHWA points to its recent ''State DOT Gap Analysis'' initiative, which has helped States significantly with their asset management plan development activities. The FHWA believes that all States could benefit from the types of practices recommended, but not required, in the section. Therefore, FHWA retained the proposed language

[56] AASHTO, NYSAMPO, Alaska DOT, Colorado DOT, Connecticut DOT, Delaware DOT, Florida DOT, Hawaii DOT, Maryland DOT, Oregon DOT.

in § 515.19 of the final rule. However, FHWA has added a sentence to § 515.19(a) that specifically states the activities described in the section are not requirements.

B. Periodic Evaluation of Facilities Repeatedly Requiring Repair and Reconstruction Due to Emergency Events, Part 667 (NPRM Section 515.019)

Section 515.019 of the NPRM contained the proposed provisions for implementation of MAP–21 section 1315(b), which requires periodic evaluations to determine if there are reasonable alternatives to roads, highways, and bridges that have repeatedly require repair and reconstruction activities due to emergency events. Comments received on the proposed § 515.019 demonstrated that FHWA needed to reconsider the location of the implementing regulations. Some commenters found the proposed regulation confusing with respect to the relationship between these MAP–21 section 1315(b) evaluation requirements and the proposed asset management regulations implementing 23 U.S.C. 119(e). Similarly, it was apparent there is confusion about the relationship between MAP–21 section 1315(b) and title 23 Emergency Relief Program funding eligibility provisions in 23 U.S.C. 125 and implementing regulations at 23 CFR part 668.

As a result of these comments, FHWA decided to relocate the MAP–21 section 1315(b) implementing regulations to part 667, thereby giving the regulations their own part, separate from both the asset management regulations in part 515 and the Emergency Relief Program regulations in part 668. As a result of the relocation, as well as changes FHWA made in response to NPRM comments, the final rule substantially reorganizes and revises the section 1315(b) implementing regulations. Table 1 shows the changes in numbering in the final rule. The FHWA discusses other comments received, and the changes made in response to those comments, below.

NPRM Section 515.019(a) (Final Rule Section 667.1)

Section 667.1 of the final rule describes the obligation of each State, acting through its State DOT, to perform periodic statewide evaluations. In the final rule, the description of the overall State DOT obligation to carry out statewide evaluations is revised to more closely align with the language in MAP–21 section 1315(b). The reference to eligibility for funding under title 23, U.S.C., that was in NPRM § 515.019(a) is removed from the regulation. The FHWA made this change because FHWA created a definition of ''roads, highways' and bridges'' in § 667.3 of the final rule, and the definition addresses eligibility under title 23. For the same reason, the definition of ''emergency event'' that was in NPRM § 515.019(a) is removed from the general provision in § 667.1 of the final rule, and placed in the definitions section in § 667.3.

Seventeen commenters addressed the general provision on statewide evaluations. Several States asserted that FHWA should remove the evaluation section from the rule entirely.[57] The State DOTs of Maryland, New York State, and South Dakota recommended that, instead of a separate rule on evaluations, FHWA use the risk analysis in asset management plans as the means for fulfilling section 1315(b) requirements. Alaska and Delaware DOTs asserted that FHWA should remove the provision from the asset management rule and instead address the matter in the Emergency Relief Program.

In response, in the final rule FHWA relocated the MAP–21 section 1315(b) implementing regulations to 23 CFR part 667. The reasons for choosing this approach include: (a) MAP–21 section 1315(b) applies to more types of facilities (roads, highways, or bridges that repeatedly require repair and reconstruction activities) than the minimum assets that must be included in an asset management plan under 23 U.S.C. 119(e) (pavement and bridge assets on the National Highway System in the State); and (b) section 1315(b) is not limited by the Emergency Relief Program provisions in 23 U.S.C. 125 or 23 CFR part 668, which address eligibility for special funding and administration of those funds. The MAP–21 section 1315(b) has no connection to past, present, or future eligibility of repairs for title 23 emergency relief funding.

Washington State DOT supported the need for a network evaluation to identify locations where emergency events have occurred or may occur. The GTMA stated that it supports the provision for periodic evaluations of facilities requiring repair or reconstruction due to emergency.

The FHWA agrees, and believes the evaluations will provide useful information for planning transportation investments and developing projects.

Mississippi DOT stated that requiring States to ensure evaluations are done on State and local roads would place an unfair burden on States. The commenter observed that including locally owned facilities in the evaluations would not assure any remedial action will occur, and that it likely would prove difficult to obtain necessary data from local entities. The NYSAMPO commented that MPOs should be engaged in the development of the evaluation and determination of ''reasonable alternatives'' to repair and rehabilitation, because metropolitan planning organizations have the data, knowledge, and capability to do this work in their metropolitan planning area.

The FHWA considered these comments, but has not made any change in the responsible entity under the final rule. Under § 667.1 of the final rule, State DOTs remain responsible for performing the statewide evaluations required by MAP–21 section 1315(b), as was described in the NPRM (see 80 FR 9231, at 9245, published on February 20, 2015). The FHWA agrees that, if the statutory purpose and requirements are to be fulfilled, States will need to develop effective arrangements with MPOs and other entities not only for sharing data, but also for identifying reasonable alternatives. The FHWA acknowledges that States may find it challenging to obtain data from non-State owners, and this final rule addresses the issue of unavailable data (*see* discussion of § 667.5 of the final rule, below).

Mississippi DOT asked FHWA to identify the extent to which State DOTs will be required to address assets within areas that are periodically subjected to ''emergency events.''

In response, FHWA notes MAP–21 section 1315(b) does not include any express requirement for remedial action to address facilities identified through the evaluation process. However, FHWA believes a different kind of obligation is imposed because the statute requires this rulemaking to help conserve Federal resources and protect public safety and health. For that reason, this final rule includes provisions addressing State DOT and FHWA consideration of the results of the evaluations (*see* discussion of NPRM § 515.019(d)).

Hawaii DOT suggested that if the intent of the provision is for NHPP funding to be spent to address improvements related to climate change, or to respond to or protect against emergency or extreme weather events, then these considerations are already included in existing project planning

[57] DOTs of Alaska, Connecticut, Delaware, Georgia, Oklahoma, Maryland, New York State, and South Dakota.

and programming (*i.e.,* the long range planning process, the FHWA Emergency Relief Manual, and the FHWA Hydraulic Engineering Circulars).

In response, FHWA notes MAP–21 section 1315(b) is not part of the statute establishing the NHPP (23 U.S.C. 119), and section 1315(b) does not specify any funding eligibility or funding source for work undertaken on the facilities covered by the statute. The FHWA also believes the enactment of MAP–21 section 1315(b) indicates Congress wanted to focus additional attention on avoiding the expenditure of funds on repair and reconstruction activities that fail to reduce or eliminate the risk of repeated damage to a facility from emergency events.

In the NPRM, FHWA asked for comments on the question whether the final rule should provide greater detail on the required content for the evaluations. The FHWA requested commenters provide specific suggestions for elements they thought FHWA ought to require in the evaluations (see 80 FR 9231, at 9245, published on February 20, 2015). Ten commenters responded to FHWA's request. The AASHTO and several State DOTs urged FHWA not to specify the required content for the evaluations in greater detail.[58] Oregon DOT suggested that the rule specify what is normally to be contained in an evaluation, but also direct States to base evaluations on the best information and approach possible, and to discuss the reasons for using the approach selected to complete an evaluation. Georgia DOT asserted that additional guidance is needed regarding periodic evaluations to cover existing roads, highways, and bridges eligible for funding under title 23, including guidance on the parameters for evaluation of reasonable alternatives.

The FHWA has considered these comments, and added a definition of ''evaluation'' to the final rule (§ 667.3(b)), but decided not to establish detailed content requirements for the evaluations at this time. The final rule retains the approach proposed in the NPRM of providing broad minimum requirements, and giving States the flexibility to determine the specifics as they develop evaluations that meet those broad minimum requirements. The FHWA will monitor the need for further guidance.

Several State DOTs, in responding to FHWA's request for comments on evaluation content, did ask FHWA to define certain terms, which would have an impact on how the evaluations are done. The FHWA response to those requests appears in the section-by-section discussion of NPRM § 515.019(a).

NPRM Sections 515.019 (a) and (b) (Final Rule Section 667.3)

The final rule adds a new section devoted to definitions specific to part 667. The NPRM defined two terms, ''emergency event'' and ''reasonable alternatives'' (§ 919.019(a) and (b) of the NPRM). The final rule includes revised versions of those definitions in §§ 667.3(c) and 667.3(d). The final rule adds definitions for the terms ''catastrophic failure'' (§ 667.3(a)), ''evaluation'' (§ 667.3(b)), ''repair and reconstruction'' (§ 667.3(e)) and ''roads, highways, and bridges'' (§ 667.3(f)). Each definition is discussed below.

Six commenters addressed the proposed definition of ''emergency event'' in NPRM § 515.019(a). Three commenters called for the rule to address infrastructure failures caused by human actions. Hawaii and North Carolina DOTs asked whether FHWA intended the definition to encompass events caused by human error (*e.g.,* over-height vehicles hitting an overpass, a bridge pier being struck by a barge). The Atlanta Regional Commission stated that infrastructure failure caused by humans (*e.g.,* traffic crash, sabotage) should not be considered ''emergency events'' for the purposes of the evaluation requirements. Georgia DOT said FHWA needs to clarify the types and levels of emergencies that would meet the definition. Maryland DOT said an event should meet the definition if significant damage is the direct result of a weather-related, State-declared state of emergency.

In response, FHWA notes the proposed rule defined ''emergency event'' as ''a natural disaster or catastrophic failure due to external causes resulting in an emergency declared by the Governor of the State or an emergency or disaster declared by the President of the United States.'' The FHWA concluded there is no need to revise that definition, but FHWA did see the need to add a definition of ''catastrophic failure'' to the final rule to clarify the scope of that term. A ''catastrophic failure'' under the final rule means a sudden failure of a major element or segment of a road, highway, or bridge due to an external cause. The definition includes external events due to both human and natural causes, but excludes human-caused catastrophic failures that are primarily attributable to gradual and progressive deterioration or lack of proper maintenance. Thus, an ''emergency event'' under the final rule includes catastrophic failures caused by human error or related factors (*e.g.,* trucks striking bridge girders), but does not include catastrophic failures caused by a failure to properly care for a facility.

The FHWA does not believe the inclusion of human-caused events will make the evaluation requirement overly broad because the definition also requires the event to be accompanied by a declaration of emergency or disaster. Both Federal and State governments have used declarations of emergency or disaster in cases involving human-caused disasters. For example, in 2007, the I–35 bridge collapse in Minnesota was declared a disaster by both the President of the United States and by Minnesota Governor Pawlenty. However, the primary focus of the implementing rule continues to be on disasters involving acts of nature, such as floods, hurricanes, earthquakes, tornados, tidal waves, severe storms, or landslides. The FHWA decided not to adopt suggestions that the definition of ''emergency event'' include some form of threshold for degree or cost of damage. The FHWA concluded that the State and Federal criteria for disaster and emergency declarations provide adequate safeguards against the inclusion of minor events within the scope of the evaluation rule.

The FHWA defines ''evaluation'' in the final rule to assist State DOTs in understanding the basic elements required for an adequate evaluation under part 667. Consistent with the purpose of MAP–21 section 1315(b), a part 667 evaluation requires an analysis that identifies and considers any alternative that will mitigate, or partially or fully resolve, the root cause of the recurring damage to the particular facility. The evaluation also must identify and consider the costs of achieving such solution, and the likely duration of the solution. Finally, as proposed in NPRM § 515.019(a), the evaluation must consider the risk of recurring damage and cost of future repair under current and future environmental conditions.

Two commenters addressed the proposed definition of ''reasonable alternatives'' in NPRM § 515.019(b), which describes minimum factors for determining whether there is a reasonable alternative to an existing road, highway, or bridge that repeatedly requires repair and reconstruction activities from emergency events. Georgia DOT requested clarification on what FHWA would consider to be an acceptable reasonable alternative. Mississippi DOT asked what would be

[58] AASHTO, Connecticut DOT, Georgia DOT, Maryland DOT, New Jersey DOT, Oregon DOT, Virginia DOT.

an acceptable probability that major repairs will be required in the future, and what cost threshold would be considered reasonable to achieve a practical probability that damage will not occur in the future. Colorado DOT stated that the proposed provision might conflict with procedures in FHWA's Emergency Response Manual, and asked if ''reasonable alternatives'' could be considered betterment activities, and thus eliminate consideration of socioeconomic factors from alternatives. The commenter indicated transportation asset management activities require socio-economic inputs, and result in alternatives recommendations that do not qualify under the Emergency Relief Program. A third commenter, Oregon DOT, suggested FHWA should rewrite the rule to encourage a more general approach to determining the response to emergency events that is based on local circumstances or connect section 1315(b) requirements with Emergency Response or the Federal Emergency Management Agency (FEMA) funding requests.

In response to the request for FHWA to identify what would be an acceptable ''reasonable alternative,'' or what level of expenditures would be reasonable in order to avoid future damage, FHWA notes the definition of ''reasonable alternative'' in the rule is intended to provide States with flexibility. The FHWA believes the rule will permit States to determine, within certain broad parameters, what options are reasonable in light of their particular situations. The definition permits States to take overall cost and relative effectiveness of alternatives into account. Thus, the final rule definition in § 667.3(d) retains the NPRM's description of three criteria FHWA interprets as fundamental to the overall objective of MAP–21 section 1315(b), which is to conserve Federal resources and protect public safety and health.

With regard to the request for identification of a probability factor, FHWA notes that the evaluation of reasonable alternatives should include consideration of both incremental and total solutions. This means considering whether there is one or more alternatives that will mitigate, or partially or fully resolve, the root cause of the recurring damage. The evaluation of alternatives includes consideration of the cost of the alternatives and the likely extent and duration of the potential solutions. The FHWA did revise the definition of ''reasonable alternatives'' to clarify that actions that partially address the three criteria can be ''reasonable alternatives.'' The newly added definition of ''evaluation'' also incorporates these principles. However, FHWA does not believe it is necessary or desirable to require States to achieve a particular level of certainty or probability. The FHWA also added language to the final rule's definition of ''reasonable alternatives'' (§ 667.3(d)(3)) recognizing that these types of considerations are typically part of the planning and project development process.

Finally, FHWA reiterates that MAP–21 section 1315(b) is not a part of the Emergency Relief Program, and eligibility under the Emergency Relief Program has no effect on the applicability of the evaluation regulation. The two statutory schemes have very different purposes and requirements. The evaluation is intended to identify and address alternatives to facilities that have experienced recurring damage, and to lead to long-term solutions, not to address transportation needs immediately following a particular emergency event. Identification of a reasonable alternative pursuant to the section 1315(b) evaluation process does not automatically mean the alternative qualifies for funding under the Emergency Relief Program. The Emergency Relief Program has its own standards for funding eligibility, as reflected in 23 U.S.C. 125.[59] For these reasons, there is no conflict between the evaluation regulation and Emergency Relief Program regulations in 23 CFR part 668, and there is no need to consider whether a repair and reconstruction under part 667 involves a betterment.

The comments suggest, however, a need to emphasize that the section 1315(b) evaluation of reasonable alternatives is only one of several potential alternatives analysis requirements that may apply to proposed work on an affected facility. Facilities subject to the section 1315(b) requirement for evaluation of reasonable alternatives may also be subject to other Federal requirements for the consideration of alternatives that have their own standards for when and how alternatives are considered.[60] The FHWA and State DOTs should work together to ensure applicable alternatives analyses requirements are identified and coordinated. This should occur early enough in the planning and project development process to make the required alternatives analyses meaningful, avoid duplication in the review process, and ensure the review process complies with the applicable standards and timing for each requirement. Thus, FHWA encourages State DOTs to consider the various alternatives analysis requirements that may apply as the proposed project moves through the environmental review process, so that reasonable alternative(s) identified under section 1315(b) are tailored to meet other applicable requirements as well.

Roads, Highways, and Bridges

The FHWA received comments from thirteen parties relating to the scope and applicability of the rule. Those comments indicated a need for greater clarity in the rule about which roads, highways, and bridges are covered by part 667. The AASHTO and several State DOTs urged FHWA to make MAP–21 section 1315(b) implementing regulations apply only to NHS assets.[61] A few of these commenters cited concerns about data access or availability as the reasons for this suggestion. Connecticut DOT remarked that if the evaluation section remained in the final rule, it should only focus on assets addressed as part the asset management plan. Washington State DOT asked for additional clarification of the term ''all other roads, highways and bridges,'' in the proposed rule, including whether this phrase is meant to include all public roads (*e.g.,* State non-NHS routes, county routes, city routes). West Piedmont Planning District Commission suggested that tunnels be subject to evaluation. Tennessee DOT asked FHWA to define roads and highways in the context of the evaluation regulations, asserting that elsewhere in the proposed asset management rule only pavements and

[59] Amendments to the statute in MAP–21 substantially enhanced the availability of Emergency Relief Program funding, extending it to cover the cost of repair and reconstruction that meets current geometric and construction standards required for the types and volumes of traffic that the facility will carry over its design life. The program still requires economic justification to support funding eligibility for work exceeding the ''comparable facility'' standard in 23 U.S.C. 125(d)(2).

[60] Examples include NEPA (requires an evaluation of reasonable alternatives for certain classes of action when there is a major Federal actions, such as an FHWA funding decision and other approval); section 404 of the Clean Water Act (requires evaluation of practicable alternatives to discharge of dredge and fill into waters of the United States); and Executive Order 11988, as amended by Executive Order 13690 (requires consideration during NEPA, for all classes of action, of alternatives to avoid adverse effects and incompatible development in the floodplain; includes an ''only practicable alternative'' provision).

[61] AASHTO, Connecticut DOT, Delaware DOT, Maryland DOT, Missouri DOT, Mississippi DOT, DOTS of ID, MT, ND, SD, and WY (joint submission); Wyoming DOT; South Dakota DOT; Oregon DOT; Florida DOT.

bridges are considered mandatory assets.

In response, FHWA notes MAP–21 section 1315(b)(1) requires the evaluation of reasonable alternatives for ''roads, highways, or bridges that repeatedly require repair and reconstruction activities.'' The statute makes no distinction based on NHS status, ownership, or inclusion in a State's asset management plan. For that reason, the final rule does not limit the definition of ''roads, highways, and bridges'' to the NHS or to State-owned routes. Section 667.3(f) of the final rule defines ''roads, highways, and bridges'' for purposes of part 667 as meaning a highway, as defined in 23 U.S.C. 101(a)(11), that is open to the public and eligible for financial assistance under title 23, U.S.C.; but excluding tribally owned and federally owned roads, highways, and bridges. The definition draws from language on title 23 eligibility that FHWA proposed in NPRM § 515.019(a), as well as from the definitions of ''Federal-aid highway'' and ''highway'' in 23 U.S.C. 101(a). However, unlike the term ''Federal-aid highway'' under 23 U.S.C. 101(a)(6), the final rule's definition includes highways or roads functionally classified as local roads or rural minor collectors because the statute does not provide a basis for excluding them.

The definition in the final rule has a broader scope than just the pavements and bridges covered by the asset management final rule because, unlike the asset management plan minimum requirements under 23 U.S.C. 119(e), MAP–21 section 1315(b) does not contain language limiting the components subject to evaluation. For that reason, the definition in the final rule is broad in terms of included features, and incorporates the definition of ''highway'' in 23 U.S.C. 101(a)(11). Thus, the final rule definition includes the component parts such as tunnels and drainage structures.

The definition in the final rule adopts the NPRM's proposed exclusion for federally owned roads (*see* NPRM § 515.019(c)), and adds an express exclusion for tribal roads. The NPRM preamble discussed excluding federally owned roads (see 80 FR 9231, at 9244 (February 20, 2015)), but did not expressly discuss an exclusion of tribally owned roads. The FHWA received no comments in opposition to the exclusion of federally owned roads, and Connecticut DOT commented in support of the exclusion.

The FHWA decision on these exclusions took into account the many comments expressing concern about the scope of the regulation and the potential burdens on the State if the State were required to evaluate roads owned by other parties. The FHWA appreciates the challenges this may present, and believes those challenges could potentially be much greater in the case of federally owned and tribally owned facilities because of the government-to-government aspects of the parties' relationships. Furthermore, there are a number of fundamental differences between the Federal-aid highway program that creates funding eligibility for State and local roads, highways, and bridges, and the title 23 funding programs focused on federally owned and tribally owned roads, highways, and bridges. Given these factors, FHWA concluded evaluation of federally owned and tribally owned roads should not be a State responsibility. The FHWA will address evaluation of federally owned and tribally owned facilities separately from this rulemaking.

In summary, ''roads, highways, and bridges'' under part 667 means a highway, as defined in 23 U.S.C. 101(a)(11), that is open to the public and eligible for financial assistance under title 23, U.S.C. The term excludes tribally owned and federally owned roads, highways, and bridges. The FHWA views all facilities meeting the definition of ''roads, highways, and bridges'' in this final rule as subject to the evaluation requirement. The FHWA recognizes this means State DOTs will have to work cooperatively with such owners to carry out the evaluations. However, many aspects of the Federal-aid highway program, such as the transportation planning process and performance management, require State and local governments to work together toward a common goal. Nonetheless, FHWA acknowledges there may be challenges in doing a statewide evaluation of roads, highways, and bridges as defined in the final rule. In recognition of those challenges, in the final rule FHWA changed the timing and frequency requirements for evaluations of roads, highways, and bridges that are not on the NHS. This decision is discussed below under final rule § 667.5, which describes the section added to the final rule to address data time period, availability, and sources.

North Carolina DOT asked for further clarification of the term ''site,'' specifically as it relates to roads and pipes. Tennessee DOT requested guidance on what would constitute a ''site.'' Neither the NPRM nor this final rule use the term ''site.'' The FHWA believes the commenters asked about ''site'' because that term is used in FHWA's Emergency Relief Program regulations (23 CFR part 668) and its *Emergency Relief Manual.* Because the term is not used in this final rule, FHWA does not believe there is a need to define it.

Mississippi DOT requested that FHWA define the phrase ''repeatedly require repair.'' This phrase appears both in MAP–21 section 1315(b) and in this rule. The FHWA interprets the comment as asking for a response on two issues. First, the applicable time period within which repair and reconstruction activities would have to occur in order to trigger application of the evaluation requirement. The FHWA received related comments in connection with its request for comments on whether FHWA should establish a limit to the length of the ''look back'' States DOTs will do under the rule to determine whether a road, highway, or bridge has been repaired or reconstructed on two or more occasions. All of these comments, and FHWA's responses, are discussed below in the section-by-section discussion of final rule § 667.5.

The FHWA interprets the second part of the Mississippi DOT question as asking what type of work qualifies as ''repair.'' The Mississippi and Tennessee DOTs requested clarification on what would constitute a repair, including repairs to infrastructure other than pavement or a bridge; and whether the term includes minor repairs addressed by State forces through routine maintenance, or debris removal. Tennessee DOT requested a definition for the term ''repair.'' The NYMTC suggested setting a dollar threshold for the cost of repairs that would trigger the evaluation.

After considering these comments, FHWA decided to make two changes to the rule. First, FHWA revised the term ''repair or reconstruction'' to ''repair and reconstruction.'' The FHWA made this change because the statute uses ''and'' rather than ''or'' and the use of ''or'' could be interpreted as expanding the scope of the statute. The FHWA also decided to add a definition of the statutory phrase ''repair and reconstruction'' to the final rule. The term plays a central role in determining which facilities will be subject to evaluation, and comments indicated some uncertainty among the States about the scope of the term. In developing a definition, FHWA considered that work meeting the MAP-21 section 1315(b) statutory standard of ''repair and reconstruction'' must include at least some aspect of reconstruction (rebuilding) work. In addition, FHWA also considered the fact that many types of repair work fall under the term ''reconstruction.''

Finally, FHWA does not believe section 1315(b) was intended to capture minor repair work or routine maintenance work.

As a result of the above considerations, FHWA defines ''repair and reconstruction'' in the final rule as meaning permanent repairs such as restoring pavement surfaces, reconstructing damaged bridges and culverts, and replacing highway appurtenances. The definition explicitly excludes repair work meeting the definition of ''emergency repairs'' in 23 CFR 668.103. The exclusion helps ensure ''repair and reconstruction'' focuses on work that is more substantial than activities such as routine maintenance or debris removal. The FHWA also notes that, when a State DOT determines whether a facility that has had repair and reconstruction work on two or more occasions is subject to the evaluation requirement, it is necessary to look at other portions of the rule as well. To fall within the evaluation rule, the repair and reconstruction activity must be carried out as a result of an emergency event (as that term is defined in the final rule). By definition, this eliminates any repair and reconstruction activity performed as routine maintenance (including repair of minor damage typically expected from normal seasonal weather conditions), preventative maintenance, or reconstruction due to the normal ''wear and tear'' effects experienced over the life of a facility.

Vermont Agency of Transportation recommended that FHWA add a definition of ''resilience'' to the rule, to acclimate States to the terminology and its integration as a transportation value and performance metric. The FHWA agrees the concept of resilience, and its integration in transportation planning and project development, are important. The FHWA expects resilience will be a consideration in the evaluation of reasonable alternatives under part 667, particularly resilience to extreme weather events and climate change. The FHWA does not believe it is necessary to define the term in part 667 because it is defined in FHWA Order 5520, *Transportation System Preparedness and Resilience to Climate Change and Extreme Weather Events* (December 15, 2014). The Order defines ''resilience'' as ''. . . the ability to anticipate, prepare for, and adapt to changing conditions and withstand, respond to, and recover rapidly from disruptions.'' That definition can be readily applied, without change, to activities under part 667.

Final Rule Section 667.5

The proposed rule did not include any time limit on the scope of the evaluations. In the NPRM, FHWA requested comments on whether FHWA should establish a limit to the length of the ''look back'' State DOTs will do in order to determine whether a road, highway, or bridge has been repaired or reconstructed on two or more occasions. The FHWA also requested comments on what would be an appropriate and feasible length of time. Twenty-six commenters addressed FHWA's questions.

Eighteen commenters agreed that FHWA should establish a limit to the length of the ''look back.'' The range of comments on an appropriate and feasible length of time varied from as few as 5 years, to nearly 40 years. Commenters who suggested shorter lengths of time for the look-back expressed concern that some States have issues regarding the availability or reliability of data on repairs or reconstructions due to emergency events, or that it would be time-consuming to conduct an inventory for a longer period of time. The specific comments suggested the following time frames:

- The State DOTs of Mississippi, Tennessee, and Virginia suggested that the look-back period should be 5 years.
- Delaware DOT stated that the period should be between 5 and 10 years.
- Four State DOTs, an association of governments, and one MPO recommended that the period be capped at 10 years.[62]
- North Carolina DOT and Oregon DOT suggested 20 years for the length of the length of the look back.
- The remaining commenters who provided feedback, including AASHTO and nine State DOTs, suggested the length of time be less than 40 years.[63] However, one of the commenters, while agreeing with the stance of less than 40 years, suggested a substantially shorter timeframe (*e.g.,* 7 years). The rationale for limiting the length of time to less than 40 years was that this time period aligns approximately with the Disaster Relief Act of 1974, and that any time period longer than 40 years would require State DOTs to examine older, non-computerized records.

West Piedmont Planning District Commission stated that FHWA did not need to establish a limit on the length of the look-back, and Missouri DOT commented that FHWA should provide flexibility in the time for the evaluation period.

Several State DOTs commented on the question of time periods, but focused on aspects other than whether FHWA should establish a look-back limit.[64] Instead, most of them expressed the need for more clarification, specifically that the rule should define the frequency interval by which repeated repairs/reconstruction should be measured (*e.g.,* two repairs during a period of 10 years). Texas DOT said FHWA should clarify the interval threshold for triggering an evaluation, meaning FHWA should specify the length of time between two repairs or reconstructions due to an emergency. Mississippi DOT requested that FHWA identify the applicable time period within which repair or reconstruction activities would have to occur in order to trigger application of the evaluation requirement.

In response to these comments, FHWA considered both the time period that should be covered by an evaluation (the ''look-back'' period), and whether the rule should establish a parameter for how close in time repairs or reconstruction on a facility must occur in order to fall under the regulation. Based on the comments received and the purpose of the statute, FHWA determined a 20-year ''look back'' is the most appropriate time span for the first evaluation. The FHWA chose the 20-year period for the starting point because FHWA shares commenters concerns about the availability of data, especially for older work. The necessary repair and reconstruction records likely are reasonably available for at least the last 20 years. Many of those records also are likely to be in electronic form, which will facilitate analysis. However, to further address commenters' concerns, FHWA included provisions on data availability in the final rule, as discussed below. The FHWA also elected to adopt a specific starting date for the look-back, to avoid any potential uncertainty about the starting point for the evaluations.

Accordingly, final rule § 667.5(a) establishes January 1, 1997, as the beginning date for the evaluations. The final rule also provides the end date for evaluations can be no earlier than December 31 of the year preceding the deadline for completion of the evaluation in question. Under these two provisions, the first State DOT

[62] Atlanta Regional Council, Washington State DOT, South Dakota DOT, New Jersey DOT, Maryland DOT, New York State Association of MPOs.

[63] AASHTO; Colorado DOT, Connecticut DOT, Florida DOT; North Dakota DOT; DOTs of ID, MT, ND, SD, WY (joint submission).

[64] Georgia DOT, Hawaii DOT, Minnesota DOT, Texas DOT, Vermont DOT, Wyoming DOT.

evaluation will cover a period of approximately 20 years. Subsequent evaluations will build on the first evaluation by continuing to use the January 1, 1997 starting date.

The FHWA agrees with commenters it would be useful to clarify in the final rule whether there is a frequency interval between repair/reconstruction incidents that determines whether a facility must be included in the evaluation (*e.g.,* two repairs during a period of 10 years). The comments make it evident adding a specific provision on this question would help eliminate potential confusion and uncertainty about the requirements under the rule. In deciding how to address this issue, FHWA considered that one important objective of the rule is to focus evaluation efforts on facilities where repeated repair and reconstruction activities suggest the presence of some underlying problem or condition. In cases where there is an underlying problem or condition, such as location or design, contributing to the damage, repeated reinvestment without considering alternative actions is potentially wasteful. The amount of time that elapses between events may be, or may not be, relevant to whether there is a need to consider alternative actions.

After balancing the considerations raised by the comments, FHWA adopted a requirement in the final rule that State DOTs must include all facilities that have required repair and reconstruction due to emergency events on two or more occasions during the time period covered by an evaluation. The FHWA concluded this choice will help ensure State DOTs have a growing body of data to help them recognize potential trends in damage to particular facilities, and will ensure evaluations over time capture any facilities suffering a second damage incident after the date of the first evaluation. In the case of emergency events, particularly natural disasters, it often is necessary to look at long periods of time to ensure weather and other relevant trends are recognized. However, FHWA acknowledges the length of time between the incidents may affect a State DOT's assessment of what may be a reasonable alternative, as well as the priority a State DOT may assign to resolving the problems affecting the facility.

For example, when incidents of repair and reconstruction due to emergency events for a facility occurred more than 20 years apart, even if the root cause of the damage was the same in both incidents, the State DOT evaluation may conclude addressing the underlying problem is a low priority because the probability of recurrence is relatively low. In addition, State DOT evaluations should take into account all relevant facts in assessing reasonable alternatives, and that assessment may indicate that the two incidents do not reflect a common underlying problem that can be mitigated, or partially or fully solved, through one course of action. Accordingly, § 667.5(a) of the final rule provides that, subject to the timing provisions in § 667.7 of the final rule, evaluations must include any road, highway, or bridge (as defined in the rule) that on or after January 1, 1997, required repair and reconstruction on two or more occasions because of emergency events.

Several commenters raised concerns related to the availability of the data needed to perform the required evaluations. Some commenters, like Tennessee DOT, stated the evaluation period should be short enough to ensure good records existed for repairs and reconstruction performed as a result of emergency events. Others, like Mississippi DOT, stated it would likely prove difficult to obtain necessary data from local entities. Several NPRM commenters referred to their concerns about data access or availability as the reasons for suggesting evaluation requirements apply only to NHS pavements and bridges. As a result of the comments received on the NPRM, FHWA added a provision to § 667.5(b) of the final rule, limiting the State DOT's responsibility to using reasonable efforts to obtain the data needed for the evaluations. If the State DOT determines the needed data is not reasonably available for a road, highway, or bridge, the State DOT must document that fact in the evaluation.

The NPRM did not propose to specify data sources or data requirements in the rule. The FHWA requested comments on whether the rule should include such provisions, and what data sources would be most appropriate. Ten commenters addressed FHWA's questions. The AASHTO and several State DOTs remarked that the rule should not address the types of data that should be considered.[65] Three State DOTs said the regulation should address the types of data that should be considered in the evaluation. Washington State DOT requested that FHWA specify data sources regarding locations that have been declared a state of emergency and the projects on the NHS that have been funded through emergency conditions. Tennessee DOT suggested that only FHWA or FEMA emergency funds records should be considered, as they would coincide with the presidential disaster declaration requirement in the proposed rule. Oregon DOT urged that the rule should only specify the types of data that normally should be considered, and that the rule direct State DOTs to base evaluations on the best data available, to provide a discussion of data sources used, and a discussion of problems or limitations associated with carrying out the evaluations.

In response, FHWA notes that States will have the most comprehensive knowledge about both State and federally declared disasters affecting their facilities, as well as about which events involved damage to title 23-eligible transportation facilities in the State. Therefore, in the final rule FHWA does not set a requirement for the types of data States should use. Under § 667.5(c) of the final rule, States may use whatever data types and sources they believe useful. The FHWA interprets this provision as implicitly requiring the States to apply reasonable data quality standards in selecting what data will be useful. The final rule indicates available data sources include reports and other information required to receive Emergency Relief Program funds, as well as other sources used to apply for Federal or non-Federal funding, and State or local records pertaining to damage sustained and/or funding sought.

NPRM Section 515.019(c)) (Final Rule Section 667.7)

The proposed rule would have established a phased approach to the required evaluations (*see* NPRM § 515.019(c)). The proposed rule gave State DOTs 2 years after effective date of the final rule to complete evaluations for NHS highways and bridges and any other assets included in the State DOT's asset management plan. The State DOTs would have 4 years after the effective date of the final rule to complete the evaluation for all other roads, highways, and bridges meeting the criteria for evaluation. Under the proposed rule, State DOTs would update evaluations after every emergency event to the extent needed to include facilities affected by the event, and would perform a full review and update at least every 4 years after completion of the first evaluation of the NHS. In the NPRM, FHWA requested comments on whether the time frames for the initial evaluations were appropriate and, if not, how much time ought to be allotted. The FHWA also requested comments on

[65] AASHTO, Connecticut DOT, Delaware DOT, Georgia DOT, New Jersey DOT, Oregon DOT, Virginia DOT.

the appropriateness of the timing for update requirements.

Six commenters responded to FHWA's question about the deadline for the initial evaluation of NHS assets and other assets included in State DOT asset management plans. The State DOTs of Delaware, New Jersey, Virginia, and Washington State said the 2 years allotted for the initial evaluations of these assets was appropriate. Oregon and Tennessee DOTs argued that they could not answer the question without knowing more specific information about the evaluation process, such as the length of the look-back, the scale of repair to be considered, and the availability of data. One of these commenters urged FHWA to provide flexibility to States regarding the timeframe.

With regard to the evaluation deadline for all other facilities covered by the rule, nine commenters responded. The State DOTs of Delaware, New Jersey, and Virginia stated that the 4 years allotted for the first evaluation of such other facilities was appropriate. Oregon and Tennessee DOTs remarked that an appropriate timeframe depends on the complexity and sophistication of the expected evaluations, data availability, and other factors. Two commenters associated the time needed with the scope of the phrase ''roads, highways, and bridges.'' Washington State DOT asked for additional clarification of the term ''all other roads, highways and bridges,'' including whether this phrase is meant to include all public roads (*e.g.,* State non-NHS routes, county routes, city routes). Connecticut DOT suggested that the final rule exclude federally owned facilities from this evaluation.

The FHWA received a number of comments relating to the proposed provisions on updating evaluations after emergency events. Texas DOT requested clarification of the extent of the additional evaluation of the assets after emergency events. South Dakota DOT said updating the data every time there is an emergency event would be extremely burdensome. The AASHTO and Connecticut DOT said an exemption from providing an update should be provided if, during the period, the State did not experience an applicable disaster over a certain financial threshold (*e.g.,* $1 million). Oregon DOT argued that completing the proposed evaluation in conjunction with undertaking a repeated repair or replacement project would eliminate the need for a periodic update cycle. North Carolina DOT asked whether the phrase ''to the extent needed to include facilities affected by the event'' (NPRM § 515.019(c)) would require States to include ferry approaches, ferry terminals, alternate routes, or detour routes in addition to the route causing an update to the evaluation.

Fifteen commenters addressed FHWA's question on whether a 4-year general update for statewide evaluations would be appropriate, and if not, then what would be a reasonable timeframe. Eight State DOTs stated that a 4-year general update was appropriate.[66] Tennessee DOT argued that a 4-year update should be feasible, provided that only repairs requiring disaster funding would be considered after the initial evaluation is complete. Georgia and Mississippi DOTs suggested that the update cycle align with the STIP development cycle. Maryland DOT suggested that the cycle align with the cycle for the ''Bridge and Pavement Management Systems.'' The city of Wahpeton, ND said the update cycle should be lengthened to 10 years, because the economic viability of a facility would not likely change over a 4-year period. Maryland DOT stated if there has not been a declared state of emergency, or no damage occurred as a result of a State-declared state of emergency within an allotted number of years, this evaluation should not be required.

In developing the final rule, FHWA considered all of these comments on evaluation deadlines and updates, along with related comments submitted with regard to the definition of ''roads, highways, and bridges.'' The FHWA acknowledges the potential burdens on State DOTs caused by the breadth of the MAP–21 section 1315(b) mandate, and believes these burdens ought to be considered when determining the timing for the first evaluation and the frequency of evaluations required for the varying types of roads, highways, and bridges covered by the rule. Given the various factors, FHWA concluded the purposes of the statute (conservation of Federal resources and protection of public safety and health) can best be accomplished by focusing State DOT efforts primarily on NHS roads, highways, and bridges. The FHWA also concluded it would be reasonable to require evaluation of a non-NHS facility only when there is some plan to do work on the facility. Accordingly, FHWA substantially revised the evaluation deadlines and evaluation update provisions in the final rule. The final rule divides the periodic evaluation requirement into the following two categories:

- States must complete the first evaluations for NHS roads, highways, and bridges within 2 years after the effective date for part 667. States must update the evaluation of NHS facilities after emergency events, as well as on a regular 4-year cycle (*see* final rule § 667.7(a)).
- States may defer the evaluations of roads, highways, and bridges not included in § 667.7(a) for 4 years after the effective date for part 667, and those evaluations will be required based on a timeline tied to the proposal of a project on the road, highway, or bridge (*see* final rule § 667.7(b)). Prior to including any project relating to a road, highway, or bridge subject to § 667.7(b) in its STIP, the State DOT must prepare an evaluation that conforms to part 667 for the affected portion of the facility. Because the evaluation is project-based, each time a project is proposed for inclusion in the STIP there will be an evaluation. For that reason, no separate update requirement is needed.

The FHWA believes this approach is consistent with the objectives of MAP–21 section 1315(b) and is within FHWA's discretion to interpret the meaning of ''periodic evaluation'' in the statute. The revisions adopted in the final rule should address the concerns expressed by some commenters about the potential burden on State DOTs, and the need for alignment between the evaluation requirements and asset management plan requirements. The final rule limits the highest level of effort to regular evaluations of assets that are of high Federal interest and must be in State DOT asset management plans. Evaluations for other roads, highways, and bridges are required only when there is some reasonable likelihood work will be performed on those facilities.

In response to North Carolina DOT's question about the intended scope of the phrase ''to the extent needed to include facilities affected by the event'' in NPRM § 515.019(c), FHWA has revised the language in the final rule. The new language substitutes the phrase ''roads, highways, and bridges'' for the word ''facilities.'' As a result, infrastructure features like ferry approaches, ferry terminals, alternate routes, or detour routes would be included if they meet the rule's definition of ''roads, highways, and bridges.''

The FHWA concluded the remaining comments on these issues did not warrant a change in the final rule. In response to Texas DOT's question about the extent of the update after an emergency event, FHWA clarifies that

[66] Delaware DOT, Georgia DOT, Maryland DOT, Mississippi DOT, New Jersey DOT, Tennessee DOT, Virginia DOT, Washington State DOT.

the level of information added should be commensurate with the kind of information the evaluation already contains. In addition, FHWA notes that updates after an emergency event are for the purpose of adding newly qualifying roads, highways, or bridges, or modifying information on facilities already in the evaluation. Because the evaluations are intended to help avoid repeated investment in facilities that are damaged on a recurring basis, FHWA does not believe the dollar amount of the damage from a particular emergency event or during a particular time period is relevant. For that reason, FHWA declines to adopt the suggestions from AASHTO, Connecticut DOT, and Maryland DOT that State DOTs be exempt from update requirements if, during the 4-year period between the required updates, the State did not experience an applicable disaster or did not have a disaster over a certain financial threshold (*e.g.,* $1 million). However, FHWA notes if no emergency event (as defined in the rule) occurs during the evaluation period, the new evaluation may simply state that fact and indicate the new evaluation covers the same roads, highways, and bridges as the previous evaluation.

Similarly, FHWA declines Tennessee DOT's suggestion that post-emergency event updates should be limited to repairs requiring disaster funding. As previously discussed, the statutory requirements in MAP–21 section 1315(b) are not linked to eligibility for disaster funding. The FHWA disagrees with Oregon DOT's comment that, if a remedial project is completed, there is no need for periodic evaluation updates. Even if remedial work has been done on a facility, it will still be important to know whether that facility is damaged by an emergency event after the remedial work. For that reason, road, highway, and bridge segments that meet evaluation criteria are included in the evaluation (including updates) even if remedial work on the facility occurs on or after January 1, 1997.

In response to suggestions from Georgia DOT, Mississippi DOT, and Maryland DOT about aligning the general update cycle with other planning or system management activities, FHWA believes such ideas have merit. However, FHWA concluded that State DOTs may have different preferences about which activities they want to align with the evaluation updates. Based on the likely differences in State DOT practices and views, FHWA has not attempted to align the evaluation update cycles in § 667.7(a) with other activities, but notes State DOTs may take steps to do so as long as they meet the minimum update requirements in the final rule.

Finally, Missouri DOT noted a possible typographical error in the section-by-section discussion in the NPRM (80 FR 9231, at 9238 (February 20, 2015)), and suggested that ''affects'' should be changed to ''affected.'' The FHWA appreciates the comment, but because the comment relates to language in the NPRM preamble that does not appear in this final rule, no response is needed.

NPRM Section 515.019(d) (Final Rule Section 667.9)

Under NPRM § 515.019(d), State DOTs would have to include in their 23 U.S.C. 119(e) asset management plans the results of MAP–21 section 1315(b) evaluations for any roads, highways, and bridges in their asset management plans. In the NPRM, FHWA requested comments on two issues: (1) Whether the rule should require States to consider the evaluations prior to requesting title 23 funding; and (2) whether the rule should address when and how FHWA would consider the evaluations of reasonable alternatives in connection with a project approval.

Ten commenters addressed the proposed language on inclusion of information from the evaluations in the State DOT asset management plans. The FHWA received similar comments on the proposal to include an evaluation information requirement as part of the asset management plan processes for risk management analyses. Both sets of comments, and FHWA's responses, are discussed in the above section-by-section discussion of NPRM § 515.007(a)(3). The FHWA decided the use of evaluation information in asset management plans is best addressed in the asset management regulations in part 515. For this reason, FHWA removed the proposed language from the section 1315(b) provisions in NPRM § 515.019(d). Section 515.7(c) of this final rule includes the only provisions on inclusion of the section 1315(b) evaluations in State DOT asset management plans.

The FHWA received feedback from ten commenters on its question whether to require State DOT consideration of evaluation results prior to requesting title 23 funding for a project. All of the commenters—AASHTO and the State DOTs—stated that FHWA should not require States to consider the section 1315(b) alternatives evaluation prior to requesting title 23 funding for a project.[67] A few of the commenters remarked that developing alternatives might take months or even years to complete, which would preclude rapid response to an emergency and restoring the functionality of the transportation system as quickly as possible. Mississippi DOT argued that when a facility is damaged due to an extreme event, the requirement to conduct and submit an evaluation for review prior to approval of funding could create an undue hardship to the public.

The FHWA considered these comments and agrees that the rule should not include a specific milestone requirement. The FHWA also concluded that the purpose of the rule cannot be achieved if State DOTs and FHWA do nothing to take the evaluation results into consideration. After considering the statutory purpose and potential burdens on State DOTs, FHWA concluded the final rule should require State DOTs to consider the information, but provide flexibility in terms of when that consideration occurs. The final rule (§ 667.9(a)) requires State DOTs to consider the results of an evaluation when developing projects involving facilities subject to part 667, and encourages the State DOTs to include consideration of the evaluations in the transportation planning process and the environmental review process.

The FHWA notes that part 667 is intended to support long-term investment decisionmaking in a manner that results in the conservation of Federal resources and protection of public safety and health. These objectives can most easily be accomplished if the evaluations are considered early in the project development process. However, in terms of compliance with part 667, State DOTs are free to decide when in the overall project development process they wish to consider the information. The final rule expressly provides that State DOTs are not prohibited from responding immediately to an emergency, and restoring the functionality of the transportation system as quickly as possible, or from receiving funding under the Emergency Repair Program.

The FHWA received comments from ten parties on its question whether the rule should specify when and how FHWA would consider MAP–21 section 1315(b) evaluations. The State DOTs of Connecticut, Delaware, Maryland, and New Jersey stated that FHWA should not address when and how it would consider the section 1315(b) alternatives evaluation in connection with FHWA

[67] AASHTO, Connecticut DOT, Delaware DOT, Maryland DOT, Mississippi DOT, New Jersey DOT, Oregon DOT, Tennessee DOT, Virginia DOT, Washington State DOT.

project approval. The State DOTs of Georgia, Oregon, and Tennessee said FHWA should address how it will consider the alternatives evaluation. Washington State DOT suggested that FHWA provide clarification on the intent of when and how FHWA would consider the section 1315(b) alternatives. Mississippi DOT argued that States should be given maximum flexibility to address damage due to extreme events because upgrading a facility to address a given probability of future repairs could be financially impractical.

The FHWA considered these comments and the purposes of the underlying statute. The FHWA also viewed these issues in the context of its risk-based stewardship and oversight approach to program administration. As a result, FHWA decided the final rule should not specify a particular milestone at which FHWA would consider evaluation results. The FHWA also concluded the final rule should not prevent FHWA from considering the evaluations when appropriate. Accordingly, § 667.9(c) of the final rule provides FHWA will periodically review the State DOT's compliance with part 667. This review will include looking at whether the State is performing the evaluations and considering the results in a manner consistent with part 667.

The FHWA will also consider whether the evaluations are having the beneficial effects on investment decisions that the statute promotes, for the purpose of assessing nationally whether the regulation is effective. In addition, § 667.9(c) makes it clear that FHWA may consider the results of the evaluations when relevant to an FHWA decision, including when FHWA makes a planning finding under 23 U.S.C. 134(g)(8), when it makes decisions during the environmental review process for projects involving roads, highways, or bridges subject to part 667, or when FHWA approves funding.

The NPRM § 515.019(e) proposed requiring State DOTs to make MAP–21 section 1315(b) evaluations available to FHWA on request. The FHWA did not receive any comments on this provision. In the final rule, this provision is included in § 667.9(c).

The AASHTO suggested that the cross-reference in § 515.019(d) appears to be incorrect, and stated FHWA should instead reference § 515.007(a)(3). The FHWA appreciates the comment, as the NPRM citation was incorrect. However, FHWA decided to eliminate the provisions in NPRM § 515.019(d) from the final rule, and thus the citation is not used in part 667.

C. Other Comments

The FHWA received a number of comments that did not relate to specific proposals in the NPRM. This section addresses those comments.

The Atlanta Regional Commission encouraged FHWA to consider how a State asset management plan relates to other mandated planning products required by Federal law, in particular the Statewide Transportation Plan. Similarly, South Carolina DOT stated that guidance on the relationships between the asset management plan and other planning documents (*e.g.,* Multimodal Transportation Plan and STIP) should be provided to ensure consistency in the way States implement asset management.

In response, FHWA believes that final rule's requirement for integration of the asset management plan with the planning processes addresses this request (*see* § 515.9(h) of the final rule). The relationships between the asset management plan, other performance plans, and the planning process is also addressed in the planning statutes, 23 U.S.C. 134(h)(2)(D) and 23 U.S.C. 135 (d)(2)(C), and their implementing regulations in 23 CFR 450.206(c)(4) and 23 CFR 450.306(d)(4). The FHWA does not believe additional guidance on the relationships between the asset management plan and other planning documents is needed at this time.

Alaska DOT said the statement in the NPRM's Executive Summary (80 FR 9231, 9232) that ''FAHP once primarily funded major new location infrastructure projects, today the FAHP primary focuses on preserving existing infrastructure through preventative maintenance and reconstruction'' is inaccurate because some States still need to spend Federal funds on expanding infrastructure.

In response, FHWA agrees that there are States that still need to spend portion of their Federal funds on expanding infrastructure. However, the FAHP's primary focus today is on maintaining the existing infrastructure rather than expanding it.

Virginia DOT recommended that FHWA commit resources to assisting State DOTs in developing the asset management plan, such as periodic meetings and expert assistance from FHWA's consultants. The commenter also asked FHWA to provide an example of an overall asset management plan that meets their minimum requirements.

In response, FHWA notes it will continue to present Webinars, undertake Peer Exchanges, provide training, conduct meetings, and undertake other information sharing and technical assistance type activities with regard to asset management and developing asset management plans. For example, FHWA has developed and presented training pertaining to development of asset management plans, developing training focused on asset management financial planning, conducted bi-monthly Webinars on asset management-related topics, and conducted pilot studies with products that benefits all States. In addition, in the last 2 years, FHWA has provided technical assistance to 15 States to conduct an asset management gap analysis for strengthening their current asset management practices. Examples of asset management plans prepared prior to this final rule are available; however, as of the publication date of this final rule, FHWA has not reviewed those plans to determine whether they are consistent with the requirements of this final rule.

Maryland DOT said FHWA should note in the final rule that, because of non-data driven variables used in developing a program of asset management, the answers to asset management's five core questions as outlined in the NPRM's Executive Summary (80 FR 9231) [68] represent a snapshot in time of how a State DOT might approach managing its assets, relative to fiscal and policy constraints, which could change with new leadership or other, external events.

In response, FHWA acknowledges that States may have their own fiscal and policy constraints and agrees that the asset management plan for the NHS would need to be implemented consistent with State requirements, but with the understanding that Federal requirements as described in this final rule must also be met. The answers to the five questions may seem to be a snap-shot in time. However, the respondents will belong to different agencies with different business practices and local requirements. Therefore, the responses collectively cover many different scenarios that help with developing an implementable approach.

Washington State DOT said that it could not locate the chart, identified on in the NPRM (80 FR 9231, 9240), as showing the interaction of the proposed asset management processes and related requirements.

[68] The NPRM's five core questions: What is the current status of our assets? What is the required condition and performance of those assets? Are there critical risks that must be managed? What are the best investment options available for managing the assets? What is the best long-term funding strategy?

In response, FHWA notes the chart was placed in the rulemaking docket on April 14, 2015.

A private citizen said the NHS should be evaluated to decide whether the new NHS additions required by MAP–21 can be supported by the DOT. Oregon DOT said FHWA should add to the final rule a thorough discussion of the attributes of an NHS route and what should or should not be a part of the NHS.

In response, FHWA notes that a discussion of new NHS additions and the attributes of an NHS route are outside the scope of this rule.

New York State DOT said compounding these proposed rules is the fact that MAP–21 dedicates two-thirds of Federal-aid funding to the NHS in the form of NHPP funds. The commenter stated that, if a State does not meet minimum thresholds for Interstate pavement conditions, it will be forced to divert funds from its STP to meet the requirement, which would further limit investments in a critical part of the transportation system. In addition, the commenter stated that, if a State does not meet minimum NHS bridge conditions, it must ensure that minimum investment levels are achieved, which could also cause a diversion of funds from other asset management driven needs.

In response, FHWA notes that a discussion of funding and diversion of funds from STP to NHPP is outside the scope of this rule.

A private citizen said each State DOT should have a better understanding of the MAP–21 requirements, noting that FHWA has not offered any formal MAP–21 on-site seminars. This same commenter said a relational database management system would have to be established to support all on-system work.

In response, FHWA notes these comments fall outside the scope of this rulemaking, but points out FHWA conducted a public Webinar on April 1, 2015, to explain the proposed asset management regulations in lieu of on-site Webinars.

VII. Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The FHWA has determined that this action does not constitute a significant regulatory action within the meaning of Executive Order 12866 or within the meaning of DOT's regulatory policies and procedures. The FHWA determination that the final rule is nonsignificant is based on important differences between the proposed rule and the final rule. The final rule lessens requirements placed on States, increases flexibility afforded State DOTs, and reduces the potential for uncertainty in the application of the rule. The FHWA made the changes in the final rule in response to comments received.

The FHWA determined that this action is not economically significant within the meaning of E.O. 12866. Additionally, this action complies with the principles of Executive Order 13563. The rule is expected to have benefits that exceed its costs, and the rule will not require expenditures by State, local, or tribal governments that exceed the $151 million threshold under the Unfunded Mandates Reform Act. These changes are not anticipated to adversely affect, in any material way, any sector of the economy. In addition, these changes will not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Therefore, a full regulatory evaluation is not necessary.

The FHWA is presenting a RIA in support of this final rule. The RIA estimates the economic impact, in terms of costs and benefits, on State DOTs as required by E.O. 12866 and E.O. 13563. This section of the final rule identifies and estimates costs and benefits resulting from the rule. The complete RIA may be accessed in the rulemaking's docket (FHWA–2013–0052).

The FHWA received a number on comments on the RIA that was prepared in support of the NPRM. Those comments, and FHWA's responses, are summarized below.

Comments on Estimated Costs

Seventeen commenters addressed the estimated costs included in the RIA.[69] The majority of comments stated that the RIA underestimated the cost of developing and implementing an asset management plan in compliance with the proposed rule.

The Mississippi DOT stated that the figures suggest expenditures by the States at approximately $60,000 per year over a 12-year period, which it felt was very low. Given the complexity of developing and implementing the asset management plan, it cited the need to assign numerous staff to the effort. In addition, they noted that many State DOTs do not have the in-house staff to conduct various aspects of the asset management plan, which would require consultants and additional resources for the operational components associated with inventory management, data collection, verification, and analysis. They also felt that the operational cost to implement and maintain the plan would be significant and that the cost of implementing the asset management plan did not appear to be included in the estimated cost of implementing the rule.

The Oregon DOT said that both the costs and time period to develop an asset management plan and implement the requirements are underestimated since the financial and staffing costs would be significant, as indicated by their own estimates. The AASHTO remarked that the cost estimated by FHWA underestimates the professional staff time and other costs needed to comply with all of the items in the action given the complexity of the rule. They expanded on this remark, saying that the estimate does not cover the cost to build, track, and submit the asset management plan, does not include all of the other staff work needed to support this system, and does not seem to consider that States would have to change various data collection and analyses processes in order to develop the specific type of proposed asset management plan. The Florida and North Dakota DOTs concurred with the comments submitted by AASHTO. The Connecticut DOT noted that in Connecticut, the estimated cost for asset management is about $3 million annually including labor, software, training, and consultant services for asset management, bridge management, and pavement management units.

The Texas DOT stated that the proposed rule (and other rulemakings on National Performance Measures) would create an onerous program. The South Dakota and Wyoming DOTs said that FHWA should significantly reduce the requirements and burdens that the proposed rule would impose on State DOTs. In a joint submission, five State DOTs commented that States already do asset management work, and that the cost of complying with the proposed rule would exceed FHWA's estimates. They suggested that FHWA should significantly reduce the requirements and burdens.[70] The South Carolina DOT said that most State DOTs are already measuring their infrastructure

[69] AASHTO; Arkansas DOT; Connecticut DOT; Georgia DOT; Michigan DOT; Mississippi DOT; New York Metropolitan Transportation Council; New York State DOT; Oregon DOT; South Carolina DOT; South Dakota DOT; Tennessee DOT; Texas DOT; Vermont Agency of Transportation; Wyoming DOT; DOTs of ID, MT, ND, SD, and WY (joint submission), The City of Wahpeton, ND.

[70] DOTs of ID, MT, ND, SD, and WY (joint submission).

conditions and will continue to use their existing performance measures for reporting to their legislators and stakeholders. This State DOT stated that measuring condition, inspection frequency, and performance vary according to the geographic location, weather conditions (including extreme weather), and the size of the State's NHS, which could make assessment difficult and the cost of implementation disproportionate.

In response to these comments, FHWA conducted additional research by contacting 5 of the 9 States that were initially used as the basis for developing cost estimates (approximately 10 percent of 52 DOTs) to validate or update the estimated compliance costs of the rule. Four of the five states estimated higher costs than provided in the initial analysis, reflecting additional labor time and/or consultant costs to complete an asset management plan anticipated to be compliant with the rule. As a result of the revised figures, FHWA has increased the staff and consultant cost estimate for developing a compliant asset management plan by approximately 23.7 percent. This increase was based on an 80 percent increase in the estimated cost for developing an in-house asset management plan, to an average of $306,000 per State, and a 19.9 percent increase in the cost of developing a consultant-supported plan, to an average of $472,058 per state, for the initial plans.

For the plan updates, which would be required every 4 years, the RIA includes costs equal to half of the total cost of the initial plan, so the adjustment in the initial plan development costs also are factored in as higher costs for plan updates. The FHWA believes these revised cost estimates are reasonable, and may actually overestimate the cost of the rule since several of the State DOTs that provided cost estimates included assets or system coverage in their plans that go beyond the requirements of the rule, and these costs were substantial for at least one State. Moreover, many States have already incorporated some of the asset management practices into their investment planning processes so some of the costs estimated for the development of the Transportation Asset Management Plans likely would have been incurred even in the absence of the rule.

The FHWA acknowledges that some States may not have the in-house staff with appropriate skills to develop an asset management plan. This was accounted for in the original RIA by assuming that only one-third of the States will develop their asset management plans in-house, while two-thirds will use contractors. In response to the comment about not including the cost of implementing the asset management plan, the RIA cost estimate did not include the cost associated with inventory management and data collection and verification because this activity was included in the RIA developed for the Pavement and Bridge Condition Performance Measures NPRM.[71] However, data analysis was taken into account in the estimated costs of developing the asset management plan.

The FHWA also acknowledges that this rule and its requirements may require some States to perform additional analyses above their current practices; however, the burden on the States has been minimized by allowing them to develop their own unique processes that address their needs, align with their asset management maturity level, include State-specific targets, and allow States to decide on the level of investment based on various strategies. The FHWA acknowledges that the level of effort and cost for developing and implementing an asset management plan varies from one State to another and agrees that the cost depends on the confidence level that each State may find acceptable with regards to inventory size, data quality, complexity of method of analysis, and other factors.

The RIA in the NPRM assumed that only four States do not currently have pavement and bridge management systems that meet the minimum standards in the proposed rule, and based on that assumption, included costs for those four States to acquire these management systems. Several commenters argued that even States with existing bridge and pavement management systems would incur costs to bring those existing management systems into compliance with the proposed rule. Specifically, Tennessee DOT said that State DOTs would need to spend more to use their existing pavement and bridge management systems. The Tennessee DOT also said that its existing management system lacks some of the required tools to meet the MAP–21 requirements, that the agency would need to purchase and/or develop an enterprise asset management system to evaluate funding decisions between different assets, and that there would be costs in consulting and/or personnel costs for the additional data and reporting requirements. The New York State DOT said that the costs of recent system implementations (Agile Assets or Deighton for pavement and bridge management) should also be considered. The Michigan DOT said that the estimates do not mention the cost of developing forecasting tools designed around pavement and bridge performance measures established by FHWA, stating that these tools would be needed to forecast infrastructure conditions under alternative investment scenarios and to establish investment strategies required under section 515.009. The Michigan DOT estimated that the cost to make changes to comply with the proposed measures would exceed $100,000.

The FHWA does not believe that purchasing and/or developing an enterprise asset management system is necessary to meet the asset management plan requirements. Asset management trade-off analyses could be accomplished using common tools such as an in-house-developed spreadsheet and does not necessitate sophisticated software purchases or upgrades. However, FHWA agrees that inclusion of some incremental costs for States to develop better forecasts of infrastructure conditions is justified. None of the five States that provided updated cost information indicated that they require upgrades to their bridge and pavement management systems as a result of the NPRM. Nonetheless, in response to comments, FHWA has updated the cost estimate to assume that, in addition to four States that need to purchase pavement management analysis tools, one-third of the remaining States (16) may require system upgrades. The cost of these system upgrades was assumed to be $150,000 each, on average.

The AASHTO, Michigan DOT, and Vermont Agency of Transportation commented that in addition to the direct costs of collecting data, analyzing data, and preparing the asset management plan document, there would be costs associated with coordinating with local agencies and providing oversight and training to these agencies and jurisdictions. The AASHTO noted that the requirements would place new burdens on State DOTs, since in most States the State does not own and operate all of the NHS assets. As a result, they commented that the rule would require counties, toll authorities, and municipalities to provide corresponding plans and data for their NHS assets. The Michigan DOT stated that State DOTs would incur additional costs to grant local transportation agencies access to the State's condition databases. It also noted that these transportation agencies (and MPOs)

[71] See the RIA for the Pavement and Bridge Condition Performance Measures NPRM at rulemaking docket FHWA–2013–0053.

would potentially need financial or technical resources to make full use of the data.

In response, FHWA notes that the State DOT staffing costs associated with the rule were included in the RIA, and these costs should encompass coordination with other agencies. The information gathered from FHWA's follow up interviews with the five State DOTs indicated that that the costs of coordination were likely to be minimal, already incorporated into their cost estimates, or accounted for within other planning coordination activities that would have been encompassed under other rulemakings. In addition, the five States surveyed included two with a significantly higher share of non-State owned NHS assets than the national average.

The city of Wahpeton, ND, asserted that the proposed rule would require some number of local governments to maintain asset management programs and that the cost per locality of doing so would be potentially as high as $60,000 to $70,000 per year.

The FHWA notes that this rule does not require local governments to develop or maintain an asset management plan or program. Thus, the costs to the local governments if they voluntarily decide to develop an asset management plan were not taken into consideration in the RIA. However, because FHWA believes that following an asset management framework is the right approach to the management of infrastructure assets and because the benefits of asset management are substantially higher than the costs, FHWA encourages local governments to consider incorporating asset management practices into their current way of doing business.

Comments on Estimated Benefits

Nine commenters commented on the estimated benefits of the rule. The AASHTO and five State DOTs commenters stated that the RIA overestimated the benefits of developing and implementing an asset management plan in accordance with the proposed rule.[72] These commenters argued that the benefits were overestimated because the RIA incorrectly assumed that States do not already undertake asset management. The AASHTO added that the NPRM did not attempt to identify the increase in benefits that would result from implementation of this proposed rule by States that have already implemented asset management practices. According to AASHTO, the heart of the benefits analysis should be identifying the extent that the proposed rule would provide benefits over and above the benefits derived from the current asset management practices of States. The Mississippi DOT suggested noting in the rule that many States have already adopted policies consistent with the principles of asset management.

The Alaska DOT asserted that the benefits of adopting asset management into practice had not been proven. The Alaska DOT also stated that the costs and benefits of asset management should be better analyzed before requiring States to conduct ''detailed life-cycle costs'' and to make organizational and cultural changes. The Georgia DOT noted that it is challenging to quantify the benefits and costs of asset management, but its experience has been that the costs may outweigh perceived benefits ''in some cases.'' The Tennessee DOT added that it also lacked confidence in the RIA's reported benefit-cost ratio because, according to the commenter, the analysis was based on a 20-year-old study of a single State. The Arkansas DOT concurred with AASHTO comments that the costs of the proposed plan would exceed the benefits, and said that the requirements would result in highway funds being diverted from projects to administrative expenses. The agency further commented that the proposals create inefficiency as they do not account for the current asset management methodologies used by States. The Oregon DOT also encouraged FHWA to reassess the costs and benefits.

The FHWA acknowledged in the NPRM the limited data on the overall benefits of asset management and specifically requested that commenters submit data on the quantitative benefits of asset management and reference any studies focusing on the economic benefits of overall asset management. The FHWA did not receive any comments directly providing quantitative benefits, but did receive an example from Oregon DOT. The Oregon DOT described its investment in a truck weight station preclearance program using an automated intelligent truck transportation system instead of building more weigh stations. The agency stated that this example illustrates not only the real-world benefit of applying asset management principles and practices, but also a weakness associated with limiting asset management considerations to only the physical condition of assets.

The FHWA acknowledges this comment and agrees that both States and communities will benefit from a broader focus developing their asset management plan. The FHWA notes that asset management plans, in accordance with section 119(e), are to address both asset condition (NHS pavement and bridge assets) and performance of the NHS.

In the follow-up interviews with a sample of States, FHWA again requested quantitative figures on the benefits of asset management. Several States noted that asset management practices are very beneficial in terms of wisely using resources, enhancing collaboration, and saving money by optimizing solutions rather than using a ''worst first'' approach to maintenance. However, the States were not able to identify specific studies or data on economic benefits that could be used by FHWA to re-calculate the benefits used in the RIA.

The FHWA acknowledges that some States have already implemented various asset management practices and use asset management analysis tools to arrive at decisions. However, these practices are generally focused on project selection using a predetermined level of investment, while asset management plans look into the future and develop investment strategies that address long term asset sustainability and system resiliency at the lowest practicable cost. Although the benefits analysis did not separate out the incremental costs of the rule above existing asset management practices of States, the costs analysis also likely includes some costs associated with analysis and financial planning that would be occurring in the absence of the rule.

The FHWA agrees that the study used as the basis for the benefits analysis was conducted 20-years ago, but believes this study's conclusion is still valid regardless of the date the study was conducted. Moreover, the benefits could be significantly higher than estimated in the original RIA. That study focused on pavement condition, and as noted in the RIA, the benefits estimated did not include the potential benefits resulting from bridge management and its role to make long-term investment decisions. The study also did not address the benefits associated with using a risk-based approach. A key value of a risk-based asset management plan is the ability to make more informed investment decisions to address risks to infrastructure. Risk-based asset management can be used to manage a number of threats, including seismic risks and extreme weather events. By understanding the assets' vulnerability to these threats and of the economic impacts of damage, resources can be

[72] AASHTO, Arkansas DOT, Mississippi DOT, Tennessee DOT, South Dakota DOT, Wyoming DOT.

prioritized to address those with the highest likely impact per dollar expenditure. By spending up-front to increase resilience, DOTs can save over the long run by avoiding higher future costs. Additionally, there would be substantial benefits in terms of mobility and safety for the traveling public due to infrastructure closures that would be avoided.

The FHWA reviewed two additional studies to re-assess the potential benefits of the rule. A study from Oregon [73] indicated that risk assessment and adopting resiliency strategies could reduce the costs of infrastructure repair, potential loss of life, and delays to travelers associated with disruptions to transportation infrastructure as well as other costs that may be incurred by the public and significantly affect the regional economy. Another study from Alaska [74] indicated that between now and 2080, climate change adaptation strategies could save anywhere from 10 percent to 45 percent of the costs resulting from climate change. Due to the high variability in each State's degree of vulnerability to various types of risks to transportation assets (and thus the benefits from addressing risks), FHWA decided not to adjust the quantitative benefits analysis. Consequently, the RIA makes a number of conservative assumptions likely underestimating the asset management benefits. The RIA also shows a break-even analysis that suggests the rule will be cost beneficial even with a much more limited set of benefits.

Other Comments on the RIA

The Mississippi DOT commented on the background included in the III. Costs and benefits of NPRM and remarked that not mentioning the primary reason for the deterioration of NHS assets—that revenue has not been adjusted for inflation—alongside increased use, environmental inputs, and age, was misleading. The agency asserted that increased material costs and flat funding have led to a decline in asset conditions despite a shift in funding from new projects to maintenance.

The FHWA agrees with the comment that a failure to adjust revenue to account for inflation can contribute to decisions leading to a decline in asset conditions. In fact, to forecast future revenue, a sound financial plan must take into consideration inflation. The FHWA also agrees that if maintenance or preservation is delayed due to inadequate resources (whatever the reason might be), assets deteriorate faster. However, inadequate resources are just contributors to asset deterioration, but not the cause of deterioration. Assets deteriorate as a result of usage or exposure to the environment.

Revised RIA

The costs and benefits are estimated for implementing the requirement for States to develop a risk-based asset management plan and to use pavement and bridge management systems that comply with the minimum standards proposed by the U.S. Department of Transportation. For this analysis, the base case is assumed to be the current state of the practice, where most State DOTs already own pavement and bridge management systems, but do not develop risk-based asset management plans.

The total cost of developing the initial plan and three updates for all 52 State DOTs, covering a 12-year time period, would be $46.1 million discounted at 3 percent and $38.5 million discounted at 7 percent, an annual cost of $3.8 million and $3.2 million, respectively. These estimates may be conservative, since many agencies may already be developing planning documents that could feed into the asset management plans or be replaced by them, therefore saving some costs to the agencies. An additional cost of $4 million to $6 million is estimated for acquiring pavement management systems (PMS) for all non-complying agencies along with $2.4 million needed to upgrade an estimated 16 existing PMS at $150,000 each for an undiscounted total of $8.4 million. The total discounted costs of the PMS acquisitions and upgrades are $8.2 million using a discount rate of 3 percent and $7.9 million for a 7 percent discount rate.

Therefore, the total nationwide costs for States to develop their asset management plans and for four State DOTs to acquire and install pavement and bridge management systems that meet the standards of the proposed rule would be $54.3 million discounted at 3 percent and $46.3 million discounted at 7 percent.

Taking the Iowa study [75] as an example of the potential benefits of applying a long-term asset management approach using a PMS, the costs of developing the asset management plans and acquiring PMS are compared to determine if the benefits of applying the rules developed would exceed the costs. We estimate the total benefits for the 50 States, the District of Columbia, and Puerto Rico of applying PMS and developing asset management plans to be $453.5 million discounted at 3 percent and $340.6 million discounted at 7 percent.

Based on the benefits derived from the Iowa study and the estimated costs of asset management plans and acquiring and upgrading PMS systems, the ratio of benefits to costs would be 8.3 at a 3 percent discount rate and 7.4 at a 7 percent discount rate. The estimated benefits do not include the potential benefits resulting from savings in bridge programs. The benefits for States already practicing good asset management decisionmaking using their PMS will be lower, as will the costs. If the requirement to develop asset management plans only marginally influences decisions on how to manage the assets, benefits are expected to exceed costs.

SUMMARY OF BENEFITS AND COSTS OF ASSET MANAGEMENT PLAN RULE

	Discounted at 3%	Discounted at 7%
Total Benefits for 50 States, the District of Columbia, and Puerto Rico	$453,517,253	$340,580,894
Total Costs for 50 States, the District of Columbia, and Puerto Rico	$54,337,661	$46,313,354
Benefit/Cost Ratio	8.3	7.4

[73] Oregon DOT (2009), *Seismic Vulnerability of Oregon State Highway Bridges: Mitigation Strategies to Reduce Major Mobility Risks,* available at: *http://www.oregon.gov/ODOT/TD/TP_RES/docs/reports/2009/2009_seismic_vulnerability.pdf.*

[74] Larsen, P.H., et al., Estimating Future Costs for Alaska Public Infrastructure At Risk from Climate Change. *Global Environmental Change* (2008), doi:10.1016/j.gloenvcha.2008.03.005, available at: *http://climatechange.alaska.gov/aag/docs/O97F18069.pdf.*

[75] Smadi, Omar, Quantifying the Benefits of Pavement Management, a paper from the 6th International Conference on Managing Pavements, 2004.

Further, any reduction in cost to maintain and rehabilitate assets can potentially free resources to make improvements elsewhere on the system, creating benefits to users from improved pavement, including improved operations and safety. In addition to improving asset investment decisionmaking, asset management plans will increase transparency and accountability to the public, gaining trust of the public and the political leadership. This can help gain support to fund highways and bridges to improve condition and performance of assets that benefits the users in the long run, rather than allowing assets to deteriorate over time as a result of a lack of funding and incur higher costs later.

To estimate the threshold benefits necessary from pavement or bridge preservation for the rule to be worthwhile, we use the incremental benefits that can be realized by road users in vehicle operating cost reductions due to improvements in pavement or bridge condition. The estimates used for the user costs in the break-even analysis are based on the numbers derived for the ''Establishment of National Bridge and Pavement Condition Performance Management Measures Regulatory Impact Analysis'' (see Docket Number FHWA–2013–0053). The FHWA estimated the cost saving per mile of travel on pavement with fair condition versus pavement in poor condition to be $0.01 per vehicle, averaged for the share of trucks and cars on the NHS. Dividing the cost of the rule by this cost, we estimated the number of vehicle miles traveled (VMT) that needed to be improved to cover the cost of the rule. Then, taking the ratio of the VMT to be improved to the number of VMT in poor condition, and multiplying by the number of NHS miles in poor condition, we estimated the number of lane-miles that needed to be improved to cover the cost of the rule. To cover the $62.7 million undiscounted cost of the rule, approximately 159 lane-miles would have to be improved from poor condition to fair condition to generate sufficient user benefits to make the rule worthwhile. For more details on the calculations, see appendix 2 of the RIA available on the docket.

For bridges, FHWA estimated the additional user cost (travel time and vehicle operating costs) of a detour due to a weight-restricted bridge. According to the National Bridge Inventory, the average detour is equal to 20 miles. The estimated average user cost per truck is $1.69 per mile. Each posted bridge is estimated to impose a detour cost of $33.80 per truck ($1.69 per VMT × 20 miles). Based on the number of trucks affected by the weight restrictions, we estimated that 2.62 weight-restricted bridge postings would have to be avoided to meet the cost of the rule. For more details on the estimates, see appendix 2.

We believe that the benefits of the rule will be well in excess of these minimal threshold amounts that would be necessary to exceed costs.

A copy of the FHWA's RIA has been placed in the docket.

Regulatory Flexibility Act

The Mississippi DOT commented on the Regulatory Flexibility Act section and said although the proposed rule states that the action of implementing this action would affect only States, the action actually extends to local public agencies that have jurisdictional authority over NHS routes.

Section 119(e)(1) of title 23, U.S.C., states that a State shall develop a risk-based asset management plan for the NHS. No other entities were required by the statute to develop a risk-based asset management plan for the NHS. The FHWA has made no change to the language of this section in response to this comment.

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601– 612), the FHWA has evaluated the effects of this action on small entities and has determined that the action would not have a significant economic impact on a substantial number of small entities. The proposed amendment addresses the obligation of Federal funds to States for Federal-aid highway projects. As such, it affects only States, and States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, the Regulatory Flexibility Act does not apply, and the FHWA certifies that the proposed action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

Two commenters addressed the applicability of the Unfunded Mandates Reform Act of 1995 to the proposed rule. The Mississippi DOT asked whether the financial threshold to be considered an unfunded mandate would be exceeded if ''realistic'' estimates of the proposed rule's compliance costs were considered. The New York Metropolitan Transportation Council stated simply that the proposed rule represents an unfunded mandate, not just on States but also on county and local governments and authorities that are responsible for portions of the NHS.

In response to these comments, FHWA notes that the estimated costs of this final rule have been adjusted upward in response to the comments received on the NPRM and additional analysis of costs from a sample of States. Even with the increased estimate, the costs still do not exceed the Unfunded Mandates Reform Act threshold.

Regarding the New York Metropolitan Council comment, 23 U.S.C. 119 (e)(1) states that a State shall develop a risk-based asset management plan for the NHS. As noted earlier, no other entities are statutorily required to develop a risk-based asset management plan for the NHS.

This rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48, March 22, 1995) as it would not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $151 million or more in any one year (2 U.S.C. 1532).

Executive Order 13132 (Federalism Assessment)

The NPRM indicated that the proposed rule did not have sufficient federalism implications to warrant the preparation of a federalism assessment. Two State DOTs did not directly comment on this determination, but instead commented on how the proposed rule would affect the relationships among different levels of government. The Mississippi DOT stated that proposed rule has federalism implications because it would require State DOTs to assess and report data on NHS assets that are beyond their jurisdictional control. The Florida DOT commented that the Federal-State partnership in transportation should have reasonable and constructive boundaries with respect to appropriate roles and responsibilities. It further commented that the Federal role should be limited to the following: Setting of broad national policy goals; conducting ''broad'' oversight to ensure that Federal funds are properly expended; funding of research; technical assistance; and dissemination of best practices. It stated that the Federal role should not extend to asset management, investment planning, and programming, and that those tasks should be left to State DOTs, with input from stakeholders closer to the actual transportation needs and concerns.

The FHWA has determined that a federalism summary impact statement is not required because this regulation is required by statute and will not preempt any State law. The FHWA believes that this final rule strikes an appropriate

balance between Federal oversight and State flexibility. This rule focuses on the management of the NHS and establishes the minimum requirements necessary to comply with 23 U.S.C. 119. We note that the Secretary of Transportation is required by 23 U.S.C. 119(e)(8) to establish the process to develop the State asset management plan described in 23 U.S.C. 119. The statute also entrusts the Secretary with ensuring that an asset management plan is consistent with the requirements of 23 U.S.C. 119 and certifying that the process used to develop the plan meets the requirements of this final rule (23 U.S.C. 119(e)(5) and (6)). Under this final rule, States continue to have discretion regarding investment planning and project selection.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information.

Paperwork Reduction Act

Two State DOTs commented that the estimated burden hours in the Paperwork Reduction Act (PRA) analysis of the NPRM were too low. The Mississippi DOT argued that the estimated burden hours were not consistent with the overall compliance cost estimates reported in the NPRM. It stated that the estimate of burden hours did not appear to include ''operational cost'' to support asset management as presented in the proposed rule. The Oregon DOT stated that the estimate of average burden hours seemed ''quite low,'' especially considering the need to coordinate with MPOs during development of an asset management plan and with FHWA during the review process.

The FHWA has updated the RIA. As a result of this update the average cost of developing an asset management plan and management systems has increased by 25.7 percent. This was mainly due to underestimating the staff time in the initial RIA. The FHWA has also increased the burden hours based on a re-evaluation of a sample of the States that had updated their burden hours. This re-evaluation resulted in an overall increase in labor costs of 23.7 percent per State.

Under the PRA (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. This action contains a collection-of-information requirement under the PRA. The MAP–21 requires State DOTs to develop risk-based asset management plans for NHS bridges and pavements to improve or preserve the condition of the assets and the performance of the system. It also requires the Secretary of Transportation to review the processes State DOTs have used to develop their asset management plans, and to determine if States have developed and implemented their asset management plans consistent with the MAP–21 requirements.

In order to be responsive to the requirements of MAP–21, FHWA proposes that State DOTs submit their asset management plans, including the processes used to develop these plans, to FHWA for: (1) Certification of the processes, and (2) a determination that the asset management plans have been developed consistent with the certified processes; however, these plans are not subject to the FHWA approval.

A description of the collection requirements, the respondents, and an estimate of the burden hours per data collection cycle are set forth below:

Collection Title: State DOTs' Risk-Based Asset Management Plan including its processes for the NHS bridges and pavements.

Type of Request: New information collection requirement.

Respondents: 50 States, the District of Columbia, and Puerto Rico.

Frequency: One collection every 4 years.

Estimated Average Burden per Response per Data Collection Cycle: Some early examples of asset management plan burden hours are available. The transportation agencies for Minnesota, Louisiana, and New York are cooperating with the FHWA to produce three early transportation asset management plans. These three States represent three different approaches that illustrate the possible range of costs and level of effort for conducting asset management plans. In addition, the information relative to the burden hours from Colorado DOT is included in the benefit-cost analysis for this rule as required by E.O. 12866. The result of that analysis indicates that the average burden hours per State for developing the initial asset management plan would be approximately 2,600 hours. However, on average, development of subsequent plans would require less effort because the processes have already been developed. The estimate for updating plans for future submission indicates that approximately 1,300 burden hours per State per data-collection cycle would be required.

National Environmental Policy Act

Agencies are required to adopt implementing procedures under the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), that establish specific criteria for, and identification of, three classes of actions: Those that normally require preparation of an environmental impact statement; those that normally require preparation of an environmental assessment; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). The FHWA's procedures are found in 23 CFR part 771. This action qualifies for categorical exclusions under 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives) and 771.117(c)(1) (activities that do not lead directly to construction). The FHWA has evaluated whether the proposed action would involve unusual circumstances and has determined that this action would not involve such circumstances.

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this rule under E.O. 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights.* The FHWA does not anticipate that this action would affect a taking of private property or otherwise have taking implications under E.O. 12630.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, *Civil Justice Reform,* to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 12898 (Environmental Justice)

The E.O. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* and DOT Order 5610.2(a), 91 FR 27534 (May 10, 2012) (available online at *www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/order_56102a/index.cfm*), requires DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income

populations in the United States. The DOT Order requires DOT agencies to address compliance with the E.O. and the DOT Order in all rulemaking activities. In addition, FHWA has issued additional documents relating to administration of the E.O. and the DOT Order. On June 14, 2012, FHWA issued an update to its EJ order, FHWA Order 6640.23A, *FHWA Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (available online at *www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm*).

The FHWA has evaluated this rule under the E.O., the DOT Order, and the FHWA Order. This rule establishes the process under which States would develop and implement asset management plans, which is a document describing how the highway network system will be managed, in a financially responsible manner, to achieve a desired level of performance and condition while managing risks over the life cycle of the assets. The asset management plan does not lead directly to construction. Therefore, the FHWA has determined that this final rule would not cause disproportionately high and adverse human health and environmental effects on minority or low-income populations.

Executive Order 13045 (Protection of Children)

We have analyzed this rule under E.O. 13045, *Protection of Children from Environmental Health Risks and Safety Risks.* The FHWA certifies that this action would not cause an environmental risk to health or safety that might disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under E.O. 13175, *Consultation and Coordination with Indian Tribal Governments,* and believes that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal laws. The proposed rulemaking would not impose any direct compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this action under E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.* The FHWA has determined that this is not a significant energy action under that order since it is not a significant regulatory action under E.O. 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Regulation Identification Number

A Regulation Identification Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects

23 CFR Part 515

Asset management, Highways and roads, Transportation.

23 CFR Part 667

Bridges, Emergency events, Highways and roads, Periodic evaluations.

In consideration of the foregoing, the FHWA amends title 23, Code of Federal Regulations, parts 515 and 667 as follows:

■ 1. Add part 515 to read as follows:

PART 515—ASSET MANAGEMENT PLANS

Sec.

515.1 Purpose.
515.3 Applicability and effective date.
515.5 Definitions.
515.7 Process for establishing the asset management plan.
515.9 Asset management plan requirements.
515.11 Deadlines and phase-in of asset management plan development.
515.13 Process certification and recertification, and annual plan consistency review.
515.15 Penalties.
515.17 Minimum standards for developing and operating bridge and pavement management systems.
515.19 Organizational integration of asset management.

Authority: Sec. 1106 and 1203 of Pub. L. 112–141, 126 Stat. 405; 23 U.S.C. 109, 119(e), 144, 150(c), and 315; 49 CFR 1.85(a).

§ 515.1 Purpose.

The purpose of this part is to:

(a) Establish the processes that a State transportation department (State DOT) must use to develop its asset management plan, as required under 23 U.S.C. 119(e)(8);

(b) Establish the minimum requirements that apply to the development of an asset management plan;

(c) Describe the penalties for a State DOT's failure to develop and implement an asset management plan in accordance with 23 U.S.C. 119 and this part;

(d) Set forth the minimum standards for a State DOT to use in developing and operating highway bridge and pavement management systems under 23 U.S.C. 150(c)(3)(A)(i).

§ 515.3 Applicability and effective date.

This part applies to all State DOTs. The effective date for the requirements in this part is October 2, 2017.

§ 515.5 Definitions.

As used in this part:

Asset means all physical highway infrastructure located within the right-of-way corridor of a highway. The term *asset* includes all components necessary for the operation of a highway including pavements, highway bridges, tunnels, signs, ancillary structures, and other physical components of a highway.

Asset class means assets with the same characteristics and function (*e.g.,* bridges, culverts, tunnels, pavements, or guardrail) that are a subset of a group or collection of assets that serve a common function (*e.g.,* roadway system, safety, Intelligent Transportation (IT), signs, or lighting).

Asset condition means the actual physical condition of an asset.

Asset management means a strategic and systematic process of operating, maintaining, and improving physical assets, with a focus on both engineering and economic analysis based upon quality information, to identify a structured sequence of maintenance, preservation, repair, rehabilitation, and replacement actions that will achieve and sustain a desired state of good repair over the life cycle of the assets at minimum practicable cost.

Asset management plan means a document that describes how a State DOT will carry out asset management as defined in this section. This includes how the State DOT will make risk-based decisions from a long-term assessment of the National Highway System (NHS), and other public roads included in the plan at the option of the State DOT, as it relates to managing its physical assets and laying out a set of investment strategies to address the condition and system performance gaps. This document describes how the highway network system will be managed to achieve State DOT targets for asset condition and system performance effectiveness while managing the risks, in a financially responsible manner, at a minimum practicable cost over the life cycle of its assets. The term *asset management plan* under this part is the risk-based asset management plan that is required under 23 U.S.C. 119(e) and is intended to carry out asset management as defined in 23 U.S.C. 101(a)(2).

Asset sub-group means a specialized group of assets within an asset class with the same

characteristics and function (*e.g.,* concrete pavements or asphalt pavements.)

Bridge as used in this part, is defined in 23 CFR 650.305, the National Bridge Inspection Standards.

Critical infrastructure means those facilities the incapacity or failure of which would have a debilitating impact on national or regional economic security, national or regional energy security, national or regional public health or safety, or any combination of those matters.

Financial plan means a long-term plan spanning 10 years or longer, presenting a State DOT's estimates of projected available financial resources and predicted expenditures in major asset categories that can be used to achieve State DOT targets for asset condition during the plan period, and highlighting how resources are expected to be allocated based on asset strategies, needs, shortfalls, and agency policies.

Investment strategy means a set of strategies that result from evaluating various levels of funding to achieve State DOT targets for asset condition and system performance effectiveness at a minimum practicable cost while managing risks.

Life-cycle cost means the cost of managing an asset class or asset sub-group for its whole life, from initial construction to its replacement.

Life-cycle planning means a process to estimate the cost of managing an asset class, or asset sub-group over its whole life with consideration for minimizing cost while preserving or improving the condition.

Minimum practicable cost means lowest feasible cost to achieve the objective.

NHS pavements and bridges and NHS pavement and bridge assets mean Interstate System pavements (inclusion of ramps that are not part of the roadway normally traveled by through traffic is optional); NHS pavements (excluding the Interstate System) (inclusion of ramps that are not part of the roadway normally traveled by through traffic is optional); and NHS bridges carrying the NHS (including bridges that are part of the ramps connecting to the NHS).

Performance of the NHS refers to the effectiveness of the NHS in providing for the safe and efficient movement of people and goods where that performance can be affected by physical assets. This term does not include the performance measures established for performance of the Interstate System and performance of the NHS (excluding the Interstate System) under 23 U.S.C. 150(c)(3)(ii)(A)(IV)–(V).

Performance gap means the gaps between the current asset condition and State DOT targets for asset condition, and the gaps in system performance effectiveness that are best addressed by improving the physical assets.

Risk means the positive or negative effects of uncertainty or variability upon agency objectives.

Risk management means the processes and framework for managing potential risks, including identifying, analyzing, evaluating, and addressing the risks to assets and system performance.

Statewide Transportation Improvement Program (STIP) has the same meaning as defined in § 450.104 of this title.

Work type means initial construction, maintenance, preservation, rehabilitation, and reconstruction.

§ 515.7 Process for establishing the asset management plan.

A State shall develop a risk-based asset management plan that describes how the NHS will be managed to achieve system performance effectiveness and State DOT targets for asset condition, while managing the risks, in a financially responsible manner, at a minimum practicable cost over the life cycle of its assets. The State DOT shall develop and use, at a minimum the following processes to prepare its asset management plan:

(a) A State DOT shall establish a process for conducting performance gap analysis to identify deficiencies hindering progress toward improving or preserving the NHS and achieving and sustaining the desired state of good repair. At a minimum, the State DOT's process shall address the following in the gap analysis:

(1) The State DOT targets for asset condition of NHS pavements and bridges as established by the State DOT under 23 U.S.C. 150(d) once promulgated.

(2) The gaps, if any, in the performance-of the NHS that affect NHS pavements and bridges regardless of their physical condition; and

(3) Alternative strategies to close or address the identified gaps.

(b) A State DOT shall establish a process for conducting life-cycle planning for an asset class or asset sub-group at the network level (network to be defined by the State DOT). As a State DOT develops its life-cycle planning process, the State DOT should include future changes in demand; information on current and future environmental conditions including extreme weather events, climate change, and seismic activity; and other factors that could impact whole of life costs of assets. The State DOT may propose excluding one or more asset sub-groups from its life-cycle planning if the State DOT can demonstrate to FHWA the exclusion of the asset sub-group would have no material adverse effect on the development of sound investment strategies due to the limited number of assets in the asset sub-group, the low level of cost associated with managing the assets in that asset sub-group, or other justifiable reasons. A life-cycle planning process shall, at a minimum, include the following:

(1) The State DOT targets for asset condition for each asset class or asset sub-group;

(2) Identification of deterioration models for each asset class or asset sub-group, provided that identification of deterioration models for assets other than NHS pavements and bridges is optional;

(3) Potential work types across the whole life of each asset class or asset sub-group with their relative unit cost; and

(4) A strategy for managing each asset class or asset sub-group by minimizing its life-cycle costs, while achieving the State DOT targets for asset condition for NHS pavements and bridges under 23 U.S.C. 150(d).

(c) A State DOT shall establish a process for developing a risk management plan. This process shall, at a minimum, produce the following information:

(1) Identification of risks that can affect condition of NHS pavements and bridges and the performance of the NHS, including risks associated with current and future environmental conditions, such as extreme weather events, climate change, seismic activity, and risks related to recurring damage and costs as identified through the evaluation of facilities repeated damaged by emergency events carried out under part 667 of this title. Examples of other risk categories include financial risks such as budget uncertainty; operational risks such as asset failure; and strategic risks such as environmental compliance.

(2) An assessment of the identified risks in terms of the likelihood of their occurrence and their impact and consequence if they do occur;

(3) An evaluation and prioritization of the identified risks;

(4) A mitigation plan for addressing the top priority risks;

(5) An approach for monitoring the top priority risks; and

(6) A summary of the evaluations of facilities repeatedly damaged by emergency events carried out under part 667 of this title that discusses, at a minimum, the results relating to the State's NHS pavements and bridges.

(d) A State DOT shall establish a process for the development of a financial plan that identifies annual costs over a minimum period of 10 years. The financial plan process shall, at a minimum, produce:

(1) The estimated cost of expected future work to implement investment strategies contained in the asset management plan, by State fiscal year and work type;

(2) The estimated funding levels that are expected to be reasonably available, by fiscal year, to address the costs of future work types. State DOTs may estimate the amount of available future

funding using historical values where the future funding amount is uncertain;

(3) Identification of anticipated funding sources; and

(4) An estimate of the value of the agency's NHS pavement and bridge assets and the needed investment on an annual basis to maintain the value of these assets.

(e) A State DOT shall establish a process for developing investment strategies meeting the requirements in § 515.9(f). This process must result in a description of how the investment strategies are influenced, at a minimum, by the following:

(1) Performance gap analysis required under paragraph (a) of this section;

(2) Life-cycle planning for asset classes or asset sub-groups resulting from the process required under paragraph (b) of this section;

(3) Risk management analysis resulting from the process required under paragraph (c) of this section; and

(4) Anticipated available funding and estimated cost of expected future work types associated with various candidate strategies based on the financial plan required by paragraph (d) of this section.

(f) The processes established by State DOTs shall include a provision for the State DOT to obtain necessary data from other NHS owners in a collaborative and coordinated effort.

(g) States DOTs shall use the best available data to develop their asset management plans. Pursuant to 23 U.S.C. 150(c)(3)(A)(i), each State DOT shall use bridge and pavement management systems meeting the requirements of § 515.17 to analyze the condition of NHS pavements and bridges for the purpose of developing and implementing the asset management plan required under this part. The use of these or other management systems for other assets that the State DOT elects to include in the asset management plan is optional (*e.g.,* Sign Management Systems, etc.).

§ 515.9 Asset management plan requirements.

(a) A State DOT shall develop and implement an asset management plan to improve or preserve the condition of the assets and improve the performance of the NHS in accordance with the requirements of this part. Asset management plans must describe how the State DOT will carry out asset management as defined in § 515.5.

(b) An asset management plan shall include, at a minimum, a summary listing of NHS pavement and bridge assets, regardless of ownership.

(c) In addition to the assets specified in paragraph (b) of this section, State DOTs are encouraged, but not required, to include all other NHS infrastructure assets within the right-of-way corridor and assets on other public roads. Examples of other NHS infrastructure assets include tunnels, ancillary structures, and signs. Examples of other public roads include non-NHS Federal-aid highways. If a State DOT decides to include other NHS assets in its asset management plan, or to include assets on other public roads, the State DOT, at a minimum, shall evaluate and manage those assets consistent with paragraph (l) of this section.

(d) The minimum content for an asset management plan under this part includes a discussion of each element in this paragraph (d).

(1) Asset management objectives. The objectives should align with the State DOT's mission. The objectives must be consistent with the purpose of asset management, which is to achieve and sustain the desired state of good repair over the life cycle of the assets at a minimum practicable cost.

(2) Asset management measures and State DOT targets for asset condition, including those established pursuant to 23 U.S.C. 150, for NHS pavements and bridges. The plan must include measures and associated targets the State DOT can use in assessing the condition of the assets and performance of the highway system as it relates to those assets. The measures and targets must be consistent with the State DOT's asset management objectives. The State DOT must include the measures established under 23 U.S.C. 150(c)(3)(A)(ii)(I)–(III), once promulgated in 23 CFR part 490, for the condition of NHS pavements and bridges. The State DOT also must include the targets the State DOT has established for the measures required by 23 U.S.C. 150(c)(3)(A)(ii)(I)–(III), once promulgated, and report on such targets in accordance with 23 CFR part 490. The State DOT may include measures and targets for NHS pavements and bridges that the State DOT established through pre-existing management efforts or develops through new efforts if the State DOT wishes to use such additional measures and targets to supplement information derived from the pavement and bridge measures and targets required under 23 U.S.C. 150.

(3) A summary description of the condition of NHS pavements and bridges, regardless of ownership. The summary must include a description of the condition of those assets based on the performance measures established under 23 U.S.C. 150(c)(3)(A)(ii) for condition, once promulgated. The description of condition should be informed by evaluations required under part 667 of this title of facilities repeated damaged by emergency events.

(4) Performance gap identification.

(5) Life-cycle planning.

(6) Risk management analysis, including the results for NHS pavements and bridges, of the periodic evaluations under part 667 of this title of facilities repeated damaged by emergency event.

(7) Financial plan.

(8) Investment strategies.

(e) An asset management plan shall cover, at a minimum, a 10-year period.

(f) An asset management plan shall discuss how the plan's investment strategies collectively would make or support progress toward:

(1) Achieving and sustaining a desired state of good repair over the life cycle of the assets,

(2) Improving or preserving the condition of the assets and the performance of the NHS relating to physical assets,

(3) Achieving the State DOT targets for asset condition and performance of the NHS in accordance with 23 U.S.C. 150(d), and

(4) Achieving the national goals identified in 23 U.S.C. 150(b).

(g) A State DOT must include in its plan a description of how the analyses required by State processes developed in accordance with § 515.7 (such as analyses pertaining to life cycle planning, risk management, and performance gaps) support the State DOT's asset management plan investment strategies.

(h) A State DOT shall integrate its asset management plan into its transportation planning processes that lead to the STIP, to support its efforts to achieve the goals in paragraphs (f)(1) through (4) of this section.

(i) A State DOT is required to make its asset management plan available to the public, and is encouraged to do so in a format that is easily accessible.

(j) Inclusion of performance measures and State DOT targets for NHS pavements and bridges established pursuant to 23 U.S.C. 150 in the asset management plan does not relieve the State DOT of any performance management requirements, including 23 U.S.C. 150(e) reporting, established in other parts of this title.

(k) The head of the State DOT shall approve the asset management plan.

(l) If the State DOT elects to include other NHS infrastructure assets or other public roads assets in its asset management plan, the State at a minimum shall address the following, using a level of effort consistent with the State DOT's needs and resources:

(1) Summary listing of assets, including a description of asset condition;

(2) Asset management measures and State DOT targets for asset condition;

(3) Performance gap analysis;

(4) Life-cycle planning;

(5) Risk analysis, including summaries of evaluations carried out under part 667 of this title for the assets, if available, and consideration of those evaluations;

(6) Financial plan; and

(7) Investment strategies.

(m) The asset management plan of a State may include consideration of critical infrastructure from among those facilities in the State that are eligible under 23 U.S.C. 119(c).

§ 515.11 Deadlines and phase-in of asset management plan development.

(a) *Deadlines.* (1) Not later than April 30, 2018, the State DOT shall submit to FHWA a State-approved initial asset management plan meeting the requirements in paragraph (b) of this section. The FHWA will review the processes described in the initial plan and make a process certification decision as provided in § 515.13(a).

(2) Not later than June 30, 2019, the State DOT shall submit a State-approved asset management plan meeting all the requirements of 23 U.S.C. 119 and this part, including paragraph (c) of this section, together with documentation demonstrating implementation of the asset management plan. The FWHA will determine whether the State DOT's plan and implementation meet the requirements of 23 U.S.C. 119 and this part as provided in § 515.13(b).

(b) The initial plan shall describe the State DOT's processes for developing its risk-based asset management plan, including the policies, procedures, documentation, and implementation approach that satisfy the requirements of this part. The plan also must contain measures and targets for assets covered by the plan. The investment strategies required by § 515.7(e) and 515.9((d)(8) must support progress toward the achievement of the national goals identified in 23 U.S.C. 150(b). The initial plan must include and address the State DOT's 23 U.S.C. 150(d) targets for NHS pavements and bridges only if the first target-setting deadline established in 23 CFR part 490 for NHS pavements and bridges is a date more than 6 months before the initial plan submission deadline in paragraph (a)(1). The initial asset management plan may exclude one or more of the necessary analyses with respect to the following required asset management processes:

(1) Life-cycle planning required under § 515.7(a)(2);

(2) The risk management analysis required under § 515.7(a)(3); and

(3) Financial plan under § 515.7(a)(4).

(c) The State-approved asset management plan submitted not later than June 30, 2019, shall include all required analyses, performed using FHWA-certified processes, and the section 150 measures and State DOT targets for the NHS pavements and bridges. The plan must meet all requirements in §§ 515.7 and 515.9. This includes investment strategies that are developed based on the analyses from all processes required under § 515.7, and meet the requirements in 23 U.S.C. 119(e)(2).

§ 515.13 Process certification and recertification, and annual plan consistency review.

(a) *Process certification and recertification under 23 U.S.C. 119(e)(6).* Not later than 90 days after the date on which the FHWA receives a State DOT's processes and request for certification or recertification, the FHWA shall decide whether the State DOT's processes for developing its asset management plan meet the requirements of this part. The FHWA will treat the State DOT's submission of an initial State-approved asset management plan under § 515.11(b) as the State DOT's request for the first certification of the State's DOT's plan development processes under 23 U.S.C. 119(e)(6). As provided in paragraph (c) of this section, State DOT shall update and resubmit its asset management plan development processes to the FHWA for a new process certification at least every 4 years.

(1) If FHWA determines that the processes used by a State DOT to develop and maintain the asset management plan do not meet the requirements established under this part, FHWA will send the State DOT a written notice of the denial of certification or recertification, including a listing of the specific requirement deficiencies.

(2) Upon receiving a notice of denial of certification or recertification, the State DOT shall have 90 days from receipt of the notice to address the deficiencies identified in the notice and resubmit the State DOT's processes to FHWA for review and certification. The FHWA may extend the State DOT's 90-day period to cure deficiencies upon request. During the cure period established, all penalties and other legal impacts of a denial of certification shall be stayed as provided in 23 U.S.C. 119(e)(6)(C)(i).

(3) If FHWA finds that a State DOT's asset management processes substantially meet the requirements of this part except for minor deficiencies, FHWA may certify or recertify the State DOT's processes as being in compliance, but the State DOT must take actions to correct the minor deficiencies within 90 days of receipt of the notification of certification. The State shall notify FHWA, in writing, when corrective actions are completed.

(b) *Annual determination of consistency under 23 U.S.C. 119(e)(5).* Not later than August 31, 2019, and not later than July 31 in each year thereafter, FHWA will notify the State DOT whether the State DOT has developed and implemented an asset management plan consistent with 23 U.S.C. 119. The notice will be in writing and, in the case of a negative determination, will specify the deficiencies the State DOT needs to address. In making the annual consistency determination, the FHWA will consider the most recent asset management plan submitted by the State DOT, as well as any documentation submitted by the State DOT to demonstrate implementation of the plan. The FHWA determination is only as to the consistency of the State DOT asset management plan and State DOT implementation of that plan with applicable requirements, and is not an approval or disapproval of strategies or other decisions contained in the plan. With respect to any assets the State DOT may elect to include in its plan in addition to NHS pavement and bridge assets, the FHWA consistency determination will consider only whether the State DOT has complied with § 515.9(l) with respect to such discretionary assets.

(1) *Plan development.* The FHWA will review the State DOT's asset management plan to ensure that it was developed with certified processes, includes the required content, and is consistent with other applicable requirements in this part.

(2) *Plan implementation.* The State DOT must demonstrate implementation of an asset management plan that meets the requirements of 23 U.S.C. 119 and this part. Each State DOT may determine the most suitable approach for demonstrating implementation of its asset management plan, so long as the information is current, documented, and verifiable. The submission must show the State DOT is using the investment strategies in its plan to make progress toward achievement of its targets for asset condition and performance of the NHS and to support progress toward the national goals identified in 23 U.S.C. 150(b). The State DOT must submit its

implementation documentation not less than 30 days prior to the deadline for the FHWA consistency determination.

(i) FHWA considers the best evidence of plan implementation to be that, for the 12 months preceding the consistency determination, the State DOT funding allocations are reasonably consistent with the investment strategies in the State DOT's asset management plan. This demonstration takes into account the alignment between the actual and planned levels of investment for various work types (*i.e.,* initial construction, maintenance, preservation, rehabilitation and reconstruction).

(ii) FHWA may find a State DOT has implemented its asset management plan even if the State has deviated from the investment strategies included in the asset management plan, if the State DOT shows the deviation was necessary due to extenuating circumstances beyond the State DOT's reasonable control.

(3) *Opportunity to cure deficiencies.* In the event FHWA notifies a State DOT of a negative consistency determination, the State DOT has 30 days to address the deficiencies. The State DOT may submit additional information showing the FHWA negative determination was in error, or to demonstrate the State DOT has taken corrective action that resolves the deficiencies specified in FHWA's negative determination.

(c) *Updates and other amendments to plans and development processes.* A State DOT must update its asset management plan and asset management plan development processes at least every 4 years, beginning on the date of the initial FHWA certification of the State DOT's processes under paragraph (a) of this section. Whenever the State DOT updates or otherwise amends its asset management plan or its asset management plan development processes, the State DOT must submit the amended plan or processes to the FHWA for a new process certification and consistency determination at least 30 days prior to the deadline for the next FHWA consistency determination under paragraph (b) of this section. Minor technical corrections and revisions with no foreseeable material impact on the accuracy and validity of the processes, analyses, or investment strategies in the plan do not constitute amendments and do not require submission to FHWA.

§ 515.15 Penalties

(a) Beginning on October 1, 2019, and in each fiscal year thereafter, if a State DOT has not developed and implemented an asset management plan consistent with the requirements of 23 U.S.C. 119 and this part, the maximum Federal share for National Highway Performance Program projects and activities carried out by the State in that fiscal year shall be reduced to 65 percent for that fiscal year.

(b)(1) Except as provided in paragraph (b)(2) of this section, if the State DOT has not developed and implemented an asset management plan that is consistent with the requirements of 23 U.S.C. 119 and this part and established the performance targets for NHS pavements and bridges required under 23 U.S.C. 150(d) by the date that is 18 months after the effective date of the 23 U.S.C. 150(c) final rule for NHS pavements and bridges, the FHWA will not approve any further projects using National Highway Performance Program funds. Such suspension of funding approvals will terminate once the State DOT has developed and implemented an asset management plan that is consistent with the requirements of 23 U.S.C. 119 and this part and established its performance targets for NHS pavements and bridges required under 23 U.S.C. 150(d).

(2) The FHWA may extend this deadline if FHWA determines that the State DOT has made a good faith effort to develop and implement an asset management plan and establish the performance targets for NHS pavements and bridges required under 23 U.S.C. 150(d).

§ 515.17 Minimum standards for developing and operating bridge and pavement management systems

Pursuant to 23 U.S.C.150(c)(3)(A)(i), this section establishes the minimum standards States must use for developing and operating bridge and pavement management systems. State DOT bridge and pavement management systems are not subject to FHWA certification under § 515.13. Bridge and pavement management systems shall include, at a minimum, documented procedures for:

(a) Collecting, processing, storing, and updating inventory and condition data for all NHS pavement and bridge assets.

(b) Forecasting deterioration for all NHS pavement and bridge assets;

(c) Determining the benefit-cost over the life cycle of assets to evaluate alternative actions (including no action decisions), for managing the condition of NHS pavement and bridge assets;

(d) Identifying short- and long-term budget needs for managing the condition of all NHS pavement and bridge assets;

(e) Determining the strategies for identifying potential NHS pavement and bridge projects that maximize overall program benefits within the financial constraints.; and

(f) Recommending programs and implementation schedules to manage the condition of NHS pavement and bridge assets within policy and budget constraints.

§ 515.19 Organizational integration of asset management.

(a) The purpose of this section is to describe how a State DOT may integrate asset management into its organizational mission, culture and capabilities at all levels. The activities described in paragraphs (b) through (d) of this section are not requirements.

(b) A State DOT should establish organizational strategic goals and include the goals in its organizational strategic implementation plans with an explanation as to how asset management will help it to achieve those goals.

(c) A State DOT should conduct a periodic self-assessment of the agency's capabilities to conduct asset management, as well as its current efforts in implementing an asset management plan. The self-assessment should consider, at a minimum, the adequacy of the State DOT's strategic goals and policies with respect to asset management, whether asset management is considered in the agency's planning and programming of resources, including development of the STIP; whether the agency is implementing appropriate program delivery processes, such as consideration of alternative project delivery mechanisms, effective program management, and cost tracking and estimating; and whether the agency is implementing adequate data collection and analysis policies to support an effective asset management program.

(d) Based on the results of the self-assessment, the State DOT should conduct a gap analysis to determine which areas of its asset management process require improvement. In conducting a gap analysis, the State DOT should:

(1) Determine the level of organizational performance effort needed to achieve the objectives of asset management;

(2) Determine the performance gaps between the existing level of performance effort and the needed level of performance effort; and

(3) Develop strategies to close the identified organizational performance gaps and define the period of time over which the gap is to be closed.

■ 2. Add part 667 to read as follows:

PART 667—PERIODIC EVALUATION OF FACILITIES REPEATEDLY REQUIRING REPAIR AND RECONSTRUCTION DUE TO EMERGENCY EVENTS

Sec.

667.1 Statewide evaluation.
667.3 Definitions.
667.5 Data time period, availability, and sources.
667.7 Timing of evaluations.
667.9 Consideration of evaluations.

Authority: Sec. 1315(b) of Pub. L. 112–141, 126 Stat. 405; 23 U.S.C. 109, 144, and 315; 49 CFR 1.85.

§ 667.1 Statewide evaluation.

Each State, acting through its department of transportation (State DOT), shall conduct statewide evaluations to determine if there are reasonable alternatives to roads, highways, and bridges that have required repair and reconstruction activities on two or more occasions due to emergency events. The evaluations shall be conducted in accordance with the requirements in this part.

§ 667.3 Definitions.

For purposes of this part:

Catastrophic failure means the sudden failure of a major element or segment of a road, highway, or bridge due to an external cause. The failure must not be primarily attributable to gradual and progressive deterioration or lack of proper maintenance.

Evaluation means an analysis that includes identification and consideration of any alternative that will mitigate, or partially or fully resolve, the root cause of the recurring damage, the costs of achieving the solution, and the likely duration of the solution. The evaluations shall consider the risk of recurring damage and cost of future repair under current and future environmental conditions. These considerations typically are a part of the planning and project development process.

Emergency event means a natural disaster or catastrophic failure resulting in an emergency declared by the Governor of the State or an emergency or disaster declared by the President of the United States.

Reasonable alternatives include options that could partially or fully achieve the following:

(1) Reduce the need for Federal funds to be expended on emergency repair and reconstruction activities;

(2) Better protect public safety and health and the human and natural environment; and

(3) Meet transportation needs as described in the relevant and applicable Federal, State, local, and tribal plans and programs. Relevant and applicable plans and programs include the Long-Range Statewide Transportation Plan, Statewide Transportation Improvement Plan (STIP), Metropolitan Transportation Plan(s), and Transportation Improvement Program(s) (TIP) that are developed under part 450 of this title.

Repair and reconstruction means work on a road, highway, or bridge that has one or more reconstruction elements. The term includes permanent repairs such as restoring pavement surfaces, reconstructing damaged bridges and culverts, and replacing highway appurtenances, but excludes emergency repairs as defined in 23 CFR 668.103.

Roads, highways, and bridges means a highway, as defined in 23 U.S.C. 101(a)(11), that is open to the public and eligible for financial assistance under title 23, U.S.C.; but excludes tribally owned and federally owned roads, highways, and bridges.

§ 667.5 Data time period, availability, and sources.

(a) The beginning date for every evaluation under this part shall be January 1, 1997. The end date must be no earlier than December 31 of the year preceding the date on which the evaluation is due for completion. Evaluations should cover a longer period if useful data is reasonably available. Subject to the timing provisions in § 667.7, evaluations must include any road, highway, or bridge that, on or after January 1, 1997, required repair and reconstruction on two or more occasions due to emergency events.

(b) State DOTs must use reasonable efforts to obtain the data needed for the evaluation. If the State DOT determines the necessary data for the evaluation is unavailable, the State DOT must document in the evaluation the lack of available data for that facility.

(c) A State DOT may use whatever sources and types of data it determines are useful to the evaluation. Available data sources include reports or other information required to receive emergency repair funds under title 23, other sources used to apply for Federal or nonfederal funding, and State or local records pertaining to damage sustained and/or funding sought.

§ 667.7 Timing of evaluations.

(a) Not later than November 23, 2018, the State DOT must complete the statewide evaluation for all NHS roads, highways and bridges. The State DOT shall update the evaluation after every emergency event to the extent needed to add any roads, highways, or bridges subject to this paragraph that were affected by the event. The State DOT shall review and update the entire evaluation at least every 4 years. In establishing its evaluation cycle, the State DOT should consider how the evaluation can best inform the State DOT's preparation of its asset management plan and STIP.

(b) Beginning on November 23, 2020, for all roads, highways, and bridges not included in the evaluation prepared under paragraph (a) of this section, the State DOT must prepare an evaluation that conforms with this part for the affected portion of the road, highway, or bridge prior to including any project relating to such facility in its STIP.

§ 667.9 Consideration of evaluations.

(a) The State DOT shall consider the results of an evaluation prepared under this part when developing projects. State DOTs and metropolitan planning organizations are encouraged to include consideration of the evaluations during the development of transportation plans and programs, including TIPs and STIPs, and during the environmental review process under part 771 of this title. Nothing in this section prohibits State DOTs from proceeding with emergency repairs to restore functionality of the system, or from receiving emergency repair funding under part 668 of this title.

(b) The FHWA will periodically review the State DOT's compliance under this part, including evaluation performance, consideration of evaluation results during project development, and overall results achieved. Nothing in this paragraph limits FHWA's ability to consider the results of the evaluations when relevant to an FHWA decision, including when making a planning finding under 23 U.S.C. 134(g)(8), making decisions during the environmental review process under part 771 of this title, or when approving funding. The State DOT must make evaluations required under this part available to FHWA upon request.

Dated: October 11, 2016.

Gregory G. Nadeau,

Federal Highway Administrator.

[FR Doc. 2016–25117 Filed 10–21–16; 8:45 am]

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Part III

Department of Health and Human Services

42 CFR Part 37
Specifications for Medical Examinations of Coal Miners; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 37

[Docket No. CDC–2014–0011; NIOSH–276]

RIN 0920–AA57

Specifications for Medical Examinations of Coal Miners

AGENCY: Centers for Disease Control and Prevention, HHS.

ACTION: Final rule.

SUMMARY: With this action, the Department of Health and Human Services (HHS), in accordance with recent rulemaking by the Department of Labor's Mine Safety and Health Administration (MSHA), finalizes amendments to Coal Workers' Health Surveillance Program regulations to establish standards for the approval of facilities to conduct spirometry and requires that all coal mine operators submit a plan for the provision of spirometry testing and X-ray examinations to all surface and underground coal miners.

DATES: This rule is effective on November 23, 2016.

FOR FURTHER INFORMATION CONTACT: A. Scott Laney, Research Epidemiologist, Division of Respiratory Disease Studies, NIOSH, Centers for Disease Control and Prevention, 1095 Willowdale Road, MS HG900.2, Morgantown, WV 26505–2888; (304) 285–5754 (this is not a toll-free number); *alaney@cdc.gov.*

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I. Public Participation

Interested persons or organizations were invited to participate in this rulemaking by submitting written views, arguments, recommendations, and data. Comments were invited on any topic related to this rulemaking.

HHS received submissions to the docket from two commenters, including a trade association representing coal mine operators and a spirometry expert.

II. Background

A. History of Coal Workers' Health Surveillance Program and Statutory Authority

All mining work generates fine particles of dust in the air. Coal miners who inhale excessive dust are known to develop a group of diseases of the lungs and airways, including coal workers' pneumoconiosis (pneumoconiosis), silicosis, and chronic obstructive pulmonary disease, including chronic bronchitis and emphysema.[1] To address such threats to the U.S. coal mining workforce, the Coal Mine Health and Safety Act was enacted in 1969 (Pub. L. 91–173) and amended by the Federal Mine Safety and Health Act of 1977 (Pub. L. 95–164, 30 U.S.C. 801 *et seq.*) (Mine Act).

The National Institute for Occupational Safety and Health (NIOSH) Coal Workers' Health Surveillance Program (CWHSP), also authorized by the Mine Act, was established to detect pneumoconiosis and prevent its progression in individual miners, while at the same time providing information for evaluation of temporal and geographic trends in pneumoconiosis. To inform each miner of his or her health status, the Act requires that coal mine operators provide each miner who begins work at a coal mine for the first time a chest roentgenogram (hereafter chest radiograph or X-ray) through an approved facility as soon as possible after employment starts. Three years later a miner must be offered a second chest radiograph. If this second examination reveals evidence of pneumoconiosis, the miner is entitled to a third chest radiograph 2 years after the second. Further, all miners working in a coal mine must be offered a chest radiograph approximately every 5 years.

All chest radiographs and other supplemental tests deemed necessary to protect the health and safety of U.S. coal miners are to be given in accordance with specifications prescribed by the Secretary of Health and Human Services (30 U.S.C. 843(a)). The Mine Act also grants the Secretary, HHS general authority to issue regulations as is deemed appropriate to carry out provisions of the Act (30 U.S.C. 957), and grants NIOSH the authority to conduct activities in the field of coal mine health on behalf of the Secretary, HHS (30 U.S.C. 951(b)).

B. Need for Rulemaking

On May 1, 2014, the Mine Safety and Health Administration (MSHA) in the Department of Labor published a final rule amending existing health and safety standards in 30 CFR part 72 to improve health protections for coal miners, including the expansion of requirements for medical surveillance.[2] The amendments added a new section, § 72.100, to require that both underground and surface coal mine operators provide to each miner chest X-rays and spirometry tests using facilities approved by NIOSH, as well as the documentation of occupational history and symptom assessment.

The expansion of MSHA's medical surveillance requirements caused HHS to amend regulations in 42 CFR part 37 pertaining to the CWHSP, thereby expanding the scope of the Program to include coal miners who work in surface coal mines and adding spirometry testing and symptom assessment for all miners. In response to MSHA's rulemaking, NIOSH published an interim final rule on August 4, 2014 (August 2014 IFR) to expand the existing CWHSP to provide chest radiographic examinations to miners who work in surface coal mines and establish requirements for spirometry testing for all coal miners under part 37.[3] This action finalizes those provisions promulgated by the August 2014 IFR.

III. Summary of Final Rule and Response to Public Comment

This document finalizes the August 2014 IFR. The following section-by-section summary describes and explains the amendments to certain provisions of part 37. Public comments are also summarized and answered. The final regulatory text is provided in the last section of this document.

[1] Edward L Petsonk and John E Parker, Coal Workers' Lung Diseases and Silicosis, *in Fishman's Pulmonary Diseases and Disorders,* 967 (Alfred P. Fishman ed., McGraw-Hill, 4th ed., 2008).

[2] 79 FR 24814.

[3] 79 FR 45110.

A. Subpart—Chest Radiographic Examinations

Section 37.1 Scope

Section 37.1 provides the scope of the provisions in Subpart—Chest Radiographic Examinations, and is amended to clarify the purpose of this subpart. Under this subpart, coal mine operators are required to provide radiographic examinations to each current and new coal miner, using medical facilities approved by NIOSH according to the standards established in this subpart. Because no comments were submitted on this section and no changes are made to the regulatory text, this section is not included in the regulatory text below.

Section 37.2 Definitions

Section 37.2 contains definitions for terms that appear throughout this subpart and the new subparts (Subpart—Spirometry Testing and Subpart—General Requirements). The existing definitions of several terms are revised and a new definition of ''B Reader'' is added, as discussed below.

The definition ''Act,'' which refers to the Federal Mine Safety and Health Act of 1977, is revised to include reference to the Public Law number and amendments.

The definition ''convenient time and place'' is revised to strike the phrase ''with respect to the conduct of any examination under this subpart,'' because that phrase is not used in part 37. Additional language is added to clarify how this term is to be interpreted. Although this definition was not included in the August 2014 IFR, revising it to be consistent with the language in §§ 37.40 and 37.100 is thus a logical outgrowth of this rulemaking.

The definition ''digital radiography systems'' is changed to replace the word ''X-ray'' with ''radiographic.'' Although this definition was not included in the August 2014 IFR, revising it is consistent with changes made to § 37.51 in this final action and is thus a logical outgrowth of this rulemaking.

The definition ''ILO Classification'' is revised to clarify that using the term ''digital chest image file'' includes all electronic standard chest images included in the set of film radiographs provided by the International Labour Office (ILO) in the International Classification of Radiographs of Pneumoconioses. The definition is also revised to recognize that NIOSH must approve other sets of chest images files as equivalent to the ILO Classification. The ILO Classification is incorporated by reference into certain sections in part 37. Although this definition was not included in the August 2014 IFR, revising it to recognize digitized image files is consistent with changes made to § 37.51 in this final action, and is thus a logical outgrowth of this rulemaking.

The definition ''NIOSH'' is revised to replace the former name of the NIOSH division responsible for the CWHSP with its new name, Respiratory Health Division (RHD). RHD is the organizational unit within NIOSH responsible for administration of the CWHSP.

The definition ''Panel of B Readers'' is revised to clarify that B Readers are certified by NIOSH and classify or otherwise evaluate radiographs for the CWHSP.

The definition ''radiologic technologist'' is revised to clarify terminology by replacing ''chest images'' with ''chest radiographs.''

A new definition of ''B Reader'' is added to direct readers to § 37.52, which requires physicians who wish to evaluate and classify chest radiographs for pneumoconiosis to take and pass a specially designed proficiency examination given by NIOSH. This definition is predicated on existing language in § 37.52, and is thus a logical outgrowth of the August 2014 IFR.

Finally, the definition ''facility'' is moved from § 37.91 and is unchanged. No comments were submitted on this section.

Section 37.3 Chest Radiographs Required for Miners

Section 37.3 requires mine operators to provide miners an opportunity to receive a chest radiograph. Paragraphs (a)(1) and (2), concerning the provision of each employed miner an opportunity for a chest radiograph at least 3.5 to 4.5 years after the previous period for the conduct of such examinations, are revised to eliminate redundancy and provide greater clarity regarding the deadlines for voluntary examinations. The sentence specifying that the period during which examinations must begin is removed because it does not provide any additional information and may be confusing. The example provided in paragraph (a)(2) is also removed for similar reasons.

No changes are made to paragraph (b), which establishes the periodicity of three required initial chest radiographs. Paragraph (c), which establishes that NIOSH will notify the miner when it is time for a second or third radiography examination and will notify the operator under certain circumstances, is revised for clarity.

Paragraph (d), concerning the availability of chest radiographs, is revised to replace ''subpart'' with ''part'' to clarify that radiographs must be made available by an operator in accordance with a plan submitted and approved by NIOSH in accordance with this part. As discussed in the August 2014 IFR, the section requiring operator plans for medical examinations has been removed from this subpart and replaced in Subpart—General Requirements.

One commenter asked that HHS require miners to submit to mandatory respiratory examinations. NIOSH does not have legal authority to require coal miners to submit to medical examinations. Although section 203(a) of the Mine Act (30 U.S.C. 843(a)) states that medical examinations shall be given to miners at certain intervals, it states elsewhere in that section that miners are to have ''the opportunity'' to have such examinations. Moreover, NIOSH concurs with MSHA's position, as addressed in the agency's May 1, 2014 final rule in response to public comment, that requiring miners to submit to medical examinations against their will would not be appropriate.[4] No changes are made to the regulatory text in response to public comment.

Section 37.4 Chest Radiographic Examinations Conducted by the Secretary

Section 37.4 details the conditions under which the HHS Secretary will determine whether to conduct a chest radiographic examination. Paragraph (a), which details the circumstances under which the Secretary, HHS, will arrange for chest radiographs at a particular mine, is unchanged.

''Shall'' is replaced with ''must,'' in accordance with Federal plain language guidelines, in paragraph (b), which requires the operator to reimburse the Secretary or person, agency, or institution directed by the Secretary to conduct radiography examinations, and paragraph (c), which requires the examinations arranged by the Secretary to be given according to the periodicity requirements in § 37.3.

Paragraph (d), which stipulates that operators participating in the National Study of Coal Workers' Pneumoconiosis would not be responsible for assuming the cost of providing chest radiographs, is removed in its entirety because that study no longer exists. No comments were submitted on this section and no changes are made to the regulatory text.

Section 37.10 Standards Incorporated by Reference

Section 37.10 provides references to the standards incorporated by reference

[4] *See* MSHA final rule, 79 FR 24814, at 24928 (May 1, 2014).

into part 37. This section is amended slightly to update the name of the NIOSH Division of Respiratory Disease Studies, now known as the Respiratory Health Division. The link to the American College of Radiology publication has been updated. No public comment was received and no further edits are made to this section.

Section 37.20 Miner Identification Document

Section 37.20 requires the use of a Miner Identification Document as a component of the examination. Although this section was not amended by the August 2014 IFR, revising it here is consistent with the addition of spirometry to part 37, and is thus a logical outgrowth of this rulemaking. The text is revised slightly to reference both radiographic and spirometry examinations. The section is also changed to clarify that the form (CDC/NIOSH 2.9) is required for both types of examination.

Section 37.40 General Provisions

Section 37.40 outlines general provisions for chest radiographs. Paragraphs (a) and (c), which require that the radiographic examination must be given at a convenient time and place and performed in an approved facility, respectively, are unchanged. Paragraph (b) is revised to update the name of the completed form that must accompany the chest radiographic examination, the Chest Radiograph Classification Form (CDC/NIOSH 2.8). No comments were submitted on this section.

Section 37.43 Approval of Radiographic Facilities That Use Film Radiography Systems

Section 37.43 establishes standards for the approval of radiography facilities that use film. Although this section was not included in the August 2014 IFR, revisions are a logical outgrowth of other changes throughout the part. The section heading is revised to clarify that it applies to film radiography systems. Paragraph (a), concerning application to NIOSH for facility participation in the CWHSP, is unchanged except to divide it into smaller paragraphs for clarity. Paragraph (a)(1) concerns the submission of sample radiographs made on the equipment intended to be used to perform radiographs under this part; (a)(2) concerns the submission of sample radiographs within 15 days of being made; (a)(3) concerns the return of such radiographs submitted as a component of the A Reader approval process. The reference provided for those chest radiographs is corrected to read § 37.52(a)(2)(i).

The name of the form referenced in paragraph (b), the Radiographic Facility Certification Document, is updated to be consistent with updates in other sections of Part 37.

Paragraphs (c), (d), and (f), concerning the evaluation of radiographs submitted with applications for NIOSH approval, the inspection of the applicant facility by NIOSH, and the establishment of a quality assurance program at the applicant facility, respectively, are unchanged.

The name of the form referenced in paragraph (e), the Radiographic Facility Certification Document, is updated to be consistent with updates in other sections of part 37. The paragraph is also divided into smaller paragraphs for clarity. Paragraph (e)(1) now concerns the suspension or withdrawal of NIOSH approval of a radiograph facility; paragraph (e)(2) requires a copy of a withdrawal notice be displayed on the mine bulletin board.

In paragraph (g), concerning the maintenance of records in accordance with Federal privacy laws, the word ''interpretations'' is replaced with ''classifications,'' to clarify that B Readers are responsible for recording classifications on the Chest Radiograph Classification Form (CDC/NIOSH 2.8). The term ''classifications'' describes surveillance activities, such as providing standardized descriptions of chest radiographs, while ''interpretations'' is a broader term meant to describe clinical activities, such as assessing radiographic findings and generating radiological differential diagnoses. This revision is consistent with similar changes in other sections of part 37.

Section 37.44 Approval of Radiographic Facilities That Use Digital Radiography Systems

Section 37.44 establishes standards for the approval of radiography facilities that use digital radiography. Although this section was not included in the August 2014 IFR, the new organization and content revisions are a logical outgrowth of other changes throughout the part. Paragraph (a), concerning application to NIOSH for facility participation in the CWHSP, is unchanged. Paragraph (a)(1), regarding the submission of digital radiographic image files with an application for facility approval, is redesignated as paragraph (a) and divided into smaller paragraphs for clarity. Paragraph (a)(1) now concerns the submission of image files; (a)(2) concerns the submission of images within 60 days of the application date; (a)(3) concerns the documentation that must accompany the image files; and (a)(4) concerns the orientation of submitted images.

Paragraph (a)(2) is redesignated as paragraph (b). The name of the form referenced in paragraphs (b) and (e), the Radiographic Facility Certification Document, is updated to be consistent with updates in other section of part 37; similarly, the word ''X-ray'' is replaced with ''radiograph'' in paragraph (g)(2).

Paragraphs (b), (c), (e), (f), and (h), concerning facility licensure, physical inspections by NIOSH, the medical physicist requirement, documentation of compliance, and maintenance of records in accordance with Federal privacy laws are redesignated as paragraphs (c), (d), (e), (f), and (i), respectively.

Paragraph (g)(2), regarding radiation exposure parameters, is redesignated as paragraph (h)(2) and is divided into smaller paragraphs for clarity. Paragraph (h)(2)(i) now concerns the monitoring of radiological exposures; paragraph (h)(2)(ii) now concerns annual assessments of radiation exposures conducted by a medical physicist. The substance of paragraph (h) is otherwise unchanged.

Section 37.50 Interpreting and Classifying Chest Radiographs—Film Radiography Systems

Section 37.50 establishes procedures for the classification of film radiographs. The section heading is revised to clarify that the procedures herein apply specifically to film radiography systems. Paragraphs (a), which requires radiographs to be interpreted in accordance with the ILO Classification, and (c), which requires those interpreting chest radiographs to have a complete set of standard radiographs for use with the ILO Classification immediately available for reference, are unchanged.

Paragraph (b) requires radiographs to be interpreted and classified by physicians who read chest radiographs in the normal course of practice and who have demonstrated proficiency in classifying pneumoconiosis in accordance with the standards in § 37.52. Non-substantive revisions to the regulatory text in paragraph (b)(1), which requires that interpretations of findings other than pneumoconiosis must be provided by a qualified physician who provides these services for the examining facility, clarify that the physician must have all required licensure and privileges and must interpret chest radiographs in the normal course of his or her practice.

Paragraph (c), which requires all interpreters to have immediately available a set of standard radiographs

for use with the ILO Classification, is unchanged.

Paragraph (d), which establishes standards for view boxes, is revised to clarify that view boxes must comply with the requirements in paragraphs (d)(1)–(4). No comments were submitted on this section.

Section 37.51 Interpreting and Classifying Chest Radiographs—Digital Radiography Systems

Section 37.51 establishes procedures for the classification of digital chest radiographs. Paragraph (a), which requires that significant abnormal findings other than pneumoconiosis must be initially interpreted and notification provided by a qualified physician, is not changed in this action.

Paragraph (b), requiring that classifications be made by B Readers and recorded on a Chest Radiograph Classification form, is revised to clarify that physician readers who have demonstrated proficiency in the classification of pneumoconiosis in accordance with § 37.52(b) are B Readers. The paragraph is also changed to remove the term ''interpretations,'' for the reasons discussed above.

Paragraph (c), which requires B Readers to have a complete set of NIOSH-approved standard digital radiographs for use with the ILO Classification immediately available for reference, is changed to clarify that NIOSH-approved digital standard images used for making classifications include all approved electronic standard chest images, thus encompassing the current digitized standard chest radiographs provided by ILO. This paragraph is also divided into smaller paragraphs to aid the reader; no substantive changes are made. Paragraph (c)(1) now concerns the use of only NIOSH-approved standard digital images for classification; (c)(2) prohibits the modification of the appearance of the standard images.

Paragraphs (d) through (g), which concern viewing systems, quality control for display devices, use of soft copy images, and the impermissibility of classifications based on digitized copies of chest radiographs are also unchanged. No comments were submitted on this section.

Section 37.52 Proficiency in the Use of Systems for Classifying the Pneumoconioses

Section 37.52 establishes the A and B Reader approval programs. Paragraph (a) establishes standards for the approval of A Readers; paragraph (a)(1), which allows A Reader approvals to continue if established prior to October 15, 2012, is changed to clarify that the approval continues indefinitely. Paragraph (a)(2) details the requirements for becoming a NIOSH-approved A Reader; paragraph (i), which requires the submission of six properly-classified sample radiographs, is revised to remove the word ''interpretations'' and replace it with ''classifications,'' and to update the name of the form to Chest Radiograph Classification Form (CDC/NIOSH 2.8), for the reasons discussed above. Paragraph (a)(2)(ii), requiring the completion of a NIOSH-approved ILO Classification course in lieu of the six sample radiographs referenced in paragraph (a)(2)(i), is unchanged.

Paragraph (b), which establishes standards for the approval of B Readers, and paragraph (b)(1), which establishes that B Reader approvals received prior to October 1, 1976 are terminated, are unchanged. Paragraph (b)(2) requires that physicians pass a proficiency examination in order to be approved as a NIOSH B Reader and is revised to clarify that B Reader proficiency examinations are only given on behalf of or by NIOSH. This paragraph is also revised to divide the large paragraph into smaller paragraphs; no substantive revisions are made. Paragraph (b)(2)(i) now concerns the provision of a complete set of NIOSH-approved standard reference digital radiographs to physicians taking the B Reader exam; (b)(2)(ii) states that physicians who qualify as B Readers need not be qualified as A Readers.

Paragraph (c) requires physicians who wish to participate in the CWHSP to apply to NIOSH. The name of the form is changed to Physician Application for Certification; the paragraph is otherwise unchanged. No comments were submitted on this section.

Section 37.53 Method of Obtaining Definitive Chest Radiograph Classifications

Section 37.53 establishes the method used by NIOSH to obtain definitive classifications of chest radiographs. For the reasons discussed above, the name of this section is revised to replace ''interpretations'' with ''chest radiograph classifications,'' to clarify that B Readers provide classifications according to the ILO system for classifying radiographs. Paragraph (a) establishes that radiographs will be independently classified by an A Reader and B Reader or two B Readers, or if agreement is lacking, NIOSH will obtain a third classification. This paragraph is revised to clarify that B Readers are qualified by NIOSH pursuant to § 37.52, and is also divided into smaller paragraphs to aid the reader. Paragraph (a)(1) now concerns agreement among the two classifications; (a)(2) concerns the procedure NIOSH follows when agreement is lacking, and is further divided into smaller paragraphs. Paragraph (a)(2)(i) concerns agreement between two of three classifications resulting in a final determination; (a)(2)(ii) concerns lack of agreement among three classifications. No other changes are made to this paragraph.

Paragraph (b), which establishes what NIOSH considers to be agreement between chest radiographs, is revised to clarify that two classifications are considered to be in agreement when they meet the standards now in paragraphs (b)(1), (2), and (3). Paragraph (b)(3), which contains the current standard for a determination of simple pneumoconiosis, is further divided into smaller paragraphs (i) and (ii) and is revised slightly to comport with the new structure. No comments were submitted on this section.

Section 37.54 Notification of Abnormal Radiographic Findings

Section 37.54 requires that findings of abnormalities identified by chest radiograph be communicated to the miner. Although this section was not included in the August 2014 IFR, the revisions discussed below are consistent with other changes in this final action.

A new heading is added to clarify the intent of paragraph (a), which provides that findings suggesting heart abnormalities, tuberculosis, lung cancer, or any other significant health condition other than pneumoconiosis must be communicated to the miner or the miner's designated physician. The paragraph is also rearranged to clarify that the first physician to interpret a miner's radiograph must communicate the findings.

A new heading is added to clarify the intent of paragraph (b), which provides that NIOSH will arrange for a physician to compare a recent radiograph found to show significant abnormal findings, including pneumoconiosis, with older images that NIOSH may have in its possession. The word ''interpretation'' is removed from this paragraph to clarify that NIOSH will arrange for a physician to compare the most recent image showing an abnormality to older images. This change is consistent with other similar changes throughout part 37, for the reasons discussed above.

A new heading is added to paragraph (c), to clarify the intent of the paragraph regarding notice to the miner of eligibility for Part 90 transfer rights. The term ''final findings'' is replaced with ''final determinations,'' which are reported to the miner or the miner's

designated physician by NIOSH, when such determinations provide evidence for the development of pneumoconiosis. Revisions also clarify that NIOSH will coordinate with MSHA regarding notification of part 90 eligibility.

Finally, a heading is added to clarify the intent of paragraph (d), which states that NIOSH makes every effort to process pneumoconiosis determinations within 60 days of receipt of chest radiograph images and other documents. The paragraph is also divided into smaller paragraphs to aid the reader. Paragraph (d)(1) now concerns timely notice by MSHA; this paragraph is revised to clarify that NIOSH will work with MSHA to provide notice within the 60-day timeframe established in paragraph (d). Paragraph (d)(2) now states that examination results may not be processed by NIOSH if the examination was made within 6 months of the date of a prior acceptable examination.

One public commenter recommended that this section be changed to allow the results of the radiography examinations and spirometry to be made available to a health professional designated by the mine operator. According to the commenter, because operators are required to establish a plan for the examinations and pay for them, they are entitled to have access to the results. The commenter argued that section 203 of the Mine Act (30 U.S.C. 843) does not support excluding mine operators from the notification requirements in this section or in the spirometry results notification requirements in the new § 37.97. According to the commenter, the decision to not provide examination results to mine operators is inconsistent with a 2006 NIOSH guidance document concerning refractory ceramic fibers and with the DOL Occupational Safety and Health Administration (OSHA) asbestos standards, both of which allow notification of employers. Further, according to the commenter, section 103(h) of the Mine Act provides for the sharing of reports and findings to any interested person. Finally, the commenter argued that sharing the examination findings with operators would allow the operators to provide health counseling and medical management to miners showing evidence of early disease.

NIOSH declines to make results of radiography or spirometry available to either mine operators or health professionals designated by operators. Section 203 of the Mine Act specifically identifies the parties that must be notified of examination results (*i.e.,* Secretary, DOL; Secretary, HHS; miner; and miner's designated physician). NIOSH is not authorized to expand notification to mine operators. Section 103 of the Mine Act, referenced by the commenter and described above, is not relevant to the matter of medical examinations of individual miners because it only addresses the conduct of mine inspections. Finally, NIOSH concurs with MSHA in its response to the question of providing examination results to operators, published in MSHA's 2014 final rule on respirable coal mine dust, which explained that the individuals notified of the miner's test results are limited in order to protect miners' confidentiality and uphold Federal privacy laws.[5]

Section 37.60 Submitting Required Chest Radiographs and Miner Identification Documents

Section 37.60 establishes the protocol for submitting radiographs to NIOSH. Paragraph (a) is revised to clarify that all submitted items, including each required chest radiograph, the Chest Radiograph Classification form, and the Miner Identification Document, become the property of NIOSH. Paragraph (a)(1) is further revised to remove the redundant sentence concerning the 14-day deadline for submission of documents after the date of the radiographic examination. The sentence concerning NIOSH's notification to the submitting facility of receipt of image files and forms is moved into paragraph (a)(2).

Paragraph (b) is revised to clarify that the operator must arrange for reexamination at no expense to the miner, in the event that NIOSH finds any submission to be inadequate.

Paragraph (c), which establishes that failure to comply with paragraph (a) or (b) may result in revocation of approval of a plan, is unchanged, as is paragraph (d), which states that chest radiographs and required forms must only be submitted for miners.

Paragraph (e) is revised to replace ''shall'' with ''must'' or ''will'' throughout the paragraph in accordance with Federal plain language guidelines. References in this paragraph concerning the collection of Social Security numbers are revised slightly to clarify that only the last four digits are required by NIOSH; this change is not substantive and reflects current Program practice. No comments were submitted on this section.

Section 37.70 Review of Classifications

Section 37.70(a) establishes that a miner may request that NIOSH reevaluate a pneumoconiosis classification that the miner believes is in error. The section heading is changed to replace ''interpretations'' with ''classifications,'' consistent with previous edits discussed above. The paragraph is also divided into smaller paragraphs to aid the reader. Paragraph (a)(1) establishes that after a written request from a miner, NIOSH will obtain one or more additional classifications by B Readers if the contested classification was based on agreement between an A Reader and a B Reader, pursuant to § 37.53. A reference in this paragraph to the section in part 37 that addresses the transfer of miners to a less dusty area is corrected to read § 37.102. Paragraph (a)(2) establishes that a classification based on agreement between two or more B Readers will be considered final and will be not be reevaluated. No comments were submitted on this section and no other changes are made to the regulatory text.

§ 37.80 Availability of Records for Radiographs

Section 37.80 requires that written consent be provided to NIOSH for the release of medical information and radiographs. This section was not included in the August 2014 IFR, but is revised in this final action to clarify that original film radiographs are available for examination at the NIOSH facility in Morgantown, WV. No comments were submitted on this section.

B. Subpart—Spirometry Testing

This subpart establishes standards for spirometry testing for all coal miners, working in both underground and surface mines. As discussed in the August 2014 IFR, the provisions in this subpart are consistent with MSHA regulations in 30 CFR 72.100, which requires that operators offer periodic spirometry and respiratory assessments to document miner respiratory symptoms and lung function. This is in addition to chest radiographic examinations and occupational history questionnaires. The subpart heading is revised to replace the word ''examinations'' with the word ''testing,'' and similar changes are made throughout the subpart to reflect the correct terminology for describing spirometry.

Section 37.90 Scope

Section 37.90 provides the scope of the provisions in Subpart—Spirometry Testing. The text of this section is changed slightly to clarify that operators are required to provide spirometry testing to both current and newly

[5] *See* 79 FR 24814, at 24928 (May 1, 2014).

employed coal miners. No comments were submitted on this section.

Section 37.91 Definitions

Section 37.91 defines terms used in this subpart. Several revisions are made to this section. The definition ''facility'' is removed, unchanged, from this section and moved to the definitions section in § 37.2.

The definition ''FET'' is revised to clarify that forced expiratory time is the time from the beginning of a forced exhalation maneuver to the end of the expiration.

The definition ''FEV1'' is revised to clarify that forced expiratory volume in one second is the greatest volume of air that can be forcibly blown out within the first second after full inspiration.

A new definition of the FEV1/FVC is added to mean the ratio between the largest acceptable FEV1 and the largest acceptable FVC following the forced vital capacity maneuver.[6] Although this definition was not included in the August 2014 IFR, it is considered to be a logical outgrowth of this rulemaking. (*See* § 37.96(b)(1).)

The existing definition of ''FEV6'' is revised to clarify that forced expiratory volume in six seconds is the greatest volume of air that can forcibly be blown out in six seconds after full inspiration.

The existing definition of ''FVC'' is revised to clarify that forced vital capacity is the greatest volume of air that can forcibly be blown out after full inspiration.

The existing definition of ''PEF'' is revised to clarify that peak expiratory flow is the maximal airflow generated during a forced vital capacity maneuver.

No comments were submitted on this section.

Section 37.92 Spirometry Testing Required for Miners

Section 37.92 requires coal mine operators to provide all miners an opportunity to receive spirometry testing. Paragraph (a), which requires that each operator must provide an opportunity for miners to perform spirometry testing at least once every 5 years, is unchanged except for the heading, in which ''Voluntary examinations'' is replaced with ''Voluntary tests.''

Paragraphs (b)(1), (2), and (3) establish the periodicity of initial, second, and third spirometry tests. The headings for the lower subparagraphs, ''Initial spirometry examination,'' ''Second examination,'' and ''Third examination'' are removed to mirror the structure of § 37.3, ''Chest radiographs required for miners.'' The word ''examination(s)'' is replaced with ''test(s)'' throughout all three. Paragraph (b)(3) is revised to clarify that a third spirometry test and respiratory assessment will be provided if the second spirometry test results demonstrate more than a 15 percent age adjusted decline in the percent predicted FEV1 value since the initial baseline test. This paragraph is also divided into smaller paragraphs to aid the reader; the two new sub-paragraphs clarify how the percent predicted FEV1 value will be calculated (paragraph (b)(3)(i)) and the appropriate correction factor for calculating the percent predicted FEV1 for an individual of Asian descent (paragraph (b)(3)(ii)). One comment was received on paragraph (b)(3), supporting the decision to establish the 15 percent decline in the percent predicted FEV1 value.

Paragraph (c) establishes notification requirements for second and third spirometry testing sessions. This paragraph is also divided into smaller paragraphs to aid the reader. Paragraph (c)(1) stipulates that the operator would be notified of a miner's eligibility for a third spirometry test only with the consent of the miner. If the operator is notified, NIOSH will not specify the medical reason for the third test nor reveal that it is the miner's third. Paragraph (c)(2) establishes that if the miner is notified of the time for a third test and the operator is not notified, provision for the test in the NIOSH-approved operator's plan will constitute the operator's compliance with this requirement; no changes are made to the text of this paragraph.

No revisions are made to paragraph (d) and no other public comment was received on this section.

Section 37.93 Approval of Spirometry Facilities

Section 37.93 establishes standards by which NIOSH approves facilities that conduct spirometry tests, including ensuring that spirometry results are of adequate quality, and specifying programmatic approaches to quality assurance and addressing deficiencies. Paragraph (a) requires that NIOSH-approved facilities be able to provide spirometry of high technical quality by meeting the standards in this subpart. The paragraph is revised to replace the term ''spirometry examinations'' with the more common ''spirometry testing,'' and to remove the link to the Spirometry Facility Certification Document to avoid incorrect information if the NIOSH Web site is updated.

Paragraph (b) establishes that a spirometry quality assurance program must be in place at the facility to minimize the rate of invalid test results. Paragraph (b)(1) requires instrument calibration checks, performed in accordance with the 2005 ATS/ERS Standardisation of Spirometry guidelines. The regulatory text is revised to clarify that instrument calibration check records must be maintained by the facility and available for inspection by NIOSH, as deemed necessary. One public commenter stated that the calibration check procedures as described in the proposed rule were most relevant to volume spirometers, which are no longer being produced and are increasingly unavailable for purchase. In response to the public comment, the regulatory text in paragraph (b)(1) is revised and divided into smaller paragraphs to clarify which calibration check procedures are expected for volume spirometers (paragraph (b)(1)(i)) and flow-type spirometers (paragraph (b)(2)(ii)). These procedures are consistent with guidance cited by the commenter and published by the Occupational Safety and Health Administration.[7] A new paragraph (b)(1)(iii) contains the existing sentence regarding the retention and maintenance of instrument calibration check records, and is changed to clarify that records will be available for inspection by NIOSH, as deemed necessary.

Paragraph (b)(2) requires automated maneuver and test session quality-checks. The paragraph is revised to clarify that the screen displayed error messages must alert the technician to maneuver acceptability and test session non-repeatability. The paragraph is also revised to clarify that each spirometry test session must have the goal of obtaining 3 acceptable with 2 repeatable forced vital capacity maneuvers. A public commenter also expressed concern that technicians understand that although the error messages referenced in paragraph (b)(2) are helpful, they are unreliable and cannot be relied on alone to evaluate and determine test validity. NIOSH agrees that technicians should not rely on the equipment alone to alert them of testing errors. Accordingly, § 37.95(a) requires all providers who collect spirometry data to successfully complete a NIOSH-approved spirometry training course. The spirometry course curriculum includes the identification and

[6] *See* Gregg L. Ruppel, *Manual of Pulmonary Function Testing,* 51 (St. Louis: Mosby Inc., 9th ed., 2009).

[7] Occupational Safety and Health Administration, U.S. Department of Labor, Spirometry Testing in Occupational Health Programs: Best Practices for Healthcare Professionals, OSHA 3637–03 2013, *https://www.osha.gov/Publications/OSHA3637.pdf.*

correction of technical and subject performance errors.[8] Course participants are given additional curriculum materials to use as guides for correcting these testing errors, which they can retain for future reference in their clinics.[9] Paragraph (b)(2) is not changed in response to the public comment.

Paragraph (b)(3) requires ongoing monitoring of spirometry test quality. The paragraph is revised to clarify that NIOSH may provide quality performance feedback to the spirometry technician(s). The word ''examination,'' used to characterize spirometry data, is removed from paragraph (b)(4), which concerns quality assurance audits.

The word ''as'' is inserted into paragraph (c), which concerns noncompliance, to improve the first sentence; the word ''examination'' is removed, for the reasons discussed above. Paragraph (d), revocation of approval, is unchanged.

Finally, in paragraph (e), references to chest radiographs are removed and/or changed to reference spirometry tests, in keeping with the theme of this subpart. These changes include replacing the term ''medical examinations'' with ''spirometry tests'' and removing the reference to radiograph examinations, classifications, and images.

Section 37.94 Respiratory assessment form

Section 37.94 requires that a respiratory assessment form must be completed for each miner upon testing. The link to the form on the NIOSH Web site is removed and the word ''examination'' is replaced with ''testing.'' No comments were submitted on this section.

Section 37.95 Specifications for Performing Spirometry Tests

Section 37.95 establishes standards for the performance of spirometry tests; the term ''examinations'' is replaced with ''tests'' in the section heading. Paragraph (a) of this section requires that persons administering spirometry tests for the CWHSP demonstrate completion of NIOSH-approved spirometry training, and maintain their knowledge by periodically completing an approved refresher course. The paragraph is revised to remove the link to the Spirometry Results Notification Form.

Paragraph (b) establishes specifications for the spirometry testing equipment used to conduct tests pursuant to this Part. A public commenter recommended that the real-time displays should be large in order to allow the technician to quickly identify issues with the tests. NIOSH agrees with the commenter's concern and has required that spirometry testing equipment conform with the 2005 ATS/ERS Standardisation of Spirometry specifications for graphics (real-time displays and test reports), which should be a minimum size for the proper recognition of errors and acceptability of test maneuvers. As part of the approval process, clinics are required to provide information pertaining to spirometer manufacturer, model, and serial number for each spirometer used during miner testing. This spirometer information allows NIOSH to confirm that the system display meets minimum requirements. No changes are made to paragraph (b).

Paragraph (c) specifies certain required documents and procedures during performance of spirometry testing, including the pre-test checklist, Respiratory Assessment form, collection of anthropometric and demographic information, and the spirometry procedure itself, which must be conducted in accordance with testing procedures described in the 2005 ATS/ERS Standardisation of Spirometry and the 2010 Standardisation of Lung Function Testing, authors' replies to readers' comments, which are incorporated by reference. The paragraph is revised to include a new paragraph (c)(1), which clarifies that the Miner Identification Document described in § 37.20 must be completed for each miner at the facility where spirometry is performed; the remaining numbered paragraphs are re-numbered accordingly. In the paragraphs now designated (c)(2) and (3), which require completion of the pre-test checklist and the Respiratory Assessment form, respectively, the links to those documents are removed, for the reason discussed above. Paragraph (c)(4), which requires the collection of anthropometric and demographic information, is revised to clarify that the data must either be entered into the facility's computer and transmitted electronically with the spirometry data file or submitted, if required under the facility's approval, on the Spirometry Results Notification form. Language concerning spirometry equipment that does not permit electronic transfer of data files is removed because all facilities that are approved to participate in the CWHSP will submit spirometry data electronically, whether in the form of spirometry data files or in the form of a completed Spirometry Results Notification Form (CDC/NIOSH 2.15) accompanied by a spirometry report PDF that contains graphics for NIOSH inspection of FVC maneuver quality. The paragraph (c)(5) heading is revised to clarify that the topic of the paragraph is test procedures.

Paragraph (d), concerning the submission of test results by the approved facility to NIOSH, is removed because it is redundant. Requirements for the submission of spirometry results to NIOSH are consolidated in § 37.96(c).

No changes are made to former paragraph (e), now designated paragraph (d), concerning records retention, other than to substitute ''test'' and ''sessions'' for ''examination'' and ''examinations,'' and no other public comments were received on this section.

Section 37.96 Spirometry Interpretations, Reports, and Submission

Section 37.96 establishes requirements for the interpretation of spirometry test results, as well as specifications for the content, deletion, and transmission of test reports. The heading of this section is revised to replace the word ''notifications'' with ''submission'' to reflect a reorganization of this section, discussed below.

Paragraph (a) of this section requires qualified health care professionals at the facilities to interpret results using a standardized approach, described in the 2005 ATS/ERS Interpretative Strategies for Lung Function Tests, and the 2014 Official ATS Standards: Spirometry in the Occupational Setting, which are incorporated by reference. No changes are made to paragraph (a).

Paragraph (b) specifies the content of spirometry test reports and the deletion of files and forms associated with the testing. The title of paragraph (b) is edited for clarity, ''Spirometry reports at NIOSH-approved spirometry facilities.'' The phrase ''at a minimum'' is removed from paragraph (b)(1) to clarify that spirometry reports must contain the elements listed in this paragraph. Paragraph (b)(1) is also divided into smaller paragraphs to clarify the required elements, and revised by adding the word ''threshold'' to describe the lower limit of normal values required. Paragraph (b)(2) is unchanged.

The language in paragraph (c), which requires that findings are communicated to the miner or the miner's designated physician, is moved from § 37.96 to a new § 37.97; the existing section

[8] *See* Spirometry: What is the Design and Content of an Approved Course? *http://www.cdc.gov/niosh/topics/spirometry/content-approved-course.html.*

[9] *See* NIOSH, *Get Valid Spirometry Results EVERY Time,* DHHS (NIOSH) Publication No. 2011–135, March 2011, *http://www.cdc.gov/niosh/docs/2011-135/,* and NIOSH, *Spirometry Quality Assurance: Common Errors and Their Impact on Test Results,* DHHS (NIOSH) Publication Number 2012–116, January 2012, *http://www.cdc.gov/niosh/docs/2012-116/default.html.*

containing references to documents incorporated by reference into this subpart is renumbered § 37.98. The notifications to miners section, public comment, and NIOSH response to comment are discussed below.

With the removal of the language in paragraph (c), paragraph (d), concerning the submission of spirometry results to NIOSH, is redesignated paragraph (c). The text in this paragraph is revised to clarify that each facility must submit spirometry results and completed forms to NIOSH within 14 days of a spirometry test. The link to the Spirometry Notification Form is removed, as discussed above, and the name of the form is corrected. This paragraph is divided into smaller paragraphs to aid clarity. Paragraph (c)(1) concerns the submission of spirometry test results in the form of an electronic data file. CWHSP prefers the submission of all test results and data points using CSV or XML files. The submission must be carried out as specified in the facility's approval. Paragraph (c)(2) allows the submission of test results electronically using the Spirometry Results Notification form, when specified under a facility's approval. Electronic submission of test results via ePDF is acceptable when facilities are otherwise unable to submit electronic files in CSV or XML format. These changes are not substantive.

The final paragraph, concerning the confidentiality of test results, is redesignated paragraph (d). The word ''examinations'' is removed from the paragraph heading. The text in this paragraph is revised to clarify that medical records containing protected health information must be maintained pursuant to the requirements in § 37.93(e). Finally, paragraph (d) is divided into two smaller paragraphs for clarity. No public comment was received on this section.

Section 37.97 Notification of Spirometry Results

New § 37.97, concerning the notification to miners or the miner's designated physician of spirometry results, comprises text that was located in § 37.96(c). It is moved to a new section to make information about notification procedures more accessible and to mirror the structure of the subpart concerning chest radiographs. The original text is revised slightly to clarify that a comparison between current and previously submitted spirometry tests will be provided by NIOSH to the miner if the results from more than one set of spirometry results are available. One public commenter recommended that the results of both radiography and spirometry be made available to a health professional designated by the mine operator. NIOSH declines to adopt this recommendation; a summary of the public comment and NIOSH's response is located above, in the discussion concerning § 37.54.

Section 37.98 Standards Incorporated by Reference

Existing § 37.97, concerning standards incorporated by reference into this subpart, is redesignated § 37.98. Paragraph (a) is revised to update the name of the NIOSH Respiratory Health Division, as discussed above. The link to the ATS Standardization of Spirometry; 1994 Update, is updated, as is the link to the 2005 ATS/ERS Standardisation of Spirometry. No comments were submitted on this section.

C. Subpart—General Requirements

This subpart establishes general requirements for all surface and underground coal mine operators.

Section 37.100 Coal Mine Operator Plan for Medical Examinations

Section 37.100 requires that all coal mine operators submit a plan for providing miners with radiography and spirometry examinations. Paragraph (a) requires operators to submit and receive NIOSH approval for a plan to provide the examinations, as well as occupational histories and respiratory assessments; it is unchanged. Paragraph (a)(1) specifies that on or after August 1, 2014, a person becoming a coal mine operator, for example by purchasing an existing mine or developing a new mine, or a mine operator without an approved plan must submit a plan within 60 days that provides for chest radiographs and occupational histories. The paragraph is revised, inserting the word ''only,'' to clarify that the provision of spirometry tests need not be included for a plan approved pursuant to this paragraph.

Paragraph (a)(2) states that all operators with approved examination plans providing only for chest radiographs and occupational histories will be notified by MSHA when they are required to submit an amended plan that includes spirometry and respiratory assessments.

In paragraph (b), which lists the required components of the operator's plan, the term ''X-ray'' is replaced with ''radiograph'' and ''tests'' are replaced with ''examinations'' in paragraph (b)(4); ''shall'' is replaced with ''must'' or ''will'' in paragraph (b)(5) in accordance with the Federal Plain Language Guidelines.[10]

Paragraph (c), which allows operators to provide for alternate examination facilities, is revised to clarify that the alternate facilities should be identified in the operator's plans submitted to NIOSH for approval.

''Shall'' is also replaced by ''must'' and ''shall be'' is replaced with ''is'' in paragraph (d), which states that an approved plan remains in effect even when the mine operator has transferred responsibility for the mine to a new operator.

Paragraph (e), concerning changes in mine plans, is unchanged. Paragraph (f), which requires the display of a proposed plan or a proposed change in plan, is revised slightly to clarify that only changes to a NIOSH-approved plan need be displayed.

In paragraph (g), which requires that mine operators resubmit a plan for each mine upon notification from NIOSH, the word ''will'' is replaced with ''must'' in accordance with Federal Plain Language Guidelines.

No public comment was received and no other changes are made to this section.

Section 37.101 Approval of Plans

Section 37.101 establishes that the operator's plan will be approved by NIOSH if it is found to meet the requirements in this subpart. Paragraphs (a) and (b), concerning approval and denial of mine operator plans, are unchanged. Paragraph (c) is revised to clarify that NIOSH will inform MSHA if an operator's plan is denied, in addition to the existing requirement for NIOSH to inform the operator. No comments were submitted on this section.

Section 37.102 Transfer of Affected Miner to Less Dusty Area

Section 37.102 requires that any miner who has evidence of the development of pneumoconiosis, as determined by NIOSH, must be given the option of transferring to a less dusty area of the mine. A public commenter recommended that transfer to a less dusty area should be mandatory for all miners with ILO classifications greater than or equal to category 2. According to the commenter, only 19 percent of over 3,000 miners who were offered an opportunity to transfer to a less dusty area since 1980 have exercised that option. Thus, the commenter thinks that the intervention program is ineffective ''in preventing pulmonary function

[10] *See* Federal Plain Language Guidelines, *http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/index.cfm.*

loss,'' and that ''stronger measures must be put in place to increase the participation in the transfer option.'' NIOSH cannot require transfer of a miner who demonstrates evidence of development of pneumoconiosis to a less dusty area. NIOSH concurs with MSHA's position, as addressed in the agency's May 1, 2014 final rule, that a mandatory transfer program would compromise the confidentiality of the CWHSP. In addition, section 203 of the Mine Act (30 U.S.C. 843) only speaks of optional transfers, and does not authorize mandatory transfers. No additional public comment was received, and no changes are made to the regulatory text.

Section 37.103 Medical Examinations at Miner's Expense

Section 37.103 states that any miner who wishes to obtain a radiography examination or spirometry test at his or her own expense may do so. For clarity, the word ''interpretation'' is replaced with ''evaluation of spirometry test results.'' No public comment was received on this section.

General

One commenter asserted that NIOSH must take into account the effects of cigarette smoking on the health outcomes of coal miners, particularly chronic obstructive pulmonary disease (COPD). The commenter referred to a 1995 NIOSH Criteria Document concerning occupational exposure to respirable coal mine dust, which recommended that underground and surface coal mine operators prohibit smoking in all mines and other work areas associated with mining, provide counseling to smokers about their increased risk of lung cancer and COPD, and encourage them to participate in a smoking cessation program.[11]

NIOSH acknowledges the effects of smoking and dust exposure on the development of occupational respiratory disease. Accordingly, NIOSH uses the Respiratory Assessment Form (CDC/NIOSH 2.13) in the course of conducting a spirometry test; the form includes detailed questions designed to establish the miner's smoking history.[12] At the population level, this data collection will allow NIOSH to take smoking into account in evaluations of coal miners' respiratory health and will assist NIOSH in developing interventions to benefit underground and surface coal miners. At the level of the individual miner, the goal of the radiography and spirometry conducted pursuant to part 37 is to identify radiographic evidence of pneumoconiosis and spirometric evidence of respiratory impairment, not to establish disease causation.

NIOSH lacks authority to prohibit smoking in underground and surface coal mines, but includes information about health effects of smoking in notifications to individual miners. Fortunately, many mines prohibit smoking onsite.

IV. Regulatory Assessment Requirements

A. Executive Order 12866 and Executive Order 13563

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

This final rule is not being treated as a ''significant'' action under E.O. 12866. It finalizes and makes non-substantive revisions to those sections in 42 CFR part 37 which added requirements for mine operators to provide symptom assessment and spirometry testing for the surveillance of decreased lung function to all coal miners, and extended existing requirements to provide chest X-rays and occupational histories for underground coal miners to surface coal mine operators. The non-substantive revisions made in this final action to those sections of 42 CFR part 37 that were promulgated by interim final rule in August 2014 (79 FR 45110) will not result in costs to either the agency or its stakeholders.

The rule does not interfere with State, local, or Tribal governments in the exercise of their governmental functions.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires each agency to consider the potential impact of its regulations on small entities including small businesses, small governmental units, and small not-for-profit organizations. This rule establishes requirements for the provision of chest X-rays and spirometry tests to all coal miners, and sets standards for the approval of testing facilities and transmission of test data.

The potential impact on small businesses has been analyzed by MSHA, in the Regulatory Economic Analysis published in support of that agency's May 1, 2014 final rule (*see http://www.msha.gov/REGS/REA/CoalMineDust2010.pdf*). This final rule does not impose any new requirements on small radiographic or spirometry facilities that participate in the Coal Workers' Health Surveillance Program administered by NIOSH under 42 CFR part 37. This final rule will not impose a significant economic burden on small coal mines. Accordingly, HHS certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

C. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, requires an agency to invite public comment on, and to obtain OMB approval of, any regulation that requires 10 or more people to report information to the agency or to keep certain records. This final action continues to impose the same information collection requirements as under the August 2014 IFR, including the submission of the following forms:

- Consent, Release, and History Form for Autopsy [CDC/NIOSH (M)2.6]
- Chest Radiograph Classification Form [CDC/NIOSH 2.8]
- Miner Identification Document [CDC/NIOSH 2.9]
- Coal Mine Operator's Plan [CDC/NIOSH (M)2.10]
- Radiographic Facility Certification Document [CDC/NIOSH (M)2.11(E)]
- Physician Application for Certification [CDC 2.12 (E)]
- Respiratory Assessment Form [CDC/NIOSH 2.13]
- Spirometry Facility Certification [CDC/NIOSH 2.14]
- Spirometry Results Notification Form [CDC/NIOSH 2.15]
- Coal Contractor Plan [CDC/NIOSH (M) 2.18 (E)]

These forms are approved by OMB for data collected under the National Coal Workers' Health Surveillance Program (CWHSP) (OMB Control No. 0920–0020, expires June 30, 2018). HHS estimates that the paperwork burden associated with this rulemaking is 20,282 hours.

[11] National Institute for Occupational Safety and Health, HHS, *Criteria for a Recommended Standard: Occupational Exposure to Respirable Coal Mine Dust,* DHHS (NIOSH) Publication No. 95–106, September 1995, *http://www.cdc.gov/niosh/docs/95-106/pdfs/95-106.pdf.*

[12] *See* Respiratory Assessment Form (CDC/NIOSH 2.13), questions 9, 9a, 9b, 9c, 9d, 10, 11, *http://www.cdc.gov/niosh/topics/surveillance/pdfs/cwhsp-respiratoryassessment-2-13.pdf.*

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Coal Mine Operator	2.10	388	1	30/60	194
Coal Mine Contractor	2.18	575	1	30/60	288
Radiograph Facility Supervisor	2.11	40	1	30/60	20
Coal Miner	2.9	14,560	1	20/60	4,854
Coal Miner—Radiograph	No form required	14,560	1	15/60	3,640
B Reader Physician	2.8	10	3014	3/60	1,507
Physicians taking the B Reader Examination	2.12	100	1	10/60	17
Spirometry Facility Supervisor	2.14	100	1	30/60	50
Spirometry Facility Employee	2.13	14,560	1	5/60	1,214
Spirometry Technician	2.15	14,560	1	20/60	4,854
Coal Mine—Spirometry	No form required	14,560	1	15/60	3,640
Pathologist	Invoice—No standard form	5	1	5/60	1
Pathologist	Pathology Report—No standard form.	5	1	5/60	1
Next-of-kin for deceased miner	2.6	5	1	15/60	2
Total					20,282

D. Small Business Regulatory Enforcement Fairness Act

As required by Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), the Department will report the promulgation of this rule to Congress prior to its effective date. The report will state that the Department has concluded that this rule is not a ''major rule'' because it is not likely to result in an annual effect on the economy of $100 million or more.

E. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector ''other than to the extent that such regulations incorporate requirements specifically set forth in law.'' For purposes of the Unfunded Mandates Reform Act, this rule does not include any Federal mandate that may result in increased annual expenditures in excess of $100 million by State, local or Tribal governments in the aggregate, or by the private sector.

F. Executive Order 12988 (Civil Justice)

This rule has been drafted and reviewed in accordance with Executive Order 12988, ''Civil Justice Reform,'' and will not unduly burden the Federal court system. Chest radiograph classifications that result in a finding of pneumoconiosis may be an element in claim processing and adjudication conducted by DOL's Black Lung Compensation Program. This final action affects radiographs submitted to DOL for the purpose of reviewing and administering those claims. This rule has been reviewed carefully to eliminate drafting errors and ambiguities.

G. Executive Order 13132 (Federalism)

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' The rule does not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

H. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)

In accordance with Executive Order 13045, HHS has evaluated the environmental health and safety effects of this rule on children. HHS has determined that the rule would have no effect on children.

I. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)

In accordance with Executive Order 13211, HHS has evaluated the effects of this rule on energy supply, distribution or use, and has determined that the rule will not have a significant adverse effect.

J. Plain Writing Act of 2010

Under Public Law 111–274 (October 13, 2010), executive Departments and Agencies are required to use plain language in documents that explain to the public how to comply with a requirement the Federal government administers or enforces. HHS has attempted to use plain language in drafting this final action consistent with the Federal Plain Writing Act guidelines.

List of Subjects in 42 CFR Part 37

Chronic obstructive pulmonary disease, Coal workers' pneumoconiosis, Incorporation by reference, Lung diseases, Mine safety and health, Occupational safety and health, Pneumoconiosis, Respiratory and pulmonary diseases, Silicosis, Spirometry, Surface coal mining, Transfer rights, Underground coal mining, X-rays.

Text of the Rule

For the reasons discussed in the preamble, the Department of Health and Human Services amends 42 CFR part 37 as follows:

PART 37—SPECIFICATIONS FOR MEDICAL EXAMINATIONS OF COAL MINERS

■ 1. The authority citation for part 37 continues to read as follows:

Authority: Sec. 203, 83 Stat. 763 (30 U.S.C. 843), unless otherwise noted.

■ 2. Amend § 37.2 by revising the introductory text and the definitions of ''Act'', ''Convenient time and place'', ''Digital radiography systems'', ''ILO Classification'', ''NIOSH'', ''Panel of B Readers'', and ''Radiologic technologist'' and by adding definitions of ''B Reader'' and ''Facility'' to read as follows:

§ 37.2 Definitions.

Any term defined in the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 *et seq.*, Pub. L. 95–164, as amended) and not defined below will have the meaning given it in the Act. As used in this subpart:

Act means the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801, *et seq.*, Pub. L. 95–164, as amended).

B Reader means a physician certified by NIOSH as able to classify chest radiographs using the ILO Classification system, pursuant to § 37.52(b).

* * * * *

Convenient time and place means that an examination conducted pursuant to this part must be given at a reasonable hour in the locality in which the miner resides or a location that is equally accessible to the miner. For example, examinations at the mine during, immediately preceding, or immediately following work and a ''no appointment'' examination at a medical facility in a community easily accessible to the residences of a majority of the miners working at the mine will be considered of equivalent convenience for purposes of this definition.

Digital radiography systems, as used in this context, include both Digital Radiography (DR) and Computed Radiography (CR) systems.

(1) *Computed radiography (CR)* is the term for digital radiographic image acquisition systems that detect radiographic signals using a cassette-based photostimulable storage phosphor. Subsequently, the cassette is processed using a stimulating laser beam to convert the latent radiographic image to electronic signals which are then processed and stored so they can be displayed.

(2) *Digital radiography (DR)* is the term used for digital radiographic image acquisition systems in which the radiographic signals received by the image detector are converted nearly instantaneously to electronic signals without movable cassettes.

Facility means a facility or organization licensed to provide health care by the State or Territory in which services are provided, such as a hospital, a clinic, or other provider that performs medical examinations.

ILO Classification means the classification of radiographs using the International Classification of Radiographs of Pneumoconioses, a system devised by an international committee of the International Labour Office (ILO), including a complete set of standard film radiographs or digital chest image files available from the ILO or other set of chest image files approved by NIOSH as equivalent. The ILO Classification is incorporated by reference into §§ 37.50(a) and (c) and 37.51(b).

* * * * *

NIOSH means the National Institute for Occupational Safety and Health (NIOSH), located within the Centers for Disease Control and Prevention (CDC). Within NIOSH, the Respiratory Health Division (RHD), 1095 Willowdale Road, Morgantown, WV 26505, is the organizational unit that has programmatic responsibility for the Coal Workers' Health Surveillance Program.

* * * * *

Panel of B Readers means the group of physicians that are currently certified by NIOSH as B Readers and who classify or otherwise evaluate radiographs for the Coal Workers' Health Surveillance Program.

* * * * *

Radiologic technologist means an individual who has met the requirements for privileges to perform general radiographic procedures and for competence in using the equipment and software employed by the examining facility to obtain chest radiographs as specified by the State or Territory and examining facility in which such services are provided. Optimally, such an individual will have completed a formal training program in radiography leading to a certificate, an associate degree, or a bachelor's degree and participated in the voluntary initial certification and annual renewal of registration for radiologic technologists offered by the American Registry of Radiologic Technologists.

* * * * *

■ 3. Revise § 37.3 to read as follows:

§ 37.3 Chest radiographs required for miners.

(a) *Voluntary examinations.* Every operator must provide to each miner who is employed in or at any of its coal mines and who was employed in coal mining prior to December 30, 1969, or who has completed the required examinations under paragraph (b) of this section an opportunity for a chest radiograph at no cost to the miner in accordance with this subpart:

(1) NIOSH will notify the operator of each coal mine of a period within which the operator may provide examinations to each miner employed at its coal mine. The period must begin no sooner than 3.5 years and end no later than 4.5 years subsequent to the ending date of the previous 6-month period specified for a coal mine either by the operator on an approved plan or by NIOSH if the operator did not submit an approved plan. Within the period specified for each mine, the operator may select a 6-month period within which to provide examinations in accordance with a plan approved under § 37.101.

(2) Within either the next or future period(s) specified to the operator for each of its coal mines, the operator of the coal mine may select a different 6-month period for each of its mines within which to offer examinations. In the event the operator does not submit an approved plan, NIOSH will specify a 6-month period to the operator within which miners must have the opportunity for examinations.

(b) *Mandatory examinations.* Every operator must provide to each miner who begins working in or at an underground coal mine for the first time after December 30, 1969 or in or at a surface coal mine for the first time after August 1, 2014:

(1) An initial chest radiograph, as soon as possible, but in no event later than 30 days after commencement of employment or within 30 days of approval of a plan to provide chest radiographs. An initial chest radiograph given to a miner according to former regulations for this subpart prior to August 1, 2014 will also be considered as fulfilling this requirement.

(2) A second chest radiograph, in accordance with this subpart, 3 years following the initial examination if the miner is still engaged in coal mining. A second radiograph given to a miner according to former regulations under this subpart prior to August 1, 2014 will be considered as fulfilling this requirement.

(3) A third chest radiograph 2 years following the second chest radiograph if the miner is still engaged in coal mining and if the second radiograph shows evidence of category 1 (1/0, 1/1, 1/2), category 2 (2/1, 2/2, 2/3), category 3 (3/2, 3/3, 3/+) simple pneumoconiosis, or complicated pneumoconiosis (ILO Classification) or if the second spirometry examination specified in § 37.92(b)(2) shows evidence of decreased lung function to the extent specified in § 37.92(b)(3).

(c) *Notification.* NIOSH will notify the miner when he or she is due to receive the second or third mandatory examination under paragraph (b) of this section. NIOSH will notify the coal mine operator when the miner is to be given a second examination.

(1) The operator will be notified of a miner's third examination only with the miner's written consent. The notice to the operator will not state the medical reason for the examination or that it is the third examination in the series.

(2) If the miner is notified by NIOSH that the third mandatory examination is due and the operator is not so notified, availability of the radiographic examination under the NIOSH-approved operator's plan will constitute the operator's compliance with the requirement to provide a third

mandatory examination even if the miner refuses to take the examination.

(d) *Availability of chest radiographs.* The opportunity for chest radiographs to be made available by an operator for purposes of this subpart must be provided in accordance with a plan that has been submitted and approved in accordance with this part.

■ 4. Revise § 37.4 to read as follows:

§ 37.4 Chest radiographic examinations conducted by the Secretary.

(a) The Secretary will give chest radiographs or make arrangements with an appropriate person, agency, or institution to give the chest radiographs and with A or B Readers to interpret the radiographs required under this subpart in the locality where the miner resides, at the mine, or at a medical facility easily accessible to a mining community or mining communities, under the following circumstances:

(1) Where, in the judgment of the Secretary, due to the lack of adequate medical or other necessary facilities or personnel at the mine or in the locality where the miner resides, the required radiographic examination cannot be given.

(2) Where the operator has not submitted an approvable plan.

(3) Where, after commencement of an operator's program pursuant to an approved plan and after notice to the operator of his failure to follow the approved plan and, after allowing 15 calendar days to bring the program into compliance, the Secretary determines and notifies the operator in writing that the operator's program still fails to comply with the approved plan.

(b) The operator of the mine must reimburse the Secretary or other person, agency, or institution as the Secretary may direct, for the cost of conducting each examination made in accordance with this section.

(c) All examinations given or arranged by the Secretary will comply with the time requirements of § 37.3. Whenever the Secretary gives or arranges for the examinations of miners at a time, a written notice of the arrangements will be sent to the operator who must post the notice on the mine bulletin board.

■ 5. Revise § 37.10 to read as follows:

§ 37.10 Standards incorporated by reference.

(a) Certain material is incorporated by reference into this subpart, Subpart—Chest Radiographic Examinations, with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, NIOSH must publish notice of change in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at NIOSH, Respiratory Health Division, 1095 Willowdale Road, Morgantown, WV 26505. To arrange for an inspection at NIOSH, call 304–285–5749. Copies are also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(b) American Association of Physicists in Medicine, Order Department, Medical Physics Publishing, 4513 Vernon Blvd., Madison, WI 53705, *http://www.aapm.org/pubs/reports*:

(1) AAPM On-Line Report No. 03, Assessment of Display Performance for Medical Imaging Systems, April 2005, into § 37.51(d) and (e).

(2) AAPM Report No. 14, Performance Specifications and Acceptance Testing for X-Ray Generators and Automatic Exposure Control Devices, Report of the Diagnostic X-Ray Imaging Committee Task Group on Performance Specifications and Acceptance Testing for X-Ray Generators and Automatic Exposure Control Devices, published by the American Institute of Physics for AAPM, January 1985, into §§ 37.42(h) and 37.44(g).

(3) AAPM Report No. 31, Standardized Methods for Measuring Diagnostic X-Ray Exposures, Report of Task Group 8, Diagnostic X-Ray Imaging Committee, published by the American Institute of Physics, July 1990, into § 37.44(g).

(4) AAPM Report No. 74, Quality Control in Diagnostic Radiology, Report of Task Group 12, Diagnostic X-Ray Imaging Committee, published by Medical Physics Publishing for AAPM, July 2002, into §§ 37.42(h), 37.43(f), and 37.44(g).

(5) AAPM Report No. 93, Acceptance Testing and Quality Control of Photostimulable Storage Phosphor Imaging Systems, October 2006, into §§ 37.42(i) and 37.44(g).

(6) AAPM Report No. 116, An Exposure Indicator for Digital Radiography, Report of AAPM Task Group 116, published by AAPM, July 2009, into § 37.44(g).

(c) American College of Radiology, 1891 Preston White Dr., Reston, VA 20191, *http://www.acr.org*:

(1) ACR Practice Guideline for Diagnostic Reference Levels in Medical X-Ray Imaging, Revised 2008 (Resolution 3), into §§ 37.42(i) and 37.44(g).

(2) [Reserved]

(d) International Labour Office, CH–1211 Geneva 22, Switzerland, *http://www.ilo.org/publns*:

(1) Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses, Revised Edition 2011, into §§ 37.50(a), 37.50(c), and 37.51(b).

(2) [Reserved]

(e) National Council on Radiation Protection and Measurements, NCRP Publications, 7910 Woodmont Avenue, Suite 400, Bethesda, MD 20814–3095, Telephone (800) 229–2652, *http://www.ncrppublications.org*:

(1) NCRP Report No. 102, Medical X-ray, Electron Beam, and Gamma-Ray Protection for Energies Up to 50 MeV (Equipment Design, Performance, and Use), issued June 30, 1989, into § 37.45.

(2) NCRP Report No. 105, Radiation Protection for Medical and Allied Health Personnel, issued October 30, 1989, into § 37.45.

(3) NCRP Report No. 147, Structural Shielding Design for Medical X-Ray Imaging Facilities, revised March 18, 2005, into § 37.45.

(f) National Electrical Manufacturers Association, 1300 N. 17th Street, Rosslyn, VA 22209, *http://medical.nema.org*:

(1) DICOM Standard PS 3.3–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 3: Information Object Definitions, copyright 2011, into § 37.42(i).

(2) DICOM Standard PS3.4–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 4: Service Class Specifications, copyright 2011, into § 37.42(i).

(3) DICOM Standard PS 3.10–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 10: Media Storage and File Format for Media Interchange, copyright 2011, into § 37.42(i).

(4) DICOM Standard PS 3.11–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 11: Media Storage Application Profiles, copyright 2011, into § 37.42(i).

(5) DICOM Standard PS 3.12–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 12: Media Formats and Physical Media for Media Interchange, copyright 2011, into §§ 37.42(i) and 37.44(a).

(6) DICOM Standard PS 3.14–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 14: Grayscale Standard Display Function, copyright 2011, into §§ 37.42(i)(5) and 37.51(d).

(7) DICOM Standard PS 3.16–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 16:

Content Mapping Resource, copyright 2011, into § 37.42(i).

■ 6. Revise § 37.20 to read as follows:

§ 37.20 Miner identification document.

As part of the examination, a Miner Identification Document (CDC/NIOSH (M)2.9) which includes an occupational history questionnaire must be completed for each miner at the facility where the examination is made (this document is required for both radiographic and spirometry examinations conducted pursuant to this part).

■ 7. Revise § 37.40 to read as follows:

§ 37.40 General provisions.

(a) The chest radiographic examination must be given at a convenient time and place.

(b) The chest radiographic examination consists of the chest radiograph, a completed Chest Radiograph Classification Form (CDC/NIOSH 2.8), and a completed Miner Identification Document (CDC/NIOSH 2.9).

(c) A radiographic examination must be made in a facility approved in accordance with § 37.43 or § 37.44. Chest radiographs of miners under this section must be performed:

(1) By or under the supervision of a physician who makes chest radiographs in the normal course of practice and who has demonstrated ability to make chest radiographs of a quality to best ascertain the presence of pneumoconiosis; or

(2) By a radiologic technologist as defined in § 37.2.

■ 8. Revise § 37.43 to read as follows:

§ 37.43 Approval of radiographic facilities that use film radiography systems.

(a) Facilities become eligible to participate in this program by demonstrating their ability to make high quality diagnostic chest radiographs by submitting to NIOSH six or more sample chest radiographs made and processed at the applicant facility and which are of acceptable quality to one or more individuals selected by NIOSH from the panel of B Readers. Applicants must also submit a radiograph of a plastic step-wedge object [1] or other test object (available on loan from NIOSH) that was made and processed at the same time with the same technique as the radiographs submitted and processed at the facility for which approval is sought.

(1) At least one chest radiograph and one test object radiograph must have been made with each unit to be used hereunder.

(2) All radiographs must have been made within 15 calendar days prior to submission and must be marked to identify the facility where each radiograph was made, the X-ray machine used, and the date each was made.

(3) The chest radiographs will be returned and may be the same radiographs submitted pursuant to § 37.52(a)(2)(i).

(b) Each radiographic facility submitting chest radiographs for approval under this section must complete and include a Radiographic Facility Certification Document (CDC 2.11) describing each unit to be used to make chest radiographs under the Act. The form must include:

(1) The date of the last radiation safety inspection by an appropriate licensing agency or, if no such agency exists, by a qualified expert as defined in NCRP Report No. 102 (incorporated by reference, *see* § 37.10);

(2) The deficiencies found;

(3) A statement that all the deficiencies have been corrected; and

(4) The date of acquisition of the unit. To be acceptable, the radiation safety inspection must have been made within 1 year preceding the date of application.

(c) Radiographs submitted with applications for approval under this section will be evaluated by one or more individuals selected by NIOSH from the panel of B Readers or by a qualified medical physicist or consultant. Applicants will be advised of any reasons for denial of approval.

(d) NIOSH or its representatives may make a physical inspection of the applicant's facility and any approved radiographic facility at any reasonable time to determine if the requirements of this subpart are being met.

(e) NIOSH may require a facility periodically to resubmit radiographs of a test object, sample radiographs, or a Radiographic Facility Certification Document for quality control purposes.

(1) Approvals granted hereunder may be suspended or withdrawn by notice in writing when in the opinion of NIOSH the quality of radiographs or information submitted under this section warrants such action.

(2) A copy of a notice withdrawing approval will be sent to each operator who has listed the facility as its facility for giving chest radiographs and must be displayed on the mine bulletin board adjacent to the operator's approved plan. The approved plan will be reevaluated by NIOSH in light of this change.

(f) A formal written quality assurance program must be established at each facility addressing radiation exposures, equipment maintenance, and image quality, and must conform to the standards in AAPM Report No. 74, pages 1–19, 47–53, and 56 (incorporated by reference, *see* § 37.10).

(g) In conducting medical examinations pursuant to this part, physicians and radiographic facilities must maintain the results and analysis of these examinations (including any hard copies or digital files containing individual data, classifications, and images) consistent with applicable statutes and regulations governing the handling and protection of individually identifiable health information, including, as applicable, the HIPAA Privacy and Security Rules (45 CFR part 160 and 45 CFR part 164, subparts A, C, and E).

■ 9. Revise § 37.44 to read as follows:

§ 37.44 Approval of radiographic facilities that use digital radiography systems.

(a) Facilities seeking approval must demonstrate the ability to make high quality digital chest radiographs by submitting to NIOSH digital radiographic image files of a test object (*e.g.*, a plastic step-wedge or chest phantom which will be provided on loan from NIOSH) as well as digital radiographic image files from six or more sample chest radiographs that are of acceptable quality to one or more individuals selected by NIOSH from the panel of B Readers and a qualified medical physicist or consultant, both designated by NIOSH.

(1) Image files must be submitted on standard portable media (compact or digital video disc) and formatted to meet specifications of the Digital Imaging and Communications in Medicine (DICOM) standard PS 3.12–2011 (incorporated by reference, *see* § 37.10). Applicants will be advised of any reasons for denial of approval.

(2) All submitted images must be made within 60 days prior to the date of application using the same technique, equipment, and software as will be used by the facility under the requested approval. At least six chest radiographs and one test object radiograph must have been made with each digital radiographic unit to be used by the facility under the requested approval. The corresponding radiographic image files must be submitted on standard portable media (compact or digital video disc) and formatted to meet specifications of the current DICOM Standard PS 3.12–2011.

[1] The plastic step-wedge object is described in E. Dale Trout, John P. Kelley, *A Phantom for the Evaluation of Techniques and Equipment Used for Roentgenography of the Chest*, Amer J Roentgenol 1973;117(4):771–776.

(3) Documentation must include the following: the identity of the facility where each radiograph was made; the X-ray machine used; and the model, version, and production date of each image acquisition software program and hardware component.

(4) The submitted sample digital chest image files must include at least two taken with the detector in the vertical position and two in the horizontal position where the imaging system permits these positions, and at least two chest images must be from persons within the highest quartile of chest diameters (28 cm or greater).

(b) Each radiographic facility submitting chest radiographic image files for approval under this section must complete and include an Radiographic Facility Certification Document (CDC 2.11) describing each system component, and the models and versions of image acquisition hardware and software to be used to make digital chest radiographs under the Act. The form must include:

(1) A copy of a dated report signed by a qualified medical physicist, documenting the evaluation of radiation safety and performance characteristics specified in this section for each digital radiography system;

(2) A copy of the report of the most recent radiation safety inspection by a licensing agency, if such agency exists;

(3) A listing of all deficiencies noted in either of the reports;

(4) A statement that all the listed deficiencies have been corrected; and

(5) The names and relevant training and experience of facility personnel described in paragraphs (c), (e), and (f) of this section. To be acceptable, the report by the medical physicist and radiation safety inspection specified in this paragraph (b) must have been made within 1 year prior to the date of submission of the application.

(c) Facilities must maintain ongoing licensure and certification under relevant local, State, and Federal laws and regulations for all digital equipment and related processes covered under this part.

(d) NIOSH or its representatives may make a physical inspection of the applicant's facility and any approved radiographic facility at any reasonable time to determine if the requirements of this subpart are being met.

(e) NIOSH may periodically require a facility to resubmit radiographic image files of the NIOSH-supplied test object (*e.g.,* step-wedge or chest phantom), sample radiographs, or a Radiographic Facility Certification Document. Approvals granted to facilities under this section may be suspended or withdrawn by notice in writing when, in the opinion of NIOSH, deficiencies in the quality of radiographs or information submitted under this section warrant such action. A copy of a notice suspending or withdrawing approval will be sent to each operator that has listed the facility for its use under this part and must be displayed on the mine bulletin board adjacent to the operator's approved plan. The operator's approved plan may be reevaluated by NIOSH in response to such suspension or withdrawal.

(f) A qualified medical physicist who is familiar with the facility hardware and software systems for image acquisition, manipulation, display, and storage, must be on site or available as a consultant. The physicist must be trained in evaluating the performance of radiographic equipment and facility quality assurance programs, and must be licensed/approved by a State or Territory of the United States or certified by a competent U.S. national board.

(g) Facilities must document that testing performed by a qualified medical physicist has verified that performance of each image acquisition system for which approval is sought met initial specifications and standards of the equipment manufacturer and performance testing as required under paragraphs (c), (f), and (h) of this section.

(h) A formal written quality assurance program must be established at each facility addressing radiation exposures, equipment maintenance, and image quality, and must conform to the standards in AAPM Report No. 74, pages 1–19, 47–53, and 56, and AAPM Report No. 116, sections VIII, IX, and X (incorporated by reference, *see* § 37.10).

(1) Applications for facility approval must include a comprehensive assessment by a qualified medical physicist within 12 months prior to application addressing the performance of X-ray generators, automatic exposure controls, and image capture systems. The assessment must comply with the following guidelines: AAPM Report No. 93, pages 1–68; AAPM Report No. 74, pages 6–11; and AAPM Report No. 14, pages 1–96 (incorporated by reference, *see* § 37.10).

(2) Radiographic technique charts must be used that are developed specifically for the radiography system and detector combinations used, indicating exposure parameters by anatomic measurements. If automated exposure control devices are used, calibration for chest imaging must be documented using the actual voltages and image capture systems.

(i) Radiological exposures resulting from at least ten (randomly selected) digital chest images obtained at the facility must be monitored at least quarterly to detect and correct potential dose creep, using methods specified in AAPM Report No. 31 (incorporated by reference, *see* § 37.10). Radiation exposures must be compared to a professionally accepted reference level published in the American College of Radiology (ACR) Practice Guideline for Diagnostic Reference Levels in Medical X-Ray Imaging, pages 1–6 (incorporated by reference, *see* § 37.10).

(ii) The medical physicist must conduct an annual assessment of measured or estimated radiation exposures, with specific recommended actions to minimize exposures during examinations performed under this part.

(3) For each digital radiography device and system, performance must be monitored annually in accordance with the recommendations of AAPM Report No. 93 (incorporated by reference, *see* § 37.10), except for the testing specifically excluded below. Documentation must be maintained on the completion of quality assurance testing, including the reproducibility of X-ray output, linearity and reproducibility of mA settings, accuracy and reproducibility of timer and kVp settings, accuracy of source-to-detector distance, and X-ray field focal spot size, selection, beam quality, congruence and collimation. For DR systems, the following tests listed in AAPM Report No. 93 are not required under this part:

(i) Section 8.4.5: Laser beam function.

(ii) Section 8.4.9: Erasure Thoroughness.

(iii) Section 8.4.11: Imaging Plate (IP) Throughput.

(4) Facilities must maintain documentation, available for inspection by NIOSH for 5 years, of the ongoing implementation of policies and procedures for monitoring and evaluating the effective management, safety, and proper performance of chest image acquisition, digitization, processing, compression, transmission, display, archiving, and retrieval functions of digital radiography devices and systems.

(i) In conducting medical examinations pursuant to this part, physicians and radiographic facilities must maintain the results and analysis of these examinations (including any hard copies or digital files containing individual data, interpretations, and images) consistent with applicable statutes and regulations governing the handling and protection of individually identifiable health information, including, as applicable, the HIPAA

Privacy and Security Rules (45 CFR part 160 and 45 CFR part 164, subparts A, C, and E).

■ 10. Revise § 37.50 to read as follows:

§ 37.50 Interpreting and classifying chest radiographs—film radiography systems.

(a) Chest radiographs must be interpreted and classified in accordance with the Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses (incorporated by reference, *see* § 37.10). Chest radiograph interpretations and classifications must be recorded on a paper or electronic Chest Radiograph Classification Form (CDC/NIOSH 2.8).

(b) Radiographs must be interpreted and classified only by a physician who reads chest radiographs in the normal course of practice and who has demonstrated proficiency in classifying the pneumoconioses in accordance with § 37.52.

(1) Initial clinical interpretations and notification of findings other than pneumoconiosis under paragraph (a) of this section must be provided by a qualified physician who provides these services for the examining facility. This physician must have all required licensure and privileges, and must interpret chest radiographs in the normal course of practice.

(2) [Reserved]

(c) All interpreters, whenever interpreting chest radiographs made under the Act, must have immediately available for reference a complete set of the standard radiographs for use with the Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses (incorporated by reference, *see* § 37.10).

(d) View boxes used for making interpretations must comply with the following:

(1) Fluorescent lamps must be simultaneously replaced with new lamps at 6-month intervals;

(2) All the fluorescent lamps in a panel of boxes must have identical manufacturer's ratings as to intensity and color;

(3) The glass, internal reflective surfaces, and the lamps must be kept clean;

(4) The unit must be so situated as to minimize front surface glare.

■ 11. Revise § 37.51 to read as follows:

§ 37.51 Interpreting and classifying chest radiographs—digital radiography systems.

(a) For each chest radiograph obtained at an approved facility using a digital radiography system, a qualified and licensed physician who reads chest radiographs in the normal course of practice must provide an initial clinical interpretation and notification, as specified in § 37.54, of any significant abnormal findings other than pneumoconiosis.

(b) Chest radiographs must be classified for pneumoconiosis by physician readers (B Readers) who have demonstrated ongoing proficiency, as specified in § 37.52(b), in classifying the pneumoconioses in a manner consistent with the Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses (incorporated by reference, *see* § 37.10). Chest radiograph classifications must be recorded on a paper or electronic Chest Radiograph Classification Form (CDC/NIOSH 2.8).

(c) All B Readers, whenever classifying digitally-acquired chest radiographs made under the Act, must have immediately available for reference a complete set of NIOSH-approved standard digital chest radiographic images, including electronic images such as scanned images, provided for use with the Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses (incorporated by reference, *see* § 37.10).

(1) Only NIOSH-approved standard digital (electronic) images may be used for classifying digital chest images for pneumoconiosis.

(2) Modification of the appearance of the standard images using software tools is not permitted.

(d) Viewing systems should enable readers to display the coal miner's chest image at the full resolution of the image acquisition system, side-by-side with the selected NIOSH-approved standard images for comparison.

(1)(i) Image display devices must be flat panel monitors displaying at least 3 MP at 10 bit depth. Image displays and associated graphics cards must meet the calibration and other specifications of the Digital Imaging and Communications in Medicine (DICOM) standard PS 3.14–2011 (incorporated by reference, *see* § 37.10).

(ii) Image displays and associated graphics cards must not deviate by more than 10 percent from the grayscale standard display function (GSDF) when assessed according to the AAPM On-Line Report No. 03, pages 1–146 (incorporated by reference, *see* § 37.10).

(2) Display system luminance (maximum and ratio), relative noise, linearity, modulation transfer function (MTF), frequency, and glare should meet or exceed recommendations listed in AAPM On-Line Report No. 03, pages 1–146 (incorporated by reference, *see* § 37.10). Viewing displays must have a maximum luminance of at least 171 cd/m2, a ratio of maximum luminance to minimum luminance of at least 250, and a glare ratio greater than 400. The contribution of ambient light reflected from the display surface, after light sources have been minimized, must be included in luminance measurements.

(3) Displays must be situated so as to minimize front surface glare. Readers must minimize reflected light from ambient sources during the performance of classifications.

(4) Measurements of the width and length of pleural shadows and the diameter of opacities must be taken using calibrated software measuring tools. If permitted by the viewing software, a record must be made of the presentation state(s), including any noise reduction and edge enhancement or restoration functions that were used in performing the classification, including any annotations and measurements.

(e) Quality control procedures for devices used to display chest images for classification must comply with the recommendations of the American Association of Physicists in Medicine AAPM On-Line Report No. 03, pages 1–146 (incorporated by reference, *see* § 37.10).

(1) If automatic quality assurance systems are used, visual inspection must be performed using one or more test patterns recommended by the medical physicist every 6 months, or more frequently, to check for defects that automatic systems may not detect.

(2) [Reserved]

(f) Classification of CR and DR digitally-acquired chest radiographs under this part must be performed based on the viewing of images displayed as soft copies using the viewing workstations specified in this section. Classification of radiographs must not be based on the viewing of hard copy printed transparencies of images that were digitally-acquired.

(g) The classification of chest radiographs based on digitized copies of chest radiographs that were originally acquired using film-screen techniques is not permissible under this part.

■ 12. Revise § 37.52 to read as follows:

§ 37.52 Proficiency in the use of systems for classifying the pneumoconioses.

(a) First or A Readers:

(1) Approval of a physician as an A Reader continues indefinitely if established prior to October 15, 2012.

(2) Physicians who desire to become A Readers must demonstrate their proficiency in classifying the pneumoconioses by either:

(i) Submitting to NIOSH from the physician's files six sample chest radiographs which are considered

properly classified by one or more individuals selected by NIOSH from the panel of B Readers. The six radiographs must consist of two without pneumoconiosis, two with simple pneumoconiosis, and two with complicated pneumoconiosis (these may be the same radiographs submitted for facility approval pursuant to §§ 37.43 and 37.44). The films will be returned to the physician. The classifications must be on the Chest Radiograph Classification Form (CDC/NIOSH 2.8); or

(ii) Satisfactory completion, since June 11, 1970, of a course approved by NIOSH on the ILO International Classification of Radiographs of Pneumoconioses.

(b) Final or B Readers:

(1) Approval as a B Reader established prior to October 1, 1976, is hereby terminated.

(2) Proficiency in evaluating chest radiographs for radiographic quality and in the use of the ILO Classification for interpreting chest radiographs for pneumoconiosis and other diseases must be demonstrated by those physicians who desire to be B Readers by taking and passing a specially-designed proficiency examination given on behalf of or by NIOSH at a time and place specified by NIOSH.

(i) Each physician who desires to take the digital version of the examination will be provided a complete set of the current NIOSH-approved standard reference digital radiographs.

(ii) Physicians who qualify under this provision need not be qualified under paragraph (a) of this section.

(c) Physicians who wish to participate in the program must familiarize themselves with the necessary components for attainment of reliable classification of chest radiographs for the pneumoconioses[2] and apply using a Physician Application for Certification Form (CDC 2.12(E)).

■ 13. Revise § 37.53 to read as follows:

§ 37.53 Method of obtaining definitive chest radiograph classifications.

(a) All chest radiographs which are first classified by an A or B Reader will be submitted by NIOSH to a B Reader qualified pursuant to § 37.52.

(1) If there is agreement between the two classifications, as described in paragraph (b) of this section, the result will be considered final and reported to MSHA for transmittal to the miner.

(2) When agreement is lacking, NIOSH must obtain a third classification from the panel of B Readers.

(i) If any two of the three classifications demonstrate agreement, the result must be considered the final determination.

(ii) If agreement is lacking among the three classifications, NIOSH will obtain independent classifications from two additional B Readers selected from the panel, and the final determination will be the median category derived from the total of five classifications.

(b) Two classifications are considered to be in agreement when:

(1) They are derived from complete classifications recorded using approved paper or electronic versions of the Chest Radiograph Classification Form (CDC/NIOSH 2.8) and received by NIOSH; and

(2) Both find either stage A, B, or C complicated pneumoconiosis; or,

(3) For simple pneumoconiosis, are both in the same major category or are within one minor category (ILO Classification 12-point scale) of each other (subject to the exception in paragraph (b)(3)(ii) of this section).

(i) The higher of the two classifications must be reported.

(ii) The only exception to the one minor category principle is a reading sequence of 0/1, 1/0 or 1/0, 0/1, which are not considered agreement.

■ 14. Revise § 37.54 to read as follows:

§ 37.54 Notification of abnormal radiographic findings.

(a) *Significant abnormal findings other than pneumoconiosis.* The first physician to interpret the radiograph must communicate findings of, or findings suggesting, abnormality of cardiac shape or size, tuberculosis, lung cancer, or any other significant abnormal findings other than pneumoconiosis to the miner indicated on the Miner Identification Document or to the miner's designated physician. A notice of the communication must be submitted to NIOSH. When significant abnormal findings are reported, NIOSH will also notify the miner to contact his or her physician.

(b) *Significant changes or progression of disease.* When NIOSH has more than one radiograph of a miner in its files and the most recent examination was found by the first physician to interpret the radiograph or subsequently by NIOSH B Readers to show an abnormality of cardiac shape or size, tuberculosis, cancer, complicated pneumoconiosis, and any other significant abnormal findings, NIOSH will arrange for a licensed physician to compare the most recent image to older images and NIOSH will inform the miner of any significant changes or progression of disease or other findings.

(c) *Notice of eligibility for part 90 transfer option.* All final determinations of radiographic classifications providing evidence for development of pneumoconiosis will be reported to the miner or to the miner's designated physician by NIOSH. In addition, NIOSH will coordinate with MSHA to assure that such miners are notified of eligibility to transfer to a less dusty area, in accordance with section 203 of the Act (*see* 30 CFR part 90 and § 37.102).

(d) *Prompt dispatch of findings.* NIOSH will make every reasonable effort to process the findings described in paragraph (c) of this section within 60 days of receipt of the information described in § 37.60 in a complete and acceptable form.

(1) NIOSH will coordinate with MSHA to provide notice of eligibility for the part 90 transfer option within the same time frame.

(2) The results of an examination may not be processed by NIOSH if the examination was made within 6 months of the date of a previous acceptable examination.

■ 15. Revise § 37.60 to read as follows:

§ 37.60 Submitting required chest radiograph classification and miner identification documents.

(a) Each chest radiograph required to be made under this subpart, together with the completed Chest Radiograph Classification Form and the completed Miner Identification Document, must be submitted together for each miner to NIOSH within 14 calendar days after the radiographic examination is given. All submitted items become the property of NIOSH.

(1) When the radiograph is digital, the image file for each radiograph, together with either hard copy or electronic versions of the completed Chest Radiograph Classification Form and the completed Miner Identification Document, must be submitted to NIOSH using the software and format specified by NIOSH either using portable electronic media, or a secure electronic file transfer.

(2) NIOSH will notify the submitting facility when it has received the image files and forms from the examination. After this notification, the facility will permanently delete, or if this is not technologically feasible for the imaging system used, render permanently inaccessible all files and forms from its electronic and physical files.

(b) If NIOSH deems any submission under paragraph (a) of this section inadequate, the operator will be notified of the deficiency. The operator must

[2] NIOSH Safety and Health Topic, *Chest Radiography: Radiographic Classification, http://www.cdc.gov/niosh/topics/chestradiography/radiographic-classification.html.*

promptly make appropriate arrangements for the necessary reexamination at no expense to the miner.

(c) Failure to comply with paragraph (a) or (b) of this section will be cause to revoke approval of a plan or any other approval as may be appropriate. An approval that has been revoked may be reinstated at the discretion of NIOSH after it receives satisfactory assurances and evidence that all deficiencies have been corrected and that effective controls have been instituted to prevent a recurrence.

(d) Chest radiographs and other required documents must be submitted only for miners.

(e) If a miner refuses to participate in all phases of the examination prescribed in this subpart, no report need be made. If a miner refuses to participate in any phase of the examination prescribed in this subpart, all forms must be submitted with his or her name and the last four digits of the Social Security number on each. If any form cannot be completed because of the miner's refusal, it must be marked ''Miner Refuses,'' and submitted to NIOSH. No submission will be made, however, without a completed Miner Identification Document (CDC/NIOSH 2.9) containing the miner's name, address, last four digits of the Social Security number and place of employment.

■ 16. Revise § 37.70 to read as follows:

§ 37.70 Review of classifications.

(a) Any miner who believes the classification for pneumoconiosis reported to him or her by MSHA is in error may file a written request with NIOSH that his or her radiograph be reevaluated.

(1) If the classification was based on agreement between an A Reader and a B Reader, NIOSH will obtain one or more additional classifications by B Readers as necessary to obtain agreement in accordance with § 37.53, and MSHA must report the results to the miner together with notification from MSHA of any rights which may accrue to the miner in accordance with § 37.102.

(2) If the reported classification was based on agreement between two (or more) B Readers, the reading will be accepted as conclusive and the miner must be so informed by MSHA.

(b) Any operator who is directed by MSHA to transfer a miner to a less dusty atmosphere based on the most recent examination may file a written request with NIOSH to review its findings. The standards set forth in paragraph (a) of this section apply and the operator and miner will be notified by MSHA whether the miner is entitled to the option to transfer.

■ 17. Revise § 37.80 to read as follows:

§ 37.80 Availability of records for radiographs.

(a) Medical information and radiographs on miners will be released by NIOSH only with the written consent from the miner, or if the miner is deceased, written consent from the miner's widow or widower, next of kin, or legal representative.

(b) To the extent authorized, original film radiographs will be made available for examination only at the NIOSH facility in Morgantown, WV.

■ 18. Revise the subpart heading above § 37.90 to read as follows:

Subpart—Spirometry Testing

■ 19. Revise § 37.90 to read as follows:

§ 37.90 Scope.

Under this subpart, coal mine operators are required to provide spirometry testing to both current and newly employed coal miners, using medical facilities approved by NIOSH in accordance with standards established in this subpart.

■ 20. Revise § 37.91 to read as follows:

§ 37.91 Definitions.

Definitions provided in § 37.2 will have the same meaning in this subpart. Any term defined in the Federal Mine Safety and Health Act of 1977 (Pub. L. 95–164, as amended) and not defined in § 37.2 or this section will have the meaning given it in the Act. As used in this subpart:

ATS means American Thoracic Society.

ERS means European Respiratory Society.

FET means forced expiratory time, which is the time from the beginning of a forced exhalation (the back-extrapolated ''time zero'') maneuver to the end of expiration.

FEV1 means forced expiratory volume in one second, which is the greatest volume of air that can be forcibly blown out within the first second, after full inspiration.

FEV1/FVC means the ratio between the largest acceptable FEV1 and the largest acceptable FVC following the forced vital capacity maneuver. It is usually reported as a percentage.

FEV6 means forced expiratory volume in six seconds, which is the greatest volume of air that can forcibly be blown out in six seconds, after full inspiration.

FVC means forced vital capacity, which is the greatest volume of air that can forcibly be blown out after full inspiration.

PEF means peak expiratory flow, which is the maximal airflow generated during a forced vital capacity maneuver.

Spirometry test means a pulmonary function test that measures expiratory volume and airflow rates and may determine the presence and severity of lung function impairments, if such are present.

■ 21. Revise § 37.92 to read as follows:

§ 37.92 Spirometry testing required for miners.

(a) *Voluntary tests.* Each operator must provide to all miners who are employed in or at any of its coal mines the opportunity to have a spirometry test and a respiratory assessment at no cost to the miner at least once every 5 years in accordance with this subpart. The tests will be available during a 6-month period that begins no less than 3.5 years and not more than 4.5 years from the end of the last 6-month period.

(b) *Mandatory tests.* Every operator must provide to each miner who begins work in or at a coal mine for the first time on or after August 1, 2014, spirometry testing and respiratory assessment at no cost to the miner in accordance with this subpart.

(1) Initial spirometry testing and respiratory assessment will be provided to all miners who begin work in or at a coal mine for the first time on or after August 1, 2014 within the first 30 days of their employment or within 30 days of approval of a plan to provide spirometry testing.

(2) A follow-up second spirometry test and respiratory assessment will be provided to the miner no later than 3 years after the initial spirometry if the miner is still engaged in coal mining.

(3) A third spirometry test and respiratory assessment will be provided no later than 2 years after the tests in paragraphs § 37.3(b)(2) and paragraph (b)(2) of this section if the chest radiograph shows evidence of pneumoconiosis as defined in § 37.3(b)(3) or if the second spirometry test results demonstrate a 15 percent or greater decline in the percent predicted FEV1 value since the initial (*i.e.,* baseline) test.

(i) Percent predicted FEV1 will be calculated according to prediction equations published in Spirometric Reference Values from a Sample of the General U.S. Population, American Journal of Respiratory and Critical Care Medicine, 159(1):179–187, January 1999 (incorporated by reference, *see* § 37.98).

(ii) A correction factor to Caucasian reference values will be applied when testing individuals of Asian descent as

specified in the ATS Technical Standards: Spirometry in the Occupational Setting, p. 987 (incorporated by reference, *see* § 37.98).

(c) *Notification.* NIOSH will notify the miner when he or she is due to receive the second or third mandatory test under paragraph (b) of this section. NIOSH will notify the coal mine operator when the miner is to perform a second spirometry test.

(1) The operator will be notified of a miner's eligibility for a third test only with the miner's written consent. The notice to the operator will not state the medical reason for the test or that it is the third test in the series.

(2) If the miner is notified by NIOSH that the third mandatory test is due and the operator is not so notified, availability of spirometry testing under the NIOSH-approved operator's plan will constitute the operator's compliance with the requirement to provide a third spirometry test even if the miner does not take the test.

(d) *Availability of spirometry testing.* The opportunity for spirometry to be available for purposes of this subpart must be indicated in an operator's plan that has been submitted and approved in accordance with this subpart.

■ 22. Revise § 37.93 to read as follows:

§ 37.93 Approval of spirometry facilities.

(a) *Application for facility approval.* Facilities seeking approval to provide the spirometry testing specified under this subpart must have the ability to provide spirometry of high technical quality. Thus, NIOSH-approved facilities must meet the requirements specified in this subpart for the following activities: Training of technicians who perform the tests; conducting spirometry tests using equipment and procedures that meet required specifications; collecting the respiratory assessment form; transmitting data to NIOSH; and communicating with miners as required for scheduling, testing, and notification of results. Facilities seeking approval may apply to NIOSH using the Spirometry Facility Certification document (CDC/NIOSH 2.14).

(b) *Spirometry quality assurance.* A spirometry quality assurance program must be in place to minimize the rate of invalid test results. This program must include all of the following components:

(1) *Instrument calibration checks.* Testing personnel must fully comply with the 2005 ATS/ERS Standardisation of Spirometry guidelines for instrument calibration check procedures, pp. 322–323, including Table 3 (incorporated by reference, *see* § 37.98).

(i) For volume spirometers, calibration check procedures must include daily (day of testing) leak and volume accuracy checks. In addition, volume linearity checks must be performed according to the frequency established by the 2005 ATS/ERS guidelines.

(ii) For flow-type spirometers, calibration must be checked daily by injecting 3 liters of air from a calibration syringe at 3 different speeds (fast, medium, slow). Flow linearity must be checked weekly as established by the 2005 ATS/ERS guidelines.

(iii) Instrument calibration check records must be maintained by the facility and available for inspection by NIOSH, as deemed necessary.

(2) *Automated maneuver and test session quality checks.* The spirometer software must automatically perform quality assurance checks on expiratory maneuvers during each spirometry testing session. Screen displayed error messages must alert the technician to maneuver acceptability and test session non-repeatability. Each spirometry test session must have the goal of obtaining 3 acceptable with 2 repeatable forced vital capacity maneuvers, as defined by the 2005 ATS/ERS Standardisation of Spirometry, p. 325 (incorporated by reference, *see* § 37.98).

(3) *Ongoing monitoring of test quality.* Facilities must submit spirometry results to NIOSH within 14 calendar days of testing as specified in § 37.96(c) to permit NIOSH to monitor test quality and provide a results report to each miner. NIOSH may provide quality performance feedback to the appropriate technician(s) along with suggestions for improvement.

(4) *Quality assurance audits.* NIOSH may periodically conduct audits to review tests submitted by approved facilities and assess the quality of spirometry provided. Such audits may include a review of all spirometry data obtained during a specified time period or review of spirometry test data collected over time on selected miners.

(c) *Noncompliance.* If NIOSH determines that a facility is not compliant with the policies and procedures specified in this subpart, or determines as the result of a quality assurance audit as specified in this section that a facility is not performing spirometry of adequate quality, the facility will be notified of the deficiency. The facility must promptly make appropriate arrangements for the deficiency to be rectified.

(d) *Revocation of approval.* If a facility fails to rectify deficiencies within 60 days of notification, NIOSH approval of the facility may be revoked. An approval which has been revoked may be reinstated at the discretion of NIOSH after it receives satisfactory assurances and evidence that all deficiencies have been corrected and that effective controls have been instituted by the facility to prevent a recurrence.

(e) *Maintenance of records.* When conducting spirometry tests pursuant to this subpart, physicians and facilities must maintain the results and analyses of these tests (including any hard copies or digital files containing individual data, such as interpretations) in a manner consistent with applicable statutes and regulations governing the handling and protection of individually identifiable health information, including, as applicable, the HIPAA Privacy and Security Rules (45 CFR part 160 and 45 CFR part 164, subparts A, C, and E).

■ 23. Revise § 37.94 to read as follows:

§ 37.94 Respiratory assessment form.

As part of the spirometry testing and concurrent with it, personnel at the facility must complete a Respiratory Assessment Form (CDC/NIOSH 2.13).

■ 24. Revise § 37.95 to read as follows:

§ 37.95 Specifications for performing spirometry tests.

(a) *Persons administering spirometry tests.* Each person administering spirometry tests for the Coal Workers' Health Surveillance Program must successfully complete a NIOSH-approved spirometry training course and maintain a valid certificate by periodically completing NIOSH-approved spirometry refresher training courses, identified on the NIOSH Web site at *http://www.cdc.gov/niosh/*. A copy of the certificate of completion from a NIOSH-approved spirometry training or refresher course, with validation dates printed on the document, must be available for inspection. NIOSH will assign each person administering spirometry tests a unique identification number, which must be entered into the spirometry system computer whenever instrument quality assurance or miner testing is done or on the Spirometry Results Notification Form (CDC/NIOSH 2.15).

(b) *Spirometer specifications.* Spirometry testing equipment must meet the 2005 ATS/ERS Standardisation of Spirometry specifications for spirometer accuracy and precision and real-time display size and content, pp. 331–333, including Table 2 on p. 322 and Table 6 on p. 332 (incorporated by reference, *see* § 37.98). Facilities must make available for inspection written verification from a third-party testing

laboratory (not the manufacturer or distributor) that the model of spirometer being used has successfully passed its validation checks as required by the Standardization of Spirometry; 1994 Update protocol, Appendix B pp. 1126–1134, including Table C1 (incorporated by reference, *see* § 37.98). Facilities may request such documentation from spirometer manufacturers. For each forced expiratory maneuver submitted for a miner under this part, the spirometry data file must retain a record of the parameters defined in the 2005 ATS/ERS Standardisation of Spirometry, p. 335 including Table 8 (incorporated by reference, *see* § 37.98). Spirometers that provide electronic transfer of spirometry data results files must use the format, content, and data structure specified by the 2005 ATS/ERS Standardisation of Spirometry, p. 335, or a procedure for data transfer that is approved by NIOSH.

(c) *Spirometry procedures.* Administration of spirometry must include the following:

(1) *Miner Identification Document.* The Miner Identification Document (CDC/NIOSH (M)2.9), described in § 37.20, must be completed for each miner at the facility where spirometry is performed.

(2) *Pre-test checklist.* The Spirometry Pre-Test Checklist portion of the Spirometry Results Notification Form (CDC/NIOSH 2.15) must be completed prior to each spirometry session to identify possible contraindications to testing, or factors that might affect results.

(3) *Respiratory Assessment Form.* A standardized Respiratory Assessment Form (CDC/NIOSH 2.13) must be completed at the initial spirometry and repeated at each spirometry testing procedure.

(4) *Collection of anthropometric and demographic information.* The miner's standing height must be measured in stocking feet using a stadiometer (or equivalent device) each time the miner performs spirometry. The miner's weight must also be measured (in stocking feet). The miner's birth date, race, and ethnicity must also be recorded. These data will be entered into the spirometry system computer and transmitted with the spirometry data file or, if required under the facility's approval, on the Spirometry Results Notification Form (CDC/NIOSH 2.15).

(5) *Test procedures.* Spirometry will be conducted in accordance with test procedures defined in the 2005 ATS/ERS Standardisation of Spirometry, pp. 323–326, and the Standardisation of Lung Function Testing, Replies to Readers, pp. 1496–1498 (both incorporated by reference, *see* § 37.98).

(i) The technician must be able to view real-time testing display screens as specified in the 2005 ATS/ERS Standardisation of Spirometry, p. 322 (incorporated by reference, *see* § 37.98).

(ii) A miner will be tested in the standing position, but may be seated if he or she experiences lightheadedness or other signs or symptoms that raise a safety concern relating to the standing position during the spirometry test.

(d) *Records retention.* On-site records of the results will include spirometry test reports and retention of all spirometry sessions, pre-test checklists, and standardized respiratory assessment results in electronic or printed format until notification to delete or render the information inaccessible, as described in § 37.100(b)(6)(ii), is received from NIOSH.

■ 25. Revise § 37.96 to read as follows:

§ 37.96 Spirometry interpretations, reports, and submission.

(a) *Interpretation of spirometry tests.* Interpretations will be carried out by physicians or other qualified health care professionals with expertise in spirometry who have all required licensure and privileges to provide this service in their State or Territory. Interpretations must be carried out using procedures and criteria consistent with recommendations in the ATS Technical Standards: Spirometry in the Occupational Setting, pp. 987–990, and the ATS/ERS Interpretative Strategies for Lung Function Tests, p. 950, p. 956 including Table 5, and p. 957 including Table 6 (both incorporated by reference, *see* § 37.98).

(b) *Spirometry reports at NIOSH-approved spirometry facilities.* (1) Spirometry test reports must contain the following:

(i) The miner's age, height, gender, race, and weight;

(ii) Numerical values (FVC, FEV6, FEV1, FEV1/FVC, FEV1/FEV6, FET, and PEF) and volume-time and flow-volume spirograms for all recorded expiratory maneuvers; normal reference value set used; and the predicted, percent predicted, and lower limit of normal threshold values;

(iii) Miner position during testing (standing or sitting);

(iv) Dates of test and last calibration check;

(v) Ambient temperature and barometric pressure (volume spirometers); and

(vi) The technician's unique identification number.

(2) NIOSH will notify the submitting facility when to permanently delete or, if this is not technologically feasible for the spirometry system used, render permanently inaccessible all files and forms associated with a miner's spirometry test from its electronic and physical files.

(c) *Submission of spirometry results.* Facilities must submit results of spirometry tests electronically with content as specified in § 37.96(b), completed pre-test screening checklists (found in Spirometry Results Notification Form CDC/NIOSH 2.15), and completed Respiratory Assessment Form (CDC/NIOSH 2.13) within 14 calendar days of testing a miner.

(1) *Electronic spirometry test results.* Submission of spirometry test results in the form of an electronic data file in a format approved by NIOSH is preferred. Facilities must utilize a secure internet data transfer site specified by NIOSH. Data submission must be performed as specified in the facility's approval. The transmitted spirometry data files must include a variable length record providing all parameters in the format, content, and data structure described by the 2005 ATS/ERS Standardisation of Spirometry, p. 335 including Table 8 (incorporated by reference, *see* § 37.98), or an alternate data file that is approved by NIOSH.

(2) *Spirometry test results submitted using the Spirometry Results Notification form.* If specified under a facility's approval, spirometry results may be provided using the Spirometry Results Notification Form (CDC/NIOSH 2.15). The form must be completed and submitted electronically, accompanied by image files in a format approved by NIOSH that documents the flow-volume and volume-time curves for each trial reported on the form. The method of electronic submission must be approved by NIOSH and carried out securely as specified for electronic data files in § 37.96(c)(1).

(d) *Confidentiality of spirometry results.* Individual medical information and spirometry results are considered protected health information under HIPAA and may only be released as specified by HIPAA or to NIOSH, as discussed in paragraph (d)(1) of this section, and maintained by the spirometry facility as specified in § 37.93(e).

(1) Personally identifiable information in the possession of NIOSH will be released only with the written consent of the miner or, if the miner is deceased, the written consent of the miner's next of kin or legal representative.

(2) To provide on-site back-up and assure complete data transfer, facilities must retain the forms and results (in electronic or paper format) from a

miner's test until instruction has been received from NIOSH to delete the associated files and forms or, if this is not technologically feasible, render the data permanently inaccessible.

■ 26. Revise § 37.97 to read as follows:

§ 37.97 Notification of spirometry results.

(a) Findings must be communicated to the miner or, if requested by the miner, to the miner's designated physician. The health care professional at the NIOSH-approved facility must inform the miner if the spirometry shows abnormal results or if the respiratory assessment suggests he or she may benefit from the medical follow-up or a smoking cessation intervention.

(b) NIOSH will notify the miner of his or her spirometry test results, a comparison between current and previously submitted spirometry tests (if available), and will advise the miner to contact a health care professional as appropriate based on the results.

■ 27. Add § 37.98 to read as follows:

§ 37.98 Standards incorporated by reference.

(a) Certain material is incorporated by reference into this subpart, Subpart—Spirometry Testing, with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, NIOSH must publish notice of change in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at NIOSH, Respiratory Health Division, 1095 Willowdale Road, Morgantown, WV 26505. To arrange for an inspection at NIOSH, call 304–285–5749. Copies are also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibv_locations.html.*

(b) American Journal of Respiratory and Critical Care Medicine, American Thoracic Society (ATS), 25 Broadway, 18th Floor, New York, NY 10004. Phone: (800) 635–7181, extension 8065. Email: *Hope.Robinson@sheridan.com. http://www.atsjournals.org/action/showHome:*

(1) Standardization of Spirometry; 1994 Update. Official Statement of the ATS, adopted November 11, 1994. American Journal of Respiratory and Critical Care Medicine 152(3):1107–1136, September 1995, into § 37.95(b). This ATS Official Statement is also available at *http://www.atsjournals.org/doi/pdf/10.1164/ajrccm.152.3.7663792.*

(2) Official American Thoracic Society Technical Standards: Spirometry in the Occupational Setting (''ATS Technical Standards: Spirometry in the Occupational Setting''). Redlich CA, Tarlo SM, Hankinson JL, Townsend MC, Eschenbacher WL, Von Essen SG, Sigsgaard T, and Weissman DN. American Journal of Respiratory and Critical Care Medicine 189(8):983–994, April 15, 2014, into §§ 37.92(b) and 37.96(a).

(3) Spirometric Reference Values from a Sample of the General U.S. Population. Hankinson JL, Odencrantz JR, Fedan KB. American Journal of Respiratory and Critical Care Medicine, 159(1):179–187, January 1999, into § 37.92(b).

(c) European Respiratory Journal, 442 Glossop Road, Sheffield, S10 2PX, UK. Phone: 44 114 267 28 60; Fax: 44 114 266 50 64. Email: *info@ersj.org.uk. http://erj.ersjournals.com/.*

(1) Standardisation of Spirometry (''2005 ATS/ERS Standardisation of Spirometry''). ATS/ERS Task Force: Standardization of Lung Function Testing. Miller MR, Hankinson J, Brusasco V, Burgos F, Casaburi R, Coates A, Crapo R, Enright P, van der Grinten CPM, Gustafsson P, Jensen R, Johnson DC, MacIntyre N, McKay R, Navajas D, Pedersen OF, Pellegrino R, Viegi G, and Wanger J. European Respiratory Journal 26(2):319–338, August 2005, into §§ 37.93(b); 37.95(b) and (c); and 37.96(c). The ATS/ERS Standardisation of Spirometry is also available on the ATS Web site at *https://www.thoracic.org/statements/resources/pfet/PFT2.pdf.*

(2) Interpretative Strategies for Lung Function Tests (''ATS/ERS Interpretative Strategies for Lung Function Tests''). ATS/ERS Task Force: Standardisation of Lung Function Testing. Pellegrino R, Viegi G, Brusasco V, Crapo RO, Burgos F, Casaburi R, Coates A, van der Grinten CPM, Gustafsson P, Hankinson J, Jensen R, Johnson DC, MacIntyre N, McKay R, Miller MR, Navajas D, Pedersen OF, and Wanger J. European Respiratory Journal 26(5):948–968, November 2005, into § 37.96(a). The ATS/ERS Standardisation of Lung Function Testing is also available on the ATS Web site at *http://www.thoracic.org/statements/resources/pft/pft5.pdf.*

(3) Standardisation of Lung Function Testing, the Authors' Replies to Readers' Comments (''Standardisation of Lung Function Testing, Replies to Readers''). Miller MR, Hankinson J, Brusasco V, Burgos F, Casaburi R, Coates A, Enright P, van der Grinten C, Gustafsson P, Jensen R, MacIntyre N, McKay RT, Pedersen OF, Pellegrino R, Viegi G, and Wanger J. European Respiratory Journal 36(6):1496–1498, December 2010, into § 37.95(c). The Standardisation of Lung Function Testing, Replies to Readers is also available on the ATS Web site at *http://www.thoracic.org/statements/resources/pft/clarification-12-2010.pdf.*

■ 28. Revise § 37.100 to read as follows:

§ 37.100 Coal mine operator plan for medical examinations.

(a) Each coal mine operator must submit and receive NIOSH approval of a plan for the provision of chest radiographs, occupational histories, spirometry tests, and respiratory assessments of miners, using the appropriate forms provided by NIOSH.

(1) During the transition from August 1, 2014 until the time when spirometry facilities are approved by NIOSH, any person becoming a coal mine operator on or after August 1, 2014, or any coal mine operator without an approved plan as of that date must submit a plan within 60 days that provides for chest radiographs and occupational histories only.

(2) Coal mine operators with previously approved plans for only chest radiographs and occupational histories, or with plans developed pursuant to paragraph (a)(1) of this section, will be notified by MSHA when the plans must be amended to include spirometry testing and respiratory assessments. Amendments must be submitted to NIOSH within 60 days of MSHA's notification.

(b) The coal mine operator's plan must include:

(1) The name, address, and telephone number of the operator(s) submitting the plan;

(2) The name, MSHA identification number for respirable dust measurements, and address of the mine included in the plan;

(3) The proposed beginning and ending date of the 6-month period(s) for voluntary radiography exams and spirometry tests (*see* §§ 37.3(a) and 37.92(a)), the estimated number of miners to be given or offered examinations during the 6-month period under the plan, and a roster specifying the names and current home mailing addresses of each miner covered by the plan;

(4) The name and location of the approved radiograph and spirometry facility or facilities, and the approximate date(s) and time(s) of day during which the radiograph examination and spirometry will be given to miners to enable a determination of whether the examinations will be conducted at a convenient time and place;

(5) If a mobile medical examination facility is proposed to provide some or all of the surveillance tests specified in paragraph (a) of this section, the plan must provide that each miner be given adequate notice of the opportunity to have the examination and that no miner will have to wait for an examination more than 1 hour before or after his or her work shift. The plan must include:

(i) The number of change houses at the mine.

(ii) One or more alternate non-mobile approved medical examination facilities for the reexamination of miners and for the mandatory examination of miners when necessary (*see* §§ 37.3(b) and 37.92(b)), or an assurance that the mobile facility will return to the location(s) specified in the plan as frequently as necessary to provide for medical surveillance examinations in accordance with these regulations.

(iii) The name and location of each change house at which examinations will be given. For mines with more than one change house, the examinations must be given at each change house or at a change house located at a convenient place for each miner.

(6) Assurances that:

(i) The operator will not solicit a physician's spirometric, radiographic or other findings concerning any miner employed by the operator;

(ii) Instructions have been given to the person(s) giving the examinations that duplicate spirograms or copies of spirograms (including copies of electronic files) and radiographs or copies of radiographs (including, for digital radiographs, copies of electronic files) will not be made, and to the extent that it is technically feasible all related electronic files must be permanently deleted from the facility records or rendered permanently inaccessible following the confirmed transfer of such data to NIOSH, and that (except as may be necessary for the purpose of this part) the physician's spirometric, radiographic and other findings, as well as the occupational history and respiratory assessment information obtained from a miner will not be disclosed in a manner that would permit identification of the individual miner with his or her information; and

(iii) The spirometry and radiographic examinations will be made at no charge to the miner.

(c) Operators may provide for alternate spirometry or radiography facilities in plans submitted to NIOSH for approval.

(d) The change of operators of any mine operating under a plan approved pursuant to § 37.101(a) must not affect the plan of the operator which has transferred responsibility for the mine. Every plan is subject to revision in accordance with paragraph (e) of this section.

(e) The operator must advise NIOSH of any change in its plan. Each change in an approved plan is subject to the same review and approval as the originally approved plan.

(f) The operator must promptly display in a visible location on the bulletin board at the mine its proposed plan or proposed change in a NIOSH-approved plan when it is submitted to NIOSH. The proposed plan or change in a NIOSH-approved plan must remain posted in a visible location on the bulletin board until NIOSH either grants or denies approval at which time the approved plan or denial of approval must be permanently posted. In the case of an operator who does not have a bulletin board, such as an operator that is a contractor, the operator must otherwise notify its employees of the examination arrangements. Upon request, the contractor must show NIOSH written evidence that its employees have been notified.

(g) Upon notification from NIOSH that sufficient time has elapsed since the previous period of examinations, the operator must resubmit a plan for each of its coal mines to NIOSH for approval for the next period of examinations (*see* §§ 37.3(a)(2) and 37.92(a)). The plan must include the proposed beginning and ending dates of the next period of examinations and all information required by paragraph (b) of this section.

■ 29. Revise § 37.101 to read as follows:

§ 37.101 Approval of plans.

(a) If, after review of any plan submitted pursuant to this subpart, NIOSH determines that the action to be taken under the plan by the operator meets the specifications of this subpart and will effectively achieve its purpose, NIOSH will approve the plan and notify the operator submitting the plan of the approval. Approval may be conditioned upon such terms as the Secretary deems necessary to carry out the purpose of section 203 of the Act.

(b) Where NIOSH has reason to believe that it will deny approval of a plan NIOSH will, prior to the denial, give notice in writing to the operator(s) of an opportunity to amend the plan. The notice must specify the ground(s) upon which approval is proposed to be denied.

(c) If a plan is denied approval, NIOSH will advise the operator(s) in writing of the reasons for the denial and inform MSHA that the plan was denied.

■ 30. Revise § 37.102 to read as follows:

§ 37.102 Transfer of affected miner to less dusty area.

(a) Any miner who, in the judgment of NIOSH, has evidence of the development of pneumoconiosis, must be afforded the option of transferring from his or her position to another position in an area of the mine where the concentration of respirable dust in the mine atmosphere is in compliance with the MSHA requirements in 30 CFR part 90. A classification of one or more of the miner's chest radiographs as showing category 1 (0/0, 1/1, 1/2), category 2 (2/1, 2/2, 2/3), or category 3 (3/2, 3/3, 3/+) simple pneumoconiosis, or complicated pneumoconiosis (ILO Classification) will be accepted as such evidence. NIOSH will, at its discretion, also accept other medical examinations provided to NIOSH for review, such as computed tomography scans of the chest or lung biopsies, as evidence of the development of pneumoconiosis.

(b) Any transfer under this section shall be in accordance with the procedures specified in 30 CFR part 90.

■ 31. Revise § 37.103 to read as follows:

§ 37.103 Medical examination at miner's expense.

Any miner who wishes to obtain a medical examination at the miner's own expense at an approved spirometry or radiography facility and to have the complete examination submitted to NIOSH may do so, provided that the examination is made no sooner than 6 months after the most recent examination of the miner submitted to NIOSH. NIOSH will provide radiographic classification, evaluation of spirometry test results, and reporting of the results of examinations made at the miner's expense in the same manner as if they were submitted under an operator's plan. Any change in the miner's transfer rights under the Act that may result from this examination will be subject to the terms of § 37.102.

Dated: October 4, 2016.

Sylvia M. Burwell,

Secretary, Department of Health and Human Services.

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Part IV

Department of Homeland Security

8 CFR Parts 103, 204, and 205
U.S. Citizenship and Immigration Services Fee Schedule; Final Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103, 204, and 205

[CIS No. 2577–15; DHS Docket No. USCIS–2016–0001]

RIN 1615–AC09

U.S. Citizenship and Immigration Services Fee Schedule

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is adjusting the fee schedule for immigration and naturalization benefit requests processed by U.S. Citizenship and Immigration Services (USCIS). The fee schedule was last adjusted on November 23, 2010. USCIS conducted a comprehensive fee review for the fiscal year (FY) 2016/2017 biennial period and determined that current fees do not recover the full cost of services provided. DHS has determined that adjusting the fee schedule is necessary to fully recover costs and maintain adequate service. DHS published a proposed fee schedule on May 4, 2016.

Under this final rule, DHS will increase fees by a weighted average of 21 percent; establish a new fee of $3,035 covering USCIS costs related to processing the Employment Based Immigrant Visa, Fifth Preference (EB–5) Annual Certification of Regional Center, Form I–924A; establish a three-level fee for the Application for Naturalization, Form N–400; and remove regulatory provisions that prevent USCIS from rejecting an immigration or naturalization benefit request paid with a dishonored check or lacking the required biometric services fee until the remitter has been provided an opportunity to correct the deficient payment.

DATES: This rule is effective December 23, 2016. Applications or petitions mailed, postmarked, or otherwise filed on or after December 23, 2016 must include the new fee.

FOR FURTHER INFORMATION CONTACT: Joseph D. Moore, Chief Financial Officer, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2130, telephone 202–272–1969.

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I. Executive Summary

The Department of Homeland Security (DHS) is adjusting the fee schedule for U.S. Citizenship and Immigration Services (USCIS). USCIS conducted a comprehensive fee review for the FY 2016/2017 biennial period, refined its cost accounting process, and determined that current fees do not recover the full costs of services provided. DHS has determined that adjusting USCIS' fee schedule is necessary to fully recover costs and maintain adequate service.

In this final rule, DHS will:

- Adjust fees by a weighted average increase of 21 percent to ensure that fees for each benefit type are adequate to cover USCIS' costs associated with processing applications and petitions, as well as providing similar benefits to asylum and refugee applicants [1] and certain other immigrants at no charge.
- Establish a new fee of $3,035 to recover the full cost of processing the Employment Based Immigrant Visa, Fifth Preference (EB–5) Annual Certification of Regional Center, Form I–924A.
- Establish a three-level fee for Application for Naturalization, Form N–400. First, DHS will increase the standard fee for Form N–400 from $595 to $640. Second, DHS will continue to charge no fee to applicants who meet the requirements of sections 328 or 329 of the Immigration and Nationality Act of 1952 (INA) with respect to military service and applicants with approved fee waivers. Third, DHS will charge a reduced fee of $320 for naturalization applicants with family income greater than 150 percent and not more than 200 percent of the Federal Poverty Guidelines.
- Remove regulatory provisions that prevent USCIS from rejecting an immigration or naturalization benefit request paid with a dishonored check or lacking the required biometric services fee until the remitter has been provided an opportunity to correct the deficient payment.
- Clarify that persons filing any benefit request may be required to appear for biometrics services or an interview and may be required to pay the biometrics services fee.

[1] Although the President has announced an increase in the refugee admissions ceiling to 110,000, the final fee structure includes costs for only 100,000, which was the anticipated ceiling at the time that the fee review was conducted.

II. Background

DHS published a notice of proposed rulemaking (NPRM) on May 4, 2016, which proposed adjusting USCIS' fee schedule by a weighted average increase of 21 percent. *See U.S. Citizenship and Immigration Services Fee Schedule; Proposed Rule,* 81 FR 26904. This final rule establishes the first fee adjustment since 2010. It is a result of a comprehensive fee review conducted by USCIS for the FY 2016/2017 biennial period. During the fee review, USCIS determined that current fees do not recover the full costs of processing immigration benefits. This final rule reflects full cost recovery including program costs that DHS excluded in the 2010 final rule. USCIS provided the FY 2016/2017 Immigration Examinations Fee Account (IEFA) Fee Review Supporting Documentation (supporting documentation), which includes budget methodology, and regulatory flexibility analysis, in the public docket. *See http://www.regulations.gov,* docket number USCIS–2016–0001.

This final rule includes the addition of fee surcharges applied to certain immigration benefits to fully recover costs related to the USCIS Refugee, Asylum, and International Operations Directorate (RAIO), the Systematic Alien Verification for Entitlements (SAVE) program (to the extent not recovered from users),[2] and the Office of Citizenship.[3] In the 2010 final rule, USCIS assumed it would continue receiving funding for these programs through congressional appropriations. *See U.S. Citizenship and Immigration Services Fee Schedule,* 75 FR 58962, 58966 (Sept. 24, 2010). The 2010 final rule removed asylum, refugee, and military naturalization costs from the fee structure and assumed that immigration fees would not be used to recover the costs of adjudicating asylum, refugee, and military naturalization requests, as well as costs associated with the SAVE program and the Office of Citizenship. The final rule removed all of these costs from the USCIS fee structure, instead assuming that these services would be funded using appropriated funds. *See* 75 FR 58963. That budget request was not fulfilled, and USCIS was left to fund the cost of these programs after having removed the surcharge. *See* Pub. L. 112–10, sec. 1639 (Apr. 15, 2011).[4]

DHS issues this final rule consistent with the Immigration and Nationality Act (INA) section 286(m), 8 U.S.C. 1356(m) (authorizing DHS to charge fees for adjudication and naturalization services at a level to ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants) and the Chief Financial Officers (CFO) Act of 1990, 31 U.S.C. 901–03 (requiring each agency's CFO to review, on a biennial basis, the fees imposed by the agency for services it provides, and to recommend changes to the agency's fees). The NPRM provides additional information on the legal authority, non-statutory guidance, and background on the IEFA fees. *See* 81 FR 26906.

[2] The SAVE program was established in 1987 by the Immigration Reform and Control Act, Pub. L. 99–603, sec. 121(c) (Nov. 6, 1986), which required the Commissioner of the Immigration and Naturalization Service to ''implement a system for the verification of immigration status . . . so that the system is available to all States by not later than October 1, 1987.'' SAVE uses an internet-based service to assist Federal, state, and local benefit-issuing and licensing agencies, and other governmental entities, in determining the immigration status of benefit or license applicants, so that only those applicants entitled to benefits or licenses receive them.

[3] The USCIS Office of Citizenship was established by section 451(f) of the Homeland Security Act of 2002. Pub. L. 107–296, sec. 451(f) (2002). The statute tasks the office with ''promoting instruction and training on citizenship responsibilities for aliens interested in becoming naturalized citizens.''

III. Final Rule

A. Changes in the Final Rule

This section details the changes made in this final rule as compared to the NPRM. These changes are summarized as follows:

1. Application to Register Permanent Residence or Adjust Status, Form I–485. DHS has revised the regulatory language regarding the fee for the Application to Register Permanent Residence or Adjust Status, Form I–485, to clarify that the proposed $750 discounted fee is available for all applicants under 14 years old who submit their Form I–485 with that of a parent. These revisions accord the fee regulations with the current Form I–485 instructions and intake practices. *See* new 8 CFR 103.7(b)(1)(i)(U)(*2*); 81 FR 26919. The section later in this preamble entitled, ''Adjustment of Status, Form I–485, and Interim Benefits,'' provides more details about this change.

[4] USCIS received $29.95 million of the requested $248 million to fund a portion of the refugee and asylum processing administered under the RAIO Directorate and military naturalization processing in Fiscal Year 2011. USCIS has not received any substantial appropriations for these programs since FY 2011. USCIS received $2.5 million for the immigrant integration grants program in FY 2014 (Pub. L. 113–76) and FY 2013 (Pub. L. 113–6). USCIS did not receive appropriations for the immigrant integration grants program in FY 2015 or FY 2016. Similarly, USCIS received no FY 2016 discretionary appropriations for the SAVE program or for the Office of Citizenship. *See* DHS Appropriations Act 2016, Pub. L. 114–113, div. F. (Dec. 18, 2015).

2. Dishonored payments. DHS has also clarified the regulations governing USCIS actions when a check used to pay the required fee is dishonored by the remitter's bank. Under this final rule, USCIS will submit all initially rejected payments to the applicant's bank a second time for it to clear or be rejected. 8 CFR 103.2(a)(7)(ii)(D). If the check is rejected again following re-submission by USCIS, it will reject the case for fee non-payment. If the case has been approved, USCIS will send a notice of intent to revoke the approval. The section later in this preamble entitled, ''Dishonored Payments,'' provides more details about this change.

3. Application for Advance Permission to Enter as a Nonimmigrant, Form I–192, and Application for Waiver for Passport and/or Visa, Form I–193. DHS has made adjustments to the proposed fees in the final rule for the Application for Advance Permission to Enter as a Nonimmigrant, Form I–192, and the Application for Waiver for Passport and/or Visa, Form I–193. For the reasons outlined in section IV.B.2.p. of this preamble, the fees that will be charged for Forms I–192 and I–193 will remain at $585, rather than the proposed fee of $930 when such forms are submitted to and processed by the U.S. Customs and Border Protection (CBP). *See* new 8 CFR 103.7(b)(1)(i)(P)–(Q).

B. Corrections

DHS inadvertently listed Application by Refugee for Waiver of Grounds of Excludability, Form I–602, in the NPRM preamble and the supporting documentation. DHS listed Form I–602 in the NPRM as part of Waiver Forms in section IV, Fee Review Methodology, at 81 FR 26916 and tables 8 and 9 at 81 FR 26926–26927. USCIS referenced it on pages 24, 47, 49, and 50 of the accompanying supporting documentation. The docket of this final rule includes a corrected version of the supporting documentation without references to Form I–602. Form I–602 has no fee and DHS should not have included it in these lists or tables. The NPRM did not assume any fee-paying workload for Form I–602; therefore, removing it from the fee schedule does not affect other fees. DHS continues to not charge a fee for Form I–602.

DHS also inadvertently did not include provisions for what would occur if a benefit request was approved before USCIS became aware that the fee payment was dishonored by the remitter institution. *See* proposed 8 CFR 103.2(a)(7)(ii), 103.7(a)(2); 81 FR 26936–26937. Specifically, DHS proposed to remove the requirement that USCIS provide notification to the requester whenever an instrument used to pay the filing fee is returned as not payable, with 14 days to cure the deficiency. However, DHS neglected to propose the necessary conforming change to 8 CFR 205.1(a)(2), which provides that the approval of a petition or self-petition made under INA section 204 is automatically revoked if the filing fee and associated service charge are not paid within 14 days of the notification to the remitter that his or her check or other financial instrument used to pay the filing fee has been returned as not payable. The latter provision must be revised to conform it to the proposed change described previously. That oversight has been corrected in this final rule. New 8 CFR 103.7(a)(2)(iii), 205.1(a). This change is discussed in more detail in the response to the public comments regarding dishonored payments.

C. Summary of Final Fees

The current USCIS fee schedule and the fees adopted in this final rule are summarized in Table 1. DHS bases the final fees on the FY 2016/2017 estimated cost baseline as outlined in the NPRM. The table excludes fees established and required by statute and those that DHS cannot adjust.

TABLE 1—NON-STATUTORY IEFA IMMIGRATION BENEFIT REQUEST FEES

Form No.[5]	Title	Current fee	Final fee
G–1041	Genealogy Index Search Request	$20	$65
G–1041A	Genealogy Records Request (Copy from Microfilm)	20	65
G–1041A	Genealogy Records Request (Copy from Textual Record)	35	65
I–90	Application to Replace Permanent Resident Card	365	455
I–102	Application for Replacement/Initial Nonimmigrant Arrival-Departure Document.	330	445
I–129/129CW	Petition for a Nonimmigrant Worker	325	460
I–129F	Petition for Alien Fiancé(e)	340	535
I–130	Petition for Alien Relative	420	535
I–131[6]/I–131A[7]	Application for Travel Document	360	575
I–140	Immigrant Petition for Alien Worker	580	700
I–191	Application for Advance Permission to Return to Unrelinquished Domicile.	585	930
I–192	Application for Advance Permission to Enter as Nonimmigrant	585	[8]585/930
I–193	Application for Waiver of Passport and/or Visa	585	585
I–212	Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal.	585	930
I–290B	Notice of Appeal or Motion	630	675
I–360	Petition for Amerasian Widow(er) or Special Immigrant	405	435
I–485	Application to Register Permanent Residence or Adjust Status	985	1,140
I–485	Application to Register Permanent Residence or Adjust Status (certain applicants under the age of 14 years).	635	750
I–526	Immigrant Petition by Alien Entrepreneur	1,500	3,675
I–539	Application to Extend/Change Nonimmigrant Status	290	370
I–600/600A	Petition to Classify Orphan as an Immediate Relative/Application for Advance Petition Processing of Orphan Petition.	720	775
I–800/800A	Petition to Classify Convention Adoptee as an Immediate Relative/Application for Determination of Suitability to Adopt a Child from a Convention Country.	720	775
I–601	Application for Waiver of Ground of Excludability	585	930
I–601A	Application for Provisional Unlawful Presence Waiver	585	630

TABLE 1—NON-STATUTORY IEFA IMMIGRATION BENEFIT REQUEST FEES—Continued

Form No.[5]	Title	Current fee	Final fee
I–612	Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended).	585	930
I–687	Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act.	1,130	1,130
I–690	Application for Waiver of Grounds of Inadmissibility	200	715
I–694	Notice of Appeal of Decision	755	890
I–698	Application to Adjust Status From Temporary to Permanent Resident (Under Section 245A of the INA).	1,020	1,670
I–751	Petition to Remove Conditions on Residence	505	595
I–765	Application for Employment Authorization	380	410
I–800A Supp. 3	Request for Action on Approved Form I–800A	360	385
I–817	Application for Family Unity Benefits	435	600
I–824	Application for Action on an Approved Application or Petition	405	465
I–829	Petition by Entrepreneur to Remove Conditions	3,750	3,750
I–910	Application for Civil Surgeon Designation	615	785
I–924[9]	Application for Regional Center Designation Under the Immigrant Investor Program.	6,230	17,795
I–924A	Annual Certification of Regional Center	0	3,035
I–929	Petition for Qualifying Family Member of a U–1 Nonimmigrant	215	230
N–300	Application to File Declaration of Intention	250	270
N–336	Request for Hearing on a Decision in Naturalization Proceedings	650	700
N–400	Application for Naturalization	595	640
N–470	Application to Preserve Residence for Naturalization Purposes	330	355
N–565	Application for Replacement Naturalization/Citizenship Document	345	555
N–600/N–600K	Application for Certification of Citizenship/Application for Citizenship and Issuance of Certificate under Section 322.	[10] 600/550	1,170
	USCIS Immigrant Fee[11]	165	220
	Biometric Services Fee	85	85

[5] Form, when used in connection with a benefit or other request to be filed with DHS to request an immigration benefit, means a device for the collection of information in a standard format that may be submitted in a paper format or an electronic format as prescribed by USCIS on its official Internet Web site. The term ''Form'' followed by an immigration form number includes an approved electronic equivalent of such form as made available by USCIS on its official Internet Web site. *See* 8 CFR 1.2 and 299.1. Therefore, the word ''form'' is used in this final rule in both the specific and general sense.

[6] As described in the NPRM, the United States' obligations under the 1967 Protocol relating to the Status of Refugees (incorporating by reference Article 28 of the 1951 U.N. Convention relating to the Status of Refugees) guide the Application for Travel Document fees for a Refugee Travel Document. The USCIS ABC model does not calculate these fees. *See* 8 CFR 103.7(b)(1)(i)(M)(2) and (3).

[7] On August 31, OMB approved Form I–131A, Application for Travel Document (Carrier Documentation). The new form will be used by Lawful Permanent Residents (LPRs) who are temporarily overseas and have lost their Permanent Resident Card or Reentry Permit, to apply for a Travel Document. *See https://www.uscis.gov/i-131a.*

[8] The fee for Form I–192 will remain $585 when filed with and processed by CBP.

[9] DHS removed the word ''Pilot'' from the form title. *See* new 8 CFR 103.7(b)(1)(i)(WW).

[10] The current fee for applications filed on behalf of a biological child is $600. The fee for an adopted child is $550. There is no fee for any application filed by a member or veteran of any branch of the U.S. Armed Forces.

[11] DHS changed the fee name to ''USCIS Immigrant Fee.'' *See* new 8 CFR 103.7(b)(1)(i)(D).

IV. Public Comments on the Proposed Rule

DHS provided a 60-day comment period following publication of the NPRM; 436 comments were posted to *regulations.gov*. Although 475 comments were received on the docket, 38 were not posted and one was withdrawn. As noted in the proposed rule, DHS may withhold information provided in comments from public viewing if it determines that such information is offensive or may affect the privacy of an individual. 81 FR 26905.

A. General Comments

DHS received comments from a broad spectrum of individuals and organizations, including refugee and immigrant service and advocacy organizations, public policy groups, members of Congress, and private citizens. Some commenters wrote that they supported the fee changes while others were critical of them. Many commenters wrote that they were generally unsupportive of the weighted average increase; others commented on specific form types. Some commenters wrote about alternative methods to reduce costs and inefficiencies.

DHS also received several comments on subjects that are not related to the proposed fees and are outside the scope of the NPRM. With limited exception as explicitly stated below, DHS has not separately summarized or responded to these comments.

B. Relative Amount of Fees

Most commenters stated opposition to the fee increases. Some commenters suggested that fee increases would reduce the number of people seeking immigration benefits. Some commenters stated that the proposed fees did not reflect the actual adjudicative workload of particular benefit types. Several commenters stated that proposed fees were too low, but the clear majority stated that the fees were too high.

Although DHS summarizes and responds to these concerns in more detail below, it emphasizes that, as an initial matter and as articulated in the NPRM, DHS needs to increase USCIS fees by a weighted average increase of 21 percent to offset growing costs and continue to provide an adequate level of service, as provided by section 286(m) of the INA, 8 U.S.C. 1356(m), which authorizes USCIS to ''ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge.'' As reflected in this provision, some USCIS fees must exceed the cost of adjudicating the respective benefit types to cover those benefits provided without charge, such as refugee benefits, asylum benefits, and other fee-exempt, fee-waived or fee-reduced workloads. Furthermore, as explained in the NPRM,

''DHS may reasonably adjust fees based on value judgements and public policy reasons where a rational basis for the methodology is propounded in the rulemaking.'' *See* 81 FR 26907.

An example is the policy decision to include a fee exemption for individuals who are victims of a severe form of human trafficking and who assist law enforcement in the investigation or prosecution of those acts of trafficking (who may qualify for T visas), and individuals who are victims of certain crimes and are being helpful to the investigation or prosecution of those crimes (who may qualify for U visas). The cost of processing those fee-exempt visas must be recovered through fees charged for other benefit requests. *See* INA secs. 101(a)(15)(T), (U), 214(o), (p), 8 U.S.C. 1101(a)(15)(T), (U), and 1184(o), (p); 8 CFR 214.11, 214.14, 103.7(c)(5)(iii); *Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status,* 73 FR 75540 (Dec. 12, 2008). Such a decision would inevitably cause an unsustainable reduction in fee revenue unless DHS spread the cost of the fee exemption among other fee-paying applicants and petitioners. Accordingly, consistent with section 286(m) of the INA, 8 U.S.C. 1356(m), DHS sets fees for other fee-paying applicants and petitioners at a level sufficient to recover the full costs of providing all such services.

Similarly, a decision to allow fee waivers for a particular benefit request, or a decision to allow a reduced fee, will also have an impact on other fee-paying applicants and petitioners. For instance, when USCIS determines to hold a fee to a smaller percentage increase than the overall methodology suggests (in this rule, DHS uses an 8 percent weighted average increase for those benefits that it determines should be held to a smaller fee increase [12]), there are cascading effects on other fee-paying applicants and petitioners. These fee-reduced immigration benefit requests may not recover the full cost of their associated workloads or the full cost of their respective fee waivers. The portion of costs that is not recovered is reallocated to other immigration benefit requests.

Correspondingly, when DHS sets a fee for a given benefit request at the level suggested by the USCIS fee-setting methodology, without further adjustment, the associated immigration benefit request absorbs a portion of the additional costs associated with the immigration benefit requests that are held down to the 8 percent weighted average increase. These fees recover the full cost of their respective fee waivers, plus some of the fee waiver costs for immigration benefit requests that are held down to the 8 percent weighted average increase.[13] These fees also recover a greater portion of the cost of fee-exempt services.

1. Proposed Fees Are Too High

The largest number of commenters wrote in opposition to the overall increase in fees. Several commenters expressed concern over specific populations (such as families or potential adoptive families) that may be particularly affected by the fee increases. Some commenters believed that a steep increase in fees would result in increased illegal immigration, particularly for individuals who may not be able to afford increased costs associated with existing legal avenues. Some commenters suggested that the increase in fees could discourage certain individuals from attempting to work or ultimately seeking lawful permanent residence resident (LPR) status in the country.

As an initial matter, DHS notes that as stated in the NPRM, it attributes 17 percent of the 21 percent weighted average fee increase to the reinstatement of the surcharge needed to sustain current operating levels of RAIO, the SAVE program, and the Office of Citizenship, as well as to account for a projected loss in fee revenue resulting from a significant increase in the number of fee waivers currently received (and which is expected to continue throughout FY 2016/2017). *See* 81 FR 26911. The remaining 4 percent is needed to recover the cost of sustaining current operating levels and to allow for limited, strategic investments necessary to ensure the agency's information technology infrastructure is strengthened. Such strengthening is needed to protect against potential cyber intrusions and to build the disaster recovery and back-up capabilities required to effectively deliver on the USCIS mission. *See* 81 FR 26910. For comparison, the inflation from July 2010 to July 2016 was 9.5 percent.[14]

DHS notes that fees do not merely cover the cost of adjudication time. The fees also cover the resources required for intake of immigration benefit requests, customer support, fraud detection, background checks, and administrative requirements.[15] DHS also reiterates that any further fee adjustments would be zero-sum. Given the need to recover the full cost of the services provided, a decision reducing the fee burden on one population of beneficiaries will ultimately increase the burden on others.

a. Barrier to Family Reunification

A number of commenters stated that an increase in fees could potentially prevent family reunification for certain U.S. citizens and lawful permanent residents (LPRs), especially for individuals seeking to reunite with several family members. USCIS understands the importance of facilitating family reunification, as well as the advantages that LPR status and citizenship provide. DHS acknowledges that certain individuals may need to file multiple requests, and thus pay multiple fees, depending on the number of family members they seek to sponsor. Nonetheless, USCIS filing fees are necessary to provide the resources required to do the work associated with such filings. When fees do not fully recover costs, USCIS is unable to maintain sufficient capacity to process requests. Inadequate fees may cause significant delays in immigration request processing, which can result in the burden of longer separation from family members.

DHS recognizes that fees impose a burden on fee-paying applicants and beneficiaries, and it takes steps to mitigate that burden as appropriate. Specifically, after USCIS applies its standard fee-setting methodology to identify the Activity-Based Cost (ABC) [16] model output for each benefit

[12] In this rule, USCIS applies this increase to a number of benefit types, including the Application for Naturalization, Form N–400; Application for Employment Authorization, Form I–765; and adoption-related applications, Forms I–600/600A/800/800A. This smaller increase, which in this rulemaking amounts to 8 percent, is the percentage difference between the current fees and the model output before reallocation, weighted by fee-paying volume. *See* 81 FR 26915.

[13] See Appendix Table 4, Cost Reallocation column in the supporting documentation. These figures represent all additional costs, including the cost of forms that are held to the 8 percent weighted average increase based on policy decisions, that USCIS applies to fees to ensure full cost recovery.

[14] The semiannual average consumer price index for all urban consumers (CPI–U) was 217.5 in July 2010 and 238.8 in July 2016. The change in the Index over 9 years was 21.3 or 9.5 percent. *See* U.S. Department of Labor, Bureau of Labor Statistics, All Urban Consumers (CPI–U) Semiannual Average tables, available at *http://www.bls.gov/cpi/cpi_dr.htm.* DHS has not recently adjusted IEFA fees by CPI–U inflation, but provides this figure as a point of comparison.

[15] See Appendix Table 5: Activity Unit Costs by Immigration Benefit Request After Cost Reallocation of the supporting documentation. Pages 19–20 define the activities in the appendix table.

[16] USCIS uses the ABC model to determine the full cost of processing immigration benefit requests and biometric services. This is the same methodology used in the last four fee reviews and the basis for the current fee structure. The ABC

request, USCIS evaluates the model output and determines whether it should be adjusted. DHS is mindful that departures from the standard USCIS fee-setting methodology result in lower fees for some and higher fees for others. DHS discusses these adjustments in more detail in the remainder of this preamble, including by reference to certain family-based benefit requests, such as the Petition for Alien Relative, Form I–130.

b. Impact on Low-Income Individuals; Low Volume Reallocation

Several commenters stated that the proposed rule would harm the ability of low-income applicants and petitioners to afford USCIS services. Some of these commenters suggested that the proposed overall fee increase would result in a reduction in overall filings from low-income applicants and petitioners. Commenters discussed the importance of maintaining an immigration system that is accessible to people at all income levels.

DHS is aware of the potential impact of fee increases on low-income individuals and is sympathetic to these concerns. As a result, DHS not only offers fee waivers, but also uses its fee-setting discretion to adjust certain immigration benefit request fees that USCIS believes may be overly burdensome on applicants, petitioners, and requestors if set at the recommended model output levels. As discussed in the proposed rule and supporting documentation, and consistent with past practice, USCIS proposed to limit fee adjustments for certain benefit requests to a set percentage increase above current fees. USCIS determined this figure by calculating the average percentage fee increase across all model outputs before cost reallocation. In this rule, that calculated figure is 8 percent. This methodology is referred to as Low Volume Reallocation.

The use of Low Volume Reallocation frequently results in lower fees for certain low-income applicants and petitioners, but always results in higher fees for other benefit requests. This is because USCIS relies almost completely on fee revenue to support its operations. DHS is therefore mindful to use low volume reallocation only where compelling circumstances counsel in favor of shifting costs from one benefit request to others.

Nonetheless, as proposed, in this final rule, DHS will continue applying Low Volume Reallocation from the 2010 final rule to the following forms:

- Notice of Appeal or Motion, Form I–290B
- Petition for Amerasian, Widow(er) or Special Immigrant, Form I–360
- Petition to Classify Orphan as an Immediate Relative, Form I–600, and Application for Advance Processing of an Orphan Petition, Form I–600A
- Petition to Classify Convention Adoptee as an Immediate Relative, Form I–800, and Application for Determination of Suitability to Adopt a Child from a Convention Country, Form I–800A
- Petition for Qualifying Family Member of a U–1 Nonimmigrant Form I–929
- Application to File Declaration of Intention, Form N–300
- Request for Hearing on a Decision in Naturalization Proceedings, Form N–336
- Application to Preserve Residence for Naturalization Purposes, Form N–470

Also as proposed, DHS will apply the same calculated 8 percent weighted average increase to the following benefit types:

- Application for Provisional Unlawful Presence Waiver, Form I–601A
- Application for Employment Authorization, Form I–765
- Request for Action on Approved Form I–800A, Form I–800A Supplement 3

DHS believes that the use of Low Volume Reallocation will mitigate the potential burden of this final rule on certain low-income applicants and petitioners.[17] DHS intends to continue assessing the affordability of its fees in future fee reviews. This may result in continuing Low Volume Reallocation, otherwise reallocating certain costs, and identifying cost savings. For purposes of this final rule, however, DHS has not materially changed the proposed rule to address the commenters' stated concerns with the proposed overall fee increase.

2. Comments on Specific Fees and Adjustments

While many commenters indicated that they were opposed to the overall increase in fees, some comments focused on increases to particular forms or to specific groups of applicants, petitioners, or requestors. Those comments are addressed below.[18]

a. Application for Certificate of Citizenship, Forms N–600/600K

In the NPRM, DHS proposed fee increases for the Application for Certificate of Citizenship, Form N–600, and the Application for Citizenship and Issuance of Certificate Under Section 322, Form N–600K. Under the proposed rule, the current $600 fee for applications filed on behalf of biological children would be increased by $570, or 95 percent, to $1,170. The proposed rule also would eliminate the current $50 discount on applications filed on behalf of adopted children, previously codified at 8 CFR 103.7(b)(1)(i)(AAA), thereby effectively increasing fees for such applications by $620, or 103 percent. *Id.*

A number of commenters stated that DHS should reconsider the proposed fee increases. Some commenters requested additional information to explain the increases. Certain commenters who submitted comments through a form letter campaign stated that the proposed increases were troubling considering that USCIS had not reported a significant increase in application volume or processing times.

Some commenters stated that the proposed fee increase would result in a significant additional burden for potential adoptive families, who already invest a great deal of time and money in the adoption process. Some stated that Forms N–600 and N–600K should be free or discounted for adopted children, or alternatively maintained at the current fee. A commenter stated that the Department of State (DOS) processes derivative citizens' requests for passports in substantially the same manner that USCIS processes Forms N–600 and N–600K, yet DOS only charges $120 for a passport book for a child younger than 16 years of age. Other commenters stated that many adopted children automatically derive U.S. citizenship from their parents when they enter the United States, while other children derive U.S. citizenship when their adoptions are completed.[19] Several commenters noted that a passport may be an effective alternative to the certificate for naturalization.

model is a business management tool that assigns resource costs to operational activities and then to products and/or services. These assignments provide an accurate cost assessment of each major step towards producing the individual outputs of an organization. For additional information on the ABC model, see pages 17–22 of the supporting documentation.

[17] DHS has not estimated the overall effect that this final rule will have on filing volume from low-income applicants. USCIS may consider exploring options to collect and analyze this data in the future.

[18] DHS addresses the comments on specific immigration benefit requests in approximate order of the number of commenters who submitted comments on that subject.

[19] *See* U.S. Citizenship and Immigration Services, Before Your Child Immigrates to the United States (11/18/2014), available at *https://www.uscis.gov/adoption/your-child-immigrates-united-states.*

As noted previously, USCIS based the proposed fee increase for the Forms N–600 and N–600K on the results of its comprehensive biennial fee review, a summary of which was available for comment in the docket accompanying the proposed rule. The biennial fee review helps ensure that fees for USCIS services cover the full cost of processing immigration benefits. In the absence of full cost recovery, USCIS would be unable to sustain an adequate level of service, let alone invest in program improvements.

DHS recognizes that fees impose a burden on fee-paying applicants and beneficiaries, and takes steps to mitigate that burden as appropriate. Specifically, after DHS applies the standard USCIS methodology to identify the model output for each benefit request, DHS evaluates the model output and determines whether it should be adjusted. In the NPRM, DHS proposed to limit a small number of fees to an 8 percent weighted average increase for one or more of the following three reasons: (1) DHS determined that the combined effect of cost, fee-paying volume, and methodology changes since the previous fee rule would otherwise place an inordinate fee burden on individuals requesting these types of benefits; (2) DHS determined that an adjustment was necessary to promote citizenship and immigrant integration or other policies; or (3) DHS lacked data on which to base an appropriate fee. *See* 81 FR 26915. For example, DHS proposed to limit to the 8 percent weighted average increase to the Application for Naturalization and the adoption petition and application fees (explained in the sections of this preamble that discuss those requests).

DHS is mindful that departures from the standard USCIS fee methodology result in lower fees for some and higher fees for others. DHS is careful to use its fee setting discretion in a way that does not result in unnecessary or unjustifiable burdens for fee-paying applicants and petitioners. Accordingly, the proposed rule (like past fee rules) would have set most fees above cost, in adherence to the fee-setting methodology. The fee for Forms N–600 and N–600K is one of those fees.

Setting aside the effect of cost reallocation,[20] DHS attributes the proposed increase to the fee for Forms N–600 and N–600K to a significant increase in the number of fee waivers granted for such forms.[21] In the 2010 final rule, DHS assumed that every applicant would pay the fee for Forms N–600 and N–600K. However, the fee-paying volume estimate for Forms N–600 and N–600K decreased from 100 percent in FY 2010/2011 to 67 percent in FY 2016/2017 due to applicants receiving fee waivers. The standard fee-setting methodology provides that the costs of waived or exempted fees are to be recovered from fee-paying applicants submitting the same form(s) (in this case, applicants filing Forms N–600 and N–600K).[22] *See* 81 FR 26922. The previous fee for Form N–600 was set under the assumption that 100 percent of filers would pay the fee; as the NPRM explained, however, a third of Form N–600 filers are receiving fee waivers. These waivers account for a large portion of the costs that must now be addressed through the proposed fee increase. In short, the Form N–600 fee in the proposed rule is the result of consistent application of USCIS's fee-setting methodology. No adjustment was made to the fee calculated under the methodology based on other policy considerations.

DHS is setting the fees for several other forms at a level that is less than their projected cost. If DHS similarly limited the fee for an Application for a Certificate of Citizenship, however, it would need to raise other fees to recover these expenses. USCIS estimates that each such instance would increase other fees between $5 and $210, with an average increase of $21.

With respect to comments about the potential impact of the proposed fee increase on adoptive families in particular, DHS notes that Forms N–600 and N–600K are not primarily used by adoptive families. USCIS estimates that adopted children represent less than 10 percent of the workload related to Applications for Certificate of Citizenship.[23] Although DHS could have established a separate fee for adopted children, the cost of such a departure from the standard fee-setting methodology would be borne by other fee-paying applicants and petitioners.[24] Similarly, if DHS set the fee for this benefit request at an equivalent level to the DOS passport fee, DHS would be required to substantially increase other fees to ensure full-cost recovery. DHS agrees with commenters that in many cases, a passport will serve the same purpose as a certificate of citizenship, and for a lower cost to the applicant. Finally, DHS notes that adjudicating a Form N–600 for an adopted child is similar in workload and difficulty to the adjudication of an Application for Certificate of Citizenship for a biological child. There would be no cost-related basis for establishing a separate fee for adopted children.

For the reasons stated above, DHS has not revised the proposed fee in this final rule. Under this final rule, the fee for the Application for Certificate of Citizenship, Form N–600, and the Application for Citizenship and Issuance of Certificate Under Section 322, Form N–600K, will be $1,170.

b. Adoption, Forms I–600/600A/800/800A

In the NPRM, DHS proposed to increase the fee for the (1) Petition to Classify Orphan as an Immediate Relative, Form I–600; (2) Application for Advance Processing of an Orphan Petition, Form I–600A; (3) Petition to Classify Convention Adoptee as an Immediate Relative, Form I–800; and (4) Application for Determination of Suitability to Adopt a Child from a Convention Country, Form I–800A. The proposed increase would change the fee for each of these forms from $720 to $775. *See* proposed 8 CFR 103.7(b)(1)(i)(Y), (Z), (JJ)(*2*), (KK); 81 FR 26939. DHS proposed to hold the increase for these benefit types (among others) to an 8 percent increase because the combined effect of cost, fee-paying volume, and methodology changes since the last fee rule would otherwise place an inordinate fee burden on individuals

[20] At least one commenter indicated that the RAIO surcharge seemed to be a large contributor to the increase in the proposed fee for the Form N–600. The commenter suggested that the RAIO surcharge should be redistributed to all other forms to reduce the financial burden of the proposed fee increase on adoptive parents. As outlined in the NPRM, Forms N–600 and 600K are not the only forms that recover the cost of RAIO, the SAVE program, and the Office of Citizenship. USCIS currently distributes these costs to all form types not set below projected cost. *See* 81 FR 26915.

[21] *See* Appendix Table 4 of the supporting documentation.

[22] When DHS holds a fee below cost, the costs that are not covered, including fee waivers, must be paid by other fee paying applicants. Specifically, other immigration benefits whose fees are not held down recover the additional cost.

[23] Based on FY 2015 actual revenue data, less than 10 percent of fee-paying applicants for Forms N–600 or N–600K paid the lower fee for adopted children.

[24] DHS will continue its policy of reducing fee burdens on adoptive families in other ways. For instance, DHS will continue to allow fee waivers for the Form N–600. DHS will also continue to cover costs attributable to the adjudication of adoption petitions and applications (Forms I–600/600A/800/800A) through the fees collected from other requests. This policy is described in the following section on ''Adoption.'' Note that in the NPRM, the row for Forms I–600/600A/800/800A was labeled as ''orphan petitions.'' The term ''orphan'' only applies to Forms I–600 and Form I–600A. The row includes data for all of the adoption forms. Therefore, DHS changed the label for Forms I–600/600A/800/800A from ''orphan petitions'' to ''adoption petitions and applications'' in the final rule and in several tables within the supporting documentation. The changes only affect the labels for the rows and do not represent a change in the data or calculations.

requesting these types of benefits. For example, if DHS did not maintain the proposed fee for the Form I–600, this benefit request would have a fee of at least $2,258. DHS believes it would be contrary to the public interest to impose a fee of this amount on an estimated 15,000 potential adoptive parents each year.

Some commenters wrote in opposition to the proposed fee increases associated with intercountry adoptions or stated that DHS should reconsider these fee increases. Commenters wrote that all adoption-related fees should remain at the current level, be lowered, or be waived when adopting children from foster care. Some commenters stated that these fee increases would lead to decreased intercountry adoptions. At least one commenter wrote that adoptive parents were specifically targeted by the proposed fee increases in the NPRM.

DHS greatly values its role in intercountry adoptions and places high priority on the accurate and timely processing of immigration applications and petitions that enable U.S. families to provide permanent homes for adopted children from around the world. It also recognizes that the financial costs, both foreign and domestic, involved in intercountry adoptions can have significant impacts on these families. DHS has a history of modifying policies to ease burdens associated with international adoption. Prior to 2007, USCIS required prospective adoptive parents who had not found a suitable child for adoption within 18 months after approval of their Application for Advance Processing of Orphan Petition, Form I–600, to submit a fee with their request to extend their approval. Since 2007, USCIS has permitted adoptive parents to request one extension of their Form I–600 approval without charge, including the biometric fee. *See* 72 FR 29864; 8 CFR 103.7(b)(1)(i)(Z). Finally, DHS does not charge an additional filing fee for an adoption petition filed on behalf of the first beneficiary child or birth siblings. *See* 8 CFR 103.7(b)(1)(i)(Z) and 103.7(b)(1)(i)(JJ)(*1*).

DHS also has a history of setting adoption-related fees lower than the amount suggested by the fee-setting methodology. In the 2010 fee rule, the calculated fee for adoption petitions and applications (Forms I–600/I–600A and I–800/I–800A) was $1,455, based on projected costs. *See* 75 FR 33461; previous 8 CFR 103.7(b)(1)(i)(Y), (Z), (II), (JJ). Instead of using the model output, DHS increased the fee by only $50, to $720. *See* 75 FR 58972. As noted previously, in the FY 2016/2017 fee review, the model output for the Form I–600 was $2,258.[25] Nonetheless, DHS proposed setting fees for adoption petitions at $775. *See* proposed 8 CFR 103.7(b)(1)(i)(Y), (Z), (JJ), (*2*), (KK). The $1,483 difference between the model output and the final fee will be recovered from other applications, petitions, and requests. Shifting the adoption petition and application costs to other fees is consistent with past DHS efforts and is in the public interest to support parents of children adopted abroad.

DHS recognizes that fees impose a burden on individuals seeking immigration benefits, and it takes steps to mitigate that burden as appropriate. At the same time, DHS must recover the full costs of the services that USCIS provides, or else risk reductions in service quality, including potential delays in processing. In this case, DHS proposed to apply the reduced (8 percent) fee increase to these benefit requests, for the reasons stated previously and consistent with DHS's practice of holding a number of benefit requests to this reduced fee increase. DHS was mindful that although this departure from the standard fee-setting methodology results in lower fees for adoptive families, it also results in higher fees for others. 81 FR 26915. Any further departure would only heighten the effect on the rest of the fee schedule, and would not be consistent with DHS's overall fee-setting methodology. DHS is therefore finalizing the fee as proposed.

c. Petition for a Nonimmigrant Worker, Form I–129

In the NPRM, DHS proposed to increase the fee for the Petition for a Nonimmigrant Worker, Form I–129, from $325 to $460. *See* proposed 8 CFR 103.7(b)(1)(i)(I); 81 FR 26937. The proposed fee increase was the result of the application of the standard USCIS fee-setting methodology to this benefit request.

Several commenters objected to the proposed fee increase. Most of the comments on this subject were from agricultural groups or farmers who expressed that the new fee would be too expensive for employers that employ H–2A temporary agricultural workers for seasonal labor. Other commenters objected to the impact that the proposed fee increase would have on performers in the arts. Commenters representing religious organizations also opposed the increase, stating that it would pose a burden to religious workers in small communities.

Others submitted comments about processing delays. Some commenters noted that delays in processing Forms I–129 affect the incomes of farmers and performers. Some commenters stated that DHS's proposal to increase the Form I–129 fee was undermined by USCIS' failure to process O and P visa requests within the 14 days allotted by statute for certain petitions. *See* INA sec. 214(c)(6)(D), 8 U.S.C.1184(c)(6)(D). Commenters stated that any fee increase should be accompanied by improvements in petition processing and policies, particularly as related to H–1B, L–1, O and P visas.[26]

As noted previously, DHS is authorized to set fees at a level that ensures recovery of the full costs of providing immigration adjudication and naturalization services. Because USCIS relies almost entirely on fee revenue, in the absence of a fee schedule that ensures full cost recovery, USCIS would be unable to sustain an adequate level of service, let alone invest in program improvements. Full cost recovery means not only that fee-paying applicants and petitioners must pay their proportionate share of costs, but also that at least some fee-paying applicants and petitioners must pay a share of the immigration adjudication and naturalization services that DHS provides for vulnerable populations on a fee-exempt, fee-reduced, or fee-waived basis. DHS is therefore mindful to adhere to the standard USCIS fee-setting methodology as often as possible, and to avoid overuse of DHS's discretion to eliminate or reduce fees for special groups of beneficiaries.

The proposed fee for the Form I–129 resulted from application of the standard USCIS fee-setting methodology, because DHS did not find a compelling reason to shift the burden of the Form I–129 fee increase onto other applicants. Following consideration of the public comments, DHS retains the fee level expressed in the proposed rule. It is possible that in a limited number of cases a reduced fee would be more appropriate, but in the interest of fairness to all applicants and petitioners, as well as in the interest of the administration, this final rule sets a single fee for the Form I–129 at $460, as proposed.[27]

[25] Model output is reflected and further explained in Appendix Table 4: Proposed Fees by Immigration Benefit Request in the supporting documentation.

[26] For additional information, see the section entitled, Improve Service and Reduce Inefficiencies.

[27] The Regulatory Flexibility Act discussion in the Statutory and Regulatory Requirements section addresses comments regarding the effect of the rule on small entities. As for processing delays, DHS has further addressed the operational and efficiency

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d. Application To Register Permanent Residence or Adjust Status, Form I–485, and Interim Benefits

In the NPRM, DHS proposed to continue offering travel document and employment authorization renewals free of charge during the pendency of an Application to Register Permanent Residence or Adjust Status, Form I–485, so long as the applicant filed the application with the appropriate fee on or after July 30, 2007. *See* 8 CFR 103.7(b)(1)(i)(M) (HH); proposed 8 CFR 103.7(b)(1)(i)(M), (II); 81 FR 26937. The associated forms are the Application for Travel Document, Form I–131, and Application for Employment Authorization, Form I–765. USCIS refers to travel document and employment authorization renewals as ''interim benefits'' when they are associated with a pending Form I–485. *See* 81 FR 26918.

DHS received several comments from individuals who applied to adjust status before July 30, 2007, and who thus do not qualify for free interim benefits. These commenters stated that their Form I–485 applications have been pending since before July 30, 2007, and that because of the annual numerical visa limits established by Congress, they would likely need to request additional travel document and employment authorization renewals in the future.[28] Some commenters stated that it is unfair to charge applicants for interim benefits while they are waiting for visas to become available. Another commenter noted that USCIS has recently started requiring refugees and asylees to pay the required fee associated with the Application for Employment Authorization when concurrently filed with Form I–485. The commenter stated that USCIS had not previously required payment of a fee for such an application.

USCIS acknowledges that under current regulations and as proposed, employment-based Form I–485 applicants who filed before July 30, 2007, must continue to pay fees associated with interim benefits. Before the USCIS 2007 fee rule, DHS did not provide free interim benefits, and the Form I–485 fee was calculated without considering the potential costs of providing such benefits. *See* 75 FR 58968, 58982.[29] The 2007 final rule increased the Form I–485 fee from $325 to $905, or 178 percent, mostly due to the decision to permit interim benefits without additional fees. 72 FR 29861. Because applicants for adjustment of status who filed before July 30, 2007, paid the lesser amount of $325 when they filed their Form I–485, and because a decision to provide free interim benefits to this population would shift additional costs to other fee-paying applicants and petitioners, DHS has decided to not provide free interim benefits for those pending applicants.

USCIS has taken other actions to alleviate the filing burden and fees on those individuals whose applications are still pending due to the lack of available visas. For example, DHS now provides Employment Authorization Documents (EADs) with 2-year validity periods, instead of previously issued 1-year periods, which effectively reduces the fee per year.[30] In addition, USCIS adopted a policy in December 2010 under which an applicant with a pending Form I–485 that was filed before August 18, 2007, may receive a combination advance parole document and EAD with a 2-year validity period. *See* Policy Memorandum, *Issuance of Advance Parole Employment Authorization Document* (Dec. 21, 2010).[31] These longer approval periods have alleviated some of the burden described by the commenters.

With regard to the comment that USCIS is requiring refugees and asylees to pay for Form I–765 when filing it concurrently with Form I–485, current regulations provide that Form I–765 has no fee if filed in conjunction with a pending or concurrently filed Form I–485 that was filed with a fee on or after July 30, 2007. *See* 8 CFR 103.7(b)(1)(i)(M)(*4*). There is no fee for a refugee who is filing Form I–485. *See* 8 CFR 103.7(b)(1)(i)(U)(*3*). Therefore, although USCIS has waived the Form I–765 fee for the first such application filed by a refugee, a Form I–765 filed by a refugee to renew his or her EAD requires a fee.[32] To renew interim benefits, a refugee who is filing a Form I–765 with Form I–485 must pay the Form I–765 fee or submit a Request for Fee Waiver, Form I–912. Similarly, if the refugee's employment authorization document expires before the Form I–485 is approved, he or she must file Form I–765 with a fee or request another fee waiver. Contrary to the commenter's statement, there has been no change in practice on this point.

Like almost all other applicants for adjustment of status, asylees are generally required to pay a fee for Form I–485; if they pay this fee, they receive free interim benefits as long as their Form I–485 is pending with USCIS. Asylees may request that both their Form I–485 and Form I–765 fees be waived. *See* 8 CFR 103.7(c)(3)(viii) & (c)(4)(iii).[33] However, if USCIS waives the fee for the initial Form I–485, subsequent Form I–765 filings (for instance, to renew or replace a lost or expired EAD) require a fee or a new fee waiver request.[34] Because fee waivers are available, because refugees and asylees are usually not subject to lengthy waiting periods associated with visa availability, and because of the importance of ensuring full-cost recovery, DHS did not find a compelling reason to shift fee burdens onto other fee-paying applicants and petitioners. Accordingly, DHS has not revised this policy in this final rule.

Finally, DHS also proposed to increase the separate Form I–485 fee that applies to a child under the age of 14 years who files a Form I–485 concurrently with the application of a parent seeking classification as an immediate relative of a U.S. citizen, a family-sponsored preference immigrant, or a family member accompanying or following to join a spouse or parent. DHS proposed a fee increase from $635 to $750, but did not propose any substantive changes to eligibility for the reduced fee. *See* 81 FR 26919.[35] USCIS received at least one comment requesting that the proposed $750 discounted fee apply to all children under the age of 14 at any time, regardless of whether their Form I–485

comments in the section of this preamble entitled, ''Improve Service and Reduce Inefficiencies.''

[28] The U.S. Department of State (DOS) manages the allocation of visa numbers and Congress establishes the annual visa numerical limits.

[29] As explained in the 2007 proposed rule, the decision to provide free interim benefits is intended to restructure certain fee arrangements that some perceived as providing disincentives for USCIS to improve efficiency in processing. *See* 72 FR 4894. By bundling the Form I–485 and interim benefit costs, USCIS ensured that an applicant for adjustment of status will pay a single fee and will not pay separate fees for interim benefits, no matter how long the case remains pending. As a result, if USCIS is unable to process the base application within the established processing goals, an applicant who needs to travel or extend his or her employment authorization is not financially disadvantaged by the delay.

[30] USCIS may, in its discretion, determine the validity period assigned to any document issued evidencing an individual's authorization to work in the United States. 8 CFR 274a.12(b).

[31] *See https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/April/issuance-advance-parole.pdf.*

[32] *See* Instructions for I–765, Application for Employment Authorization, available at *https://www.uscis.gov/sites/default/files/files/form/i-765instr.pdf.*

[33] Both fee waivers may be requested on one Request for Fee Waiver. See Instructions for Request for Fee Waiver at *https://www.uscis.gov/sites/default/files/files/form/i-912instr.pdf.*

[34] An asylee in this situation, like all individuals seeking to file a Form I–765, may still apply for a fee waiver. *See* 8 CFR 103.7(c)(3)(viii).

[35] Under the proposed rule and in this final rule, the standard fee for a Form I–485 would increase from $985 to $1,140.

was filed concurrently with the application of a parent. The commenter noted that such children, like the children who are currently eligible for the reduced Form I–485 fee, cannot work in the United States.

DHS proposed that the discounted Form I–485 fee would only be available when the Form I–485 is filed concurrently with the application of a parent seeking classification as an immediate relative of a U.S. citizen, a family-sponsored preference immigrant, or a family member accompanying or following to join a spouse or parent. *See* proposed 8 CFR 103.7(b)(1)(i)(U)(*2*); 81 FR 26938. DHS has considered the commenter's suggestion, but is unable to adopt it. USCIS does not track the completion rates (*i.e.,* adjudication times) for Form I–485 based on the age of the applicant, so the agency does not have data showing a difference in the completion rate correlated to the difference in applicant age. In addition, USCIS does not know the volume of individual Form I–485 filings by children on which to base a separate fee. To set that fee as suggested by the commenter would require deviation from the fee-setting methodology and, as stated previously in this preamble, require the costs for those applications to be shifted to other benefit requests. Therefore, DHS is not expanding the child discount to all children in this final rule.

Nevertheless, while the current and proposed provisions limited the reduced fee only to children who are derivative applicants filing the Form I–485 at the same time as their parent, USCIS has in practice extended the reduced fee provision to all immigrant relative children under the age of 14 who file the Form I–485 at the same time as their parent (*i.e.,* mailed in the same envelope), regardless of whether they are filing as a derivative or a principal applicant. Therefore, to make the regulation text consistent with the form instructions and USCIS practice, this final rule sets the fee for Form I–485 accordingly. *See* new 8 CFR 103.7(b)(1)(i)(U)(*2*).

e. Application for Travel Document, Form I–131

In the NPRM, DHS proposed to increase the fee for the Application for Travel Document, Form I–131, from $360 to $575. *See* proposed 8 CFR 103.7(b)(1)(i)(M); 81 FR 23937. The proposed fee increase was the result of application of the standard fee-setting methodology to this benefit request.

Some commenters objected to the proposed increase. Some commenters noted that the forecasted fee-paying volume for Form I–131 has not changed significantly from the 2010 fee rule.[36] Additionally, they pointed out that the Form I–131 has one of the shortest completion rates,[37] indicating that it is not a relatively complex adjudication.[38] Some of these commenters wrote that they have a pending Form I–485 that was filed before July 30, 2007, and that they are thus ineligible for free interim benefits, including being permitted to file Form I–131 without a fee while waiting for an immigrant visa to become available. *See* previous 8 CFR 103.2(b)(1)(i)(M)(*4*). Some commenters stated that they have paid the Form I–131 fee several times while waiting for a visa to become available and that applicants from countries with long visa wait times must renew their travel documents every year, sometimes for multiple family members.[39]

As noted previously, the proposed fee increase for the Form I–131 was the result of application of the standard USCIS fee-setting methodology to this benefit request. When DHS departs from the standard USCIS fee-setting methodology to reduce fees for one group, fees for other groups (including, in this case, the fee for Form I–131) must be increased to recover full cost.

With respect to the Form I–131 in particular, the proposed fee increase was also due in part to USCIS improving its ability to fully account for the costs of this benefit request. The FY 2016/2017 fee review included more complete data on the Application for Travel Document workload than was included in the 2010 final rule. As noted in the supporting documentation, the latest fee review considered the completion rates for work performed by International Operations,[40] which adjudicates some Applications for Travel Documents, in the overall completion rates for Applications for Travel Documents. This information was not available for the FY 2010/2011 fee review, but it was included in this review to more accurately represent the cost of adjudicating an Application for Travel Document overseas. The proposed fee increase was due in part to USCIS including costs and time from International Operations in the model output for the Applications for Travel Documents fee. Ultimately, the proposed fee for Form I–131 represents its proportion of USCIS operating costs, as dictated by the standard USCIS fee-setting methodology. If DHS held the fee for Form I–131 below the amount suggested by the FY 2016/2017 fee-setting methodology, then the additional costs would be transferred to other immigration benefit fees.

Because DHS did not find a compelling reason to transfer a portion of the Form I–131 fee increase to other applicants, DHS retains the fee proposed in the NPRM. DHS recognizes that this decision will affect different applicants differently; some applicants may file this application just once, while others may file it multiple times. But in the interest of fairness to all applicants and petitioners, as well as in the interest of sound and efficient adjudications, DHS has decided to not create additional levels of fees for the Form I–131. This final rule sets a fee of $575 for the Form I–131, with appropriate exceptions for refugee travel documents, as discussed below. Nevertheless, Form I–131 requests for parole filed on behalf of individuals outside the United States, including humanitarian parole, remain eligible for a fee waiver. 8 CFR 103.7(c)(3)(iv).

Finally, at least one commenter questioned why DHS did not propose a new fee for refugee travel documents. As noted in the NPRM, fees for a refugee travel document are set at a level that is consistent with U.S. obligations under Article 28 of the 1951 Convention relating to the Status of Refugees, as incorporated by reference in the 1967 Convention relating to the Status of Refugees. *See* 81 FR 26917. The fee must remain set at an amount that is consistent with U.S. obligations under Article 28. Therefore, fees for refugee travel documents will remain the same as DOS passport book fees.[41]

[36] *See* 75 FR 26923 for overall workload in table 4 and 75 FR 26924 for fee-paying workload in table 5.

[37] USCIS completion rates are the average hours per adjudication of an immigration benefit request. Adjudication hours are divided by the number of completions for the same time period to determine an average completion rate. For additional information on completion rates, see Appendix IX—Completion Rates on page 57 of the supporting documentation.

[38] *See Appendix Table 7: Completion Rates (Projected Adjudication Hours/Completions)* on page 58 of the supporting documentation.

[39] Some commenters stated DHS should use a validity period of 2 years instead of 1 year when extensions of Form I–131 are approved for this population. As noted earlier in this preamble, however, USCIS may grant an applicant who has a pending Form I–485 and interim benefits, such as advance parole, an employment authorization combination document with a 2-year validity period if the immigrant visa is not currently available. *Adjudicator's Field Manual* ch. 55.3, par. (a)(2). These longer approval periods have alleviated some of the burden on applicants with long-pending I–485 applications.

[40] *See* International Operations Cost Allocation on page 26 of the supporting documentation.

[41] The Refugee Travel Document fees are the same as the sum of the U.S. passport book application fee

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f. Application for Employment Authorization, Form I–765, and Students

In the NPRM, DHS proposed to increase the fee for the Application for Employment Authorization, Form I–765, from $380 to $410. *See* proposed 8 CFR 103.7(b)(1)(i)(II); 81 FR 26938. DHS proposed to limit the increase for these benefit types (among others) to 8 percent for humanitarian and practical reasons. Many individuals seeking immigration benefits face financial obstacles and cannot earn money through lawful employment in the United States until they receive an Employment Authorization Document (EAD). 81 FR 26916.

At least one commenter objected to the potential effect of the proposed Form I–765 fee increase on foreign students seeking work authorization under the Optional Practical Training (OPT) program. The OPT program allows an F–1 nonimmigrant student to file a Form I–765 to request authorization to work in the United States in a position that is directly related to the F–1 student's major area of study. *See* 8 CFR 214.2(f)(10)(ii)(C). OPT provides F–1 students with an opportunity to apply knowledge gained in the classroom to practical work experience off campus.

DHS places a high value on its role in attracting international students and scholars to the United States. Among other things, the contributions to U.S. educational institutions provided by a diverse international student body are invaluable. In recognition of these goals, USCIS devotes many resources to delivering immigration benefits to deserving students, including expending substantial resources, which DHS must recover, to adjudicate their eligibility for EADs. In addition, DHS limited the proposed EAD fee increase in a manner consistent with a number of other fees. *See* 81 FR 26916. Moreover, F–1 students may request fee waivers in cases in which they are unable to afford the fee. In other cases, USCIS will continue to charge the full fee based on the effort and resources expended to process this benefit. This final rule therefore sets the fee at $410, as proposed. *See* new 8 CFR 103.7(b)(1)(i)(II).

g. Application for Replacement Naturalization/Citizenship Certificate, Form N–565

In the NPRM, DHS proposed to increase the fee for the Application for Replacement Naturalization/Citizenship Certificate, Form N–565, from $345 to $555, or 61 percent. The proposed fee increase was the result of application of the standard fee-setting methodology to this benefit request.

Commenters mentioned that some people could lose proof of citizenship or naturalization due to unforeseen circumstances, such as natural disasters or theft, and that a steep increase might make it more difficult for certain individuals to obtain replacement documents. Other commenters noted that citizens may need a certificate of naturalization or citizenship due to a name change. Commenters stated that the more prohibitively expensive it becomes for foreign-born U.S. citizens to replace documentation of their citizenship, the more difficult it will be for them to work, vote, or pursue other opportunities.

Commenters noted that the completion rate for Form N–565 increased significantly since the 2010 final rule. Some commenters compared the completion rate for Form N–565 to that of the Application to Replace Permanent Resident Card, Form I–90, and stated that the two adjudications should be similar. Those commenters noted that the completion rate for Form I–90 decreased since the 2010 final rule, while the Form N–565 completion rate increased by 64 percent. Some commenters stated that USCIS should further assess why the completion rate for Form N–565 increased to this degree.

DHS acknowledges that the Form N–565 adjudication time has increased over the years, and attributes this increase to the amount of research and review necessary to adjudicate these filings. Form N–565 adjudications require USCIS to fully review A-Files for security check purposes, including discovering name variations or aliases. To verify the naturalization of an applicant, USCIS officers must research all available systems. Yet many filings involve individuals who were naturalized decades ago and whose information is not contained in electronic systems, thus requiring extensive paper-based review. USCIS officers may also have to communicate with the National Archives and Records Administration or the Federal courts to obtain evidence supporting naturalization. In some cases, paper files must be transferred to a field office to conduct an interview of the applicant. Changes in name, marital status, gender, or other facts require evidentiary review to support requested changes in USCIS records. No filing fee is required in cases where the Form N–565 is filed to request correction of a certificate that contains an error, but even such filings require that USCIS fully review the relevant A-Files. DHS further notes that the processing of Form N–565 often requires the same use of time and resources by USCIS regardless of the basis for the request.

Moreover, the fee for Form I–90 differs from the fee for Form N–565 because the adjudication of the two forms differs. LPRs typically apply for new permanent resident cards every 10 years. Their information is thus generally up-to-date and readily available in an electronic system, thus eliminating the need for full A-File reviews when adjudicating Forms I–90. In addition, Form I–90 adjudication is streamlined and partially automated because the application exists in an electronic environment. Filings that involve information that is up-to-date and available in an electronic system generally require less processing time than filings that require review of physical records or multiple systems, or that require the entry of new data.

As noted, the proposed fee for Form N–565 resulted from application of the standard USCIS fee-setting methodology. Because DHS did not find a compelling reason to shift the burden of the Form N–565 fee increase onto other applicants, DHS retains the position expressed in the proposed rule. This final rule sets the fee for Form N–565 at $555, as proposed. Applicants who cannot pay the fee may request a fee waiver. 8 CFR 103.7(c)(3)(xv).

h. Petition for Alien Relative, Form I–130

In the NPRM, DHS proposed to increase the fee for the Petition for Alien Relative, Form I–130, from $420 to $535. *See* proposed 8 CFR 103.7(b)(1)(i)(L); 81 FR 26937. The proposed fee increase was the result of application of the standard USCIS fee-setting methodology to this benefit request.

Several commenters stated that they generally opposed the proposed increase in the Form I–130 fee because the increase, along with other proposed increases, would result in a significant financial burden for certain individuals, especially for low-income immigrants and their families. Some commenters asserted that the proposed increase of $115 would be disproportionate to the current adjudication time of 45 minutes. Another commenter suggested that fees be higher for businesses in order to offset the cost for family-based applicants. The same commenter referenced existing additional fees for H–1B visas and asserted that DHS should increase fees for O and P visas

plus the additional execution fee that the Department of State charges for first-time applicants.

to offset the cost of, and reduce the fees for, family-based immigration benefit requests. One commenter noted that Form I–130 filings are not eligible for fee waivers.

DHS appreciates the concerns of commenters, but reiterates that because USCIS is funded almost exclusively by fees, it sets the USCIS fee schedule based on a full cost recovery model. This means that although there is a relationship between the proposed fee and the projected adjudication time of 45 minutes, DHS cannot set fees at a level that would only recover costs for an individual adjudicator's time. In order for USCIS to continue to fulfill its mission, DHS must set fees at a level that accounts for the total resources required for intake of immigration benefit requests, customer support, fraud detection, background checks, and administration. Moreover, because DHS provides some immigration adjudication and naturalization services (including for families) on a fee-exempt, fee-reduced, or fee-waived basis, fee-paying applicants and petitioners must at times pay more than their directly attributable share of costs.

In the case of the Form I–130, the primary reason for the proposed fee increase was the increase in USCIS' cost baseline for FY 2016/2017, and specifically the need to cover the costs of certain fee-exempt services. As noted in the NPRM and in this final rule, the FY 2016/2017 fee schedule adjusts fees to recover the costs related to RAIO, the SAVE program, and the Office of Citizenship. *See* 81 FR 26910. In the FY 2010/2011 fee review, the model output for Form I–130 was approximately $368 before cost reallocation. Cost reallocation was smaller in the FY 2010/2011 fee review because USCIS assumed that appropriations would recover surcharges related to RAIO, the SAVE program, and the Office of Citizenship. In the FY 2016/2017 fee review, the model output for Form I–130, before cost reallocation, was approximately $383.[42] As mentioned in the NPRM, in the FY 2016/2017 fee review, USCIS included RAIO, the SAVE program, and the Office of Citizenship in the cost baseline. As shown in the supporting documentation, the fee includes $152 above the model output to ensure that IEFA fees recover full cost.[43] The $152 provides revenue for services that do not otherwise generate revenue (*e.g.,* refugee, asylum, and fee-waived workloads) and for forms that are held to the 8 percent weighted average increase based on policy decisions (*e.g.,* forms N–400 and I–600/600A/800/800A).

DHS recognizes the burden that proposed fee increases impose on families and low-income individuals, and takes steps to mitigate that burden as appropriate. Specifically, after USCIS applies its standard fee-setting methodology to identify the model output for each benefit request, USCIS evaluates the model output and determines whether it should be adjusted. However, downward adjustments for some groups result in upward adjustments for other groups. There are many benefit requests that are used by families and low-income individuals, and it would be unsustainable and arguably unfair for USCIS to consistently shift the costs of all such requests to a completely unrelated subgroup of business immigration applicants and petitioners. With that context in mind, and following review of the public comments received, DHS has determined that the amount recommended under the fee-setting methodology was not inordinately high. Thus, DHS is adjusting the fee for Form I–130 in this final rule, as proposed. Moreover, as stated in the ''Fee Waivers and Exemptions'' section of this preamble, fee waivers are not provided for forms, such as Form I–130, that require petitioners to have the ability to support their intended beneficiary. DHS believes that this is sound overall policy, especially in light of the effects of fee waivers on the fees paid by other applicants and petitioners.

i. Application To Replace Permanent Resident Card, Form I–90

In the NPRM, DHS proposed to increase the fee for the Application to Replace Permanent Resident Card, Form I–90, from $365 to $455. *See* proposed 8 CFR 103.7(b)(1)(i)(G); 81 FR 26937. The proposed fee increase was the result of application of the standard USCIS fee-setting methodology to this benefit request.

A number of commenters objected to the proposed fee increase. Some commenters stated that the proposed fee was unjustified by the projected completion rate of 13 minutes. The commenters noted that although the proposed fee represents a significant increase, the projected completion rate had decreased slightly since the 2010 final rule. A commenter stated that the proposed increase would impose an unreasonable burden on many low-income applicants, especially when the reason for application may be out of their control, such as owning a prior edition of the card, expiration of the card between the individual's 14th and 16th birthday, a name change, or a change in commuter status.

Some commenters stated that USCIS guidance advises naturalization applicants to file Form I–90 if their permanent resident cards will expire within six months of the filing of their naturalization applications, and that USCIS sometimes requires naturalization applicants to file Form I–90 before completion of the Form N–400 adjudication. These commenters suggested that as a result, some applicants may file a Form I–90 and a Form N–400 in quick succession, and that DHS should reduce the combined fee burden for these two forms. The commenters suggested that DHS provide a discounted or partial fee for naturalization applicants who are required to file Form I–90.

As noted elsewhere in this preamble, because USCIS is funded almost exclusively by fees, DHS sets the USCIS fee schedule based on a full cost recovery model. This means that although there is a relationship between the proposed fee and the projected adjudication time of 13 minutes, DHS cannot set fees at a level that would only recover costs for an individual adjudicator's time. In order for USCIS to continue to fulfill its mission, DHS must set fees at a level that accounts for the total resources required for intake of immigration benefit requests, customer support, fraud detection, background checks, and administration. Moreover, because DHS provides some immigration adjudication and naturalization services on a fee-exempt, fee-reduced, or fee-waived basis, fee-paying applicants and petitioners must pay more than their directly attributable share of costs.

In the case of the Form I–90, the primary reason for the proposed fee increase is the increase in the USCIS cost baseline for FY 2016/2017, and specifically the need to cover the costs of certain fee-exempt services. As noted in the NPRM and this final rule, the FY 2016/2017 fee schedule recovers costs related to RAIO, the SAVE program, and the Office of Citizenship. *See* 81 FR 26910. In the FY 2010/2011 fee review, the model output fee for Form I–90 was

[42] Projected cost refers to the model output column of Appendix Table 4: Proposed Fees by Immigration Benefit Request in the supporting documentation.

[43] The amount here is the difference between the Model Output and the final fee. Amounts shown in Appendix Table 4: Proposed Fees by Immigration Benefit Request in the supporting documentation are rounded to the nearest dollar and all IEFA fees are rounded to the nearest $5 increment. The sum of the Model Output and the Cost Reallocation columns may not equal the proposed fee because of rounding.

approximately $321 before cost reallocation. Cost reallocation was smaller in the FY 2010/2011 fee review, because USCIS assumed appropriations that would recover the costs for RAIO, the SAVE program, and the Office of Citizenship. In the FY 2016/2017 fee review, the model output fee for Form I–90 was approximately $326, also before cost reallocation.[44] But, as mentioned in the NPRM, USCIS included the above mentioned programs in cost reallocation to recover the full cost of those programs. As shown in the supporting documentation, the fee is $129 above the model output fee to ensure that IEFA fees recover full cost.[45] The $129 provides revenue for services that do not otherwise generate revenue (*e.g.,* refugee, asylum, and fee-waived workloads) and for request types that are held to the 8 percent weighted average increase based on policy decisions (*e.g.,* Forms N–400 and I–600/600A/800/800A).

DHS recognizes that the proposed Form I–90 fee increase would impose an additional cost burden on filers. But the proposed fee increase results from application of the standard USCIS fee-setting methodology, and a downward adjustment favoring all Form I–90 filers, or a subgroup thereof, would result in upward adjustment of other fees. DHS has decided to impose this fee at the level dictated by the standard USCIS fee-setting methodology, as proposed. If applicants cannot afford to pay the increased Form I–90 fee, they may request a fee waiver. 8 CFR 103.7(c)(3)(ii).

With respect to the comments concerning naturalization applicants who are required to file a Form I–90 if their permanent resident card will expire within six months of filing the naturalization application, DHS notes that this is not a change in practice. LPRs are required to have valid, unexpired Permanent Resident Cards, Forms I–551, in their possession at all times, *see* INA sec. 264(e), 8 U.S.C. 1304(e), and DHS regulations require LPRs to file Form I–90 when those cards are set to expire in six months, *see* 8 CFR 264.5(b)(2). For this reason, an LPR with fewer than six months remaining on his or her permanent resident card must generally file Form I–90, with fee, even if the LPR has applied for naturalization.[46] In other words, applying for naturalization does not eliminate the need to file Form I–90 when a permanent resident card is about to expire. If Form I–90 is properly filed, or if Form N–400 is filed at least six months before the expiration of the applicant's permanent resident card, the applicant can request an Alien Documentation Identification and Telecommunication (ADIT) stamp in lieu of filing for a new card.

DHS observes that a permanent resident card generally does not expire until 10 years after it is received by the LPR. For individuals who are familiar with the regulatory requirements,[47] this should be sufficient time for the applicant to take appropriate action, including renewing the card or naturalizing before the card expires.[48] Generally, LPRs become eligible to naturalize after 5 years of obtaining LPR status, *see, e.g.,* 8 CFR 316.2(a)(3), and the average processing time for an application for naturalization is approximately 6 months. Therefore, individuals who receive LPR status have ample time during which they may save for fees, gather documents, and apply for naturalization before their permanent resident card expires. Moreover, creating a new process and discounted fee for those Form I–90 applicants who wish to naturalize would increase the administrative burden of administering both Form I–90 and Form N–400. For the reasons stated above, this final rule sets the Form I–90 fee at $455, as proposed, regardless of whether the applicant will also file Form N–400 in the near term.

j. Genealogy, Forms G–1041/1041A

In the NPRM, DHS proposed to increase fees for the Genealogy Index Search Request, Form G–1041, and Genealogy Records Request, Form G–1041A, from $20 or $35, depending on the format requested, to a single fee of $65. *See* proposed 8 CFR 103.7(b)(1)(i)(E)–(F); 81 FR 23967. As noted in the NPRM, DHS based the proposed fee increase on the ABC model output fee of $46 for genealogy services, as well as an additional $19 to recover the applicable administrative costs associated with funding these services, such as the USCIS Librarian and other genealogy research and information services. 81 FR 26919 (citing INA sec. 286(t)(1), 8 U.S.C. 1356(t)(1)).

Some commenters objected to the proposed fee increase. Some of these commenters compared the genealogy fees to state and local government fees for copies of vital records. Some commenters stated that the quality and efficiency of genealogy services were insufficient to justify the proposed fee increase.[49]

USCIS does not receive any appropriations for its genealogy program and thus depends on genealogy fees to cover costs, without increasing other immigration and naturalization fees to support this work. Genealogy fees have not been adjusted since USCIS created the program in 2008,[50] and such fees are currently insufficient to cover the full costs of the genealogy program. USCIS created the Genealogy Program to serve people performing genealogy research, including historical researchers, genealogists, and other members of the public, without diverting resources from the significant number of Freedom of Information Act requests to which USCIS must respond.[51] USCIS thus proposed to increase the fee to meet the full costs of the program and permit USCIS to respond to requests for such historical records and materials. Notwithstanding the fees charged by other government agencies, which likely face different operational and funding challenges, USCIS must ensure that it has sufficient funding to fulfill its mission. Following consideration of the comments on this subject, DHS has decided to set the final fee at $65, as proposed.

[44] *See* Appendix Table 4: Proposed Fees by Immigration Benefit Request in the supporting documentation.

[45] Amounts shown in Appendix Table 4: Proposed Fees by Immigration Benefit Request in the supporting documentation are rounded to the nearest dollar and all IEFA fees are rounded to the nearest $5 increment. The sum of the Model Output and the Cost Reallocation columns may not equal the proposed fee because of rounding.

[46] For additional information, see *https://www.uscis.gov/i-90* and *https://www.uscis.gov/green-card/after-green-card-granted/renew-green-card.*

[47] USCIS also provides educational products and resources to welcome immigrants, promote English language learning, educate on rights and responsibilities of citizenship, and prepare immigrants for naturalization and civic participation. In addition, USCIS provides grants, materials and technical assistance to organizations that prepare immigrants for citizenship. The USCIS Citizenship Resource Center helps users better understand the citizenship process and gain the necessary skills required to be successful during the naturalization interview and test. See *https://www.uscis.gov/us-citizenship/naturalization-test/applicant-performance-naturalization-test/uscis-citizenship-education-resources-and-initiatives.*

[48] *See https://www.uscis.gov/green-card/after-green-card-granted/renew-green-card.*

[49] At least one commenter questioned why USCIS proposed to collect the biometric services fee for the genealogy workload. While DHS is revising 8 CFR 103.2(b)(9) to clarify that any individual filing a benefit request, or any beneficiary of such a request, may be required to appear for biometric collection and pay the biometric services fee, DHS did not propose to and will not collect the biometric services fee for genealogy searches or document requests. *See* 81 FR 26917.

[50] *See* 81 FR 26919; Final Rule, Establishment of a Genealogy Program, 73 FR 28026 (May 15, 2008).

[51] Prior to the establishment of the Genealogy Program, genealogy researchers used the Freedom of Information Act process to conduct their research.

k. Petition To Remove Conditions on Residence, Form I–751

In the NPRM, DHS proposed to increase the fee for the Petition to Remove Conditions on Residence, Form I–751, from $505 to $595. Proposed 8 CFR 103.7(b)(1)(i)(HH); 81 FR 23968. The proposed fee increase was the result of application of the standard USCIS fee methodology to this benefit request.

Some commenters objected to the proposed fee increase. These commenters stated that Form I–751 is required for people who were granted conditional permanent residence through marriage, including spouses of U.S. citizens and their children, to remove the conditions on their status. The commenters asserted that the new fee is so burdensome that some applicants may miss their deadline to apply, putting those applicants at risk of losing their residency and becoming subject to removal from the United States. A commenter stated that in 2010, DHS increased the I–751 filing fee by $40. The commenter stated that to now increase it again by another $90 is unjustified, particularly when USCIS estimates that its projected workload volume for Form I–751 will decrease by 10,000 receipts from 2010/2011 levels. The commenter stated that if I–751 workloads will decrease, there is no justification for an 18 percent fee increase.

As noted previously in this preamble, because USCIS operates almost exclusively on fees, DHS sets the USCIS fee schedule based on a standard full cost recovery model. This means that DHS must account for more than just projected total receipts when setting the fee for a given benefit. For instance, DHS must account for the likelihood of fee waivers by setting fees based on projected total *fee-paying* receipts, not just projected total receipts. And DHS must also account for the costs associated with adjudicating each benefit request. If DHS did not account for fee waivers when setting fees, or for the cost of adjudicating benefit requests, DHS would not recover sufficient revenue to cover the cost of the services that DHS provides. Moreover, because DHS provides some immigration adjudication and naturalization services on a fee-exempt, fee-reduced, or fee-waived basis, fee-paying applicants and petitioners must pay more than their directly attributable share of costs.

In addition, in the case of the Form I–751 specifically, although workload volume decreased 5.5 percent since the 2010 final rule, fee-paying volume decreased at a greater rate of 8.4 percent. Moreover, the completion rate, or the average hours per adjudication, increased 39 percent since the 2010 final rule. Given that fewer fee-paying applicants are now absorbing the increased costs associated with longer adjudications, DHS believes the proposed $90 increase since the fee was last set six years ago is reasonable. Although the proposed increase would impose an additional cost burden on filers, it results from application of the standard USCIS fee methodology. A downward adjustment in favor of Form I–751 petitioners would result in upward adjustment of other fees. Furthermore, if the petitioner cannot pay the fee, they may request that the fee be waived. *See* 8 CFR 103.7(c)(3)(vii). Therefore, this final rule sets the Form I–751 fee at $595, as proposed.

l. Petition for Alien Fiancé(e), Form I–129F

In the NPRM, DHS proposed to increase the fee for the Petition for Alien Fiancé(e), Form I–129F, from to $340 to $535. *See* proposed 8 CFR 103.7(b)(1)(i)(K); 81 FR 23967. The proposed fee increase was the result of application of the standard USCIS fee methodology to this benefit request.

Some commenters objected to the proposed fee increase, stating that it could discourage family reunification. The commenters stated that the increase would be particularly burdensome because there is no fee waiver option when filing this form.

As noted previously, DHS is authorized to set fees at a level that ensures recovery of the full costs of providing immigration adjudication and naturalization services. Because USCIS relies almost entirely on fee revenue, in the absence of a fee schedule that ensures full cost recovery, USCIS would be unable to sustain an adequate level of service, let alone invest in program improvements. Full cost recovery means not only that fee-paying applicants and petitioners must pay their proportionate share of costs, but also that at least some fee-paying applicants and petitioners must pay a share of the immigration adjudication and naturalization services that DHS provides on a fee-exempt, fee-reduced, or fee-waived basis. DHS is therefore mindful to adhere to the standard USCIS fee methodology as often as possible, and to avoid overuse of DHS's discretion to eliminate or reduce fees for special groups of beneficiaries.

The proposed fee for the Form I–129F resulted from application of the standard USCIS fee methodology. DHS values its role in assisting U.S. citizens who wish to bring a foreign national fiancé(e) to the United States to marry, and is sensitive to the extra burden that the increased filing fee may impose. But if USCIS were to waive or exempt Form I–129F fees, then other applicants, petitioners, and requestors would pay higher fees to cover the cost. Because DHS did not find a compelling reason to shift the burden of the Form I–129F fee increase onto other applicants, this final rule sets the Form I–129F fee at $535, as proposed.

Moreover, as a general matter, DHS does not waive fees for petitions that require the beneficiaries to demonstrate that they will be able to support themselves financially, or that require the filing of an affidavit of support. A citizen who files Form I–129F must document his or her ability to financially support his or her foreign national fiancé(e). Because a few waiver options would be inconsistent with this financial support requirement, DHS declines to allow fee waivers for this form.

m. Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360

In the NPRM, DHS proposed to increase the fee for the Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360, from $405 to $435. Proposed 8 CFR 103.7(b)(1)(i)(T); 81 FR 23968. DHS proposed to hold the increase for these benefit types to an 8 percent increase [52] because the combined effect of cost, fee-paying volume, and methodology changes since the last fee rule would otherwise place an inordinate fee burden on individuals requesting these types of benefits. *See* 81 FR 26915.

Some commenters objected to the proposed fee increase because of its potential effect on religious workers. The commenters stated that religious workers must file additional forms and pay the required fees to obtain LPR status. The commenters noted that these workers benefit the United States by becoming integral parts of their religious ministries, participating in community outreach, and making specific connections with immigrants who speak the same language. For these reasons, the commenters requested that the agency not finalize the proposed fee increase.

Form I–360 may be used to obtain any of a large number of immigration benefits, some of which allow petitioners to file the form on a fee-exempt basis.[53] Many petitioners may

[52] The proposed increase was 7.4 percent due to rounding.

[53] *See https://www.uscis.gov/i-360.*

use the Form I–360 on a fee-exempt basis. For example, there is no fee for a petitioner seeking classification as an Amerasian; an individual self-petitioning as a battered or abused spouse, parent, or child of a United States citizen or LPR; a petitioner seeking Special Immigrant Juvenile status; or an Iraqi or Afghan national who worked for, or on behalf of, the U.S. Government in Iraq or Afghanistan. Previous 8 CFR 103.7(b)(1)(i)(T)(1)–(4).

For those petitioners who are not fee-exempt, DHS recognizes that fee increases impose a burden, and DHS takes steps to mitigate such burdens as appropriate. At the same time, DHS must recover the full costs of the services that USCIS provides, or else risk reductions in service quality. In this case, DHS proposed to apply the reduced fee increase (8 percent) to the Form I–360, for the reasons stated previously and consistent with DHS's practice of holding a number of benefit requests to this reduced fee increase. DHS was mindful that this departure from the standard fee methodology would also result in higher fees for others. *See* 81 FR 26915. Although DHS acknowledges the importance of the religious worker program to many communities, any further departure would only heighten the effect on the rest of the fee schedule, and would not be consistent with DHS's overall fee methodology. In addition, unlike many of the fee-exempt Form I–360 petitioners, religious workers fall into the category of employment-based immigrants for whom petitioners must demonstrate the ability to pay a salary. *See, e.g.,* 8 CFR 204.5(g)(2) (requiring a petition which requires an offer of employment to be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage). This final rule therefore sets the fee for Form I–360 at $435, as proposed.

n. Notice of Appeal or Motion, Form I–290B

DHS proposed to increase the fee for the Notice of Appeal or Motion, Form I–290B, from to $630 to $675. Proposed 8 CFR 103.7(b)(1)(i)(S); 81 FR 26938. DHS proposed to hold the increase for these benefit types to 8 percent [54] because the combined effect of cost, fee-paying volume, and methodology changes since the last fee rule would otherwise place an inordinate fee burden on the particular individuals requesting these types of benefits. *See* 81 FR 26915.

Some commenters objected to the proposed fee increase. Commenters stated that the resulting fee, though waivable,[55] could hinder individuals from receiving benefits for which they are eligible. The commenters noted that the time involved in submitting fee waiver requests jeopardized the chance of meeting the 30-day filing deadline for appeals. Commenters also expressed disappointment in the appeals process in general, opining that it was particularly burdensome for those attempting to rectify USCIS errors. Commenters also stated that USCIS should allow credit card payments for filing Form I–290B.

DHS appreciates the concerns of the commenters and does not intend to hinder individuals from receiving benefits for which they are eligible. At the same time, DHS must recover the full costs of the services that USCIS provides, or else risk reductions in service quality. In this case, DHS proposed to apply the reduced fee increase (8 percent) to these benefit requests, for the reasons stated previously and consistent with DHS's practice of holding a number of benefit requests to this reduced fee increase. DHS was mindful that although this departure from the standard fee methodology would result in lower fees for Form I–290B filers, it would also results in higher fees for others. 81 FR 26915. Any further departure would only increase the effect on the rest of the fee schedule, and would not be consistent with DHS's overall fee methodology. DHS addresses requests for service quality improvements and credit card payments later in this preamble. DHS has made no changes to the fee in this final rule as a result of these comments, and is finalizing the Form I–290B fee at $675, as proposed.

o. Application for Civil Surgeon Designation, Form I–910

In the NPRM, DHS proposed to increase the fee for the Application for Civil Surgeon Designation, Form I–910, from $615 to $785. *See* proposed 8 CFR 103.7(b)(1)(i)(TT); 81 FR 26939. Form I–910 is used to request recognition of a physician as a civil surgeon for purposes of performing mandatory medical examinations on intending immigrants to determine whether they are inadmissible based on health-related grounds. *See* 8 CFR 232.2(b). The proposed fee increase was the result of application of the standard USCIS fee methodology to this benefit request.

At least one commenter stated that the proposed increase may have a chilling effect on requests from physicians to become approved civil surgeons. The commenter suggested the possibility of employing a tiered-fee structure, in which USCIS would offer a lower application fee in exchange for a physician's commitment to discount fees for vulnerable children and youth and other indigent applicants.

As noted, the proposed fee increase for the Form I–910 was the result of application of the standard USCIS fee methodology to this benefit request. When DHS departs from the standard USCIS fee methodology to reduce fees for one group, fees for other groups increase to recover full cost. With respect to the proposal to establish a tiered fee structure for the application, implementing such fees would require eligibility and evidentiary requirements for each fee and income level established. This would add administrative complexity, and further increase costs. Additionally, USCIS would not know whether such civil surgeons complied with their commitments to charge lower fees without regulating and monitoring those civil surgeons, and incurring the time and costs to do so. Accordingly, no changes were made in this final rule, which sets the Form I–910 fee at $785, as proposed.

p. Application for Advance Permission To Enter as a Nonimmigrant, Form I–192, and Application for Waiver of Passport and/or Visa, Form I–193

In the NPRM, DHS proposed to increase the fee for the Application for Advance Permission to Enter as a Nonimmigrant, Form I–192, and Application for Waiver of Passport and/or Visa, Form I–193, from $585 to $930. *See* proposed 8 CFR 103.7(b)(1)(i)(P); 81 FR 26938. The proposed fee increase was the result of application of the standard USCIS fee methodology to this benefit request. In the FY 2016/2017 fee review, USCIS grouped these benefit requests with other similar benefit requests, specifically, Forms I–191, I–212, I–601, and I–612.

One commenter stated that for certain filers, CBP, and not USCIS, adjudicates the benefit request.[56] The commenter stated that it would be unfair to increase

[54] The proposed increase was 7.1 percent due to rounding.

[55] If the Form I–290B is being filed to appeal or reopen the denial of an immigration benefit request that is exempt or where a fee has been waived, the Form I–290B fee may also be waived by USCIS if the applicant or petitioner demonstrates that he or she is unable to pay the fee. 8 CFR 103.7(c)(3)(vi) and 103.7(c)(1)(iii). Further, there is no fee for Form I–290B when an Iraqi or Afghan national who worked for, or on behalf of, the U.S. Government in Iraq or Afghanistan appeals a denial of a petition for a special immigrant visa. 8 CFR 103.7(b)(1)(i)(S).

[56] The commenter acknowledged that USCIS adjudicates Form I–192 for T and U nonimmigrants.

the fee for Form I–192 applications adjudicated by CBP, because those adjudications do not increase USCIS costs.[57] The commenter stated that the proposed increase in the fee for Form I–192 would burden Canadian and Bermudan nonimmigrant waiver applicants in particular, because unlike other nonimmigrant waiver applicants who submit their applications at the same time as visa applications at no additional charge, Canadians and Bermudans do not require a visa to enter the United States, and thus pay the full filing fee to submit the waiver application. The commenter stated that an increase in the filing fee will hurt local economies in border towns because ''every dollar spent on a waiver application is a dollar not spent on tourism or retail.'' The commenter did not provide further data or analysis on the potential impact of the proposed fee increase on such economies.

In response to this comment, DHS is not implementing the fee increase proposed in the NPRM with respect to those Forms I–192 filed with and processed by CBP, and all Forms I–193. CBP uses the fee revenue from these forms to defray its own costs related to such processing. The FY 2016/2017 fee review and resulting proposed fee change was based on USCIS's costs for processing inadmissibility waivers. Therefore, under this final rule, DHS adjusts only the fee for those Forms I–192 filed with and processed by USCIS. Consequently, Form I–192 will have two fees—$585 for those filed with CBP and $930 for those filed with USCIS. New 8 CFR 103.7(b)(1)(i)(P). All filings of Form I–193 are processed by CBP and thus DHS will also not adjust the current $585 fee. New 8 CFR 103.7(b)(1)(i)(Q).

C. Fee Waivers and Exemptions

DHS proposed no changes to the USCIS fee waiver policies in the NPRM. DHS noted, however, that the lost revenue from fee waivers and exemptions has increased markedly, from $191 million in the FY 2010/2011 fee review to $613 million in the FY 2016/2017 Fee Review. DHS also explained the fee waiver process. *See* 81 FR 26922. DHS received a number of comments on its fee waiver and exemption policies. Some commenters on this subject requested that DHS permit fee waivers for additional immigration benefit requests. Others asked that DHS make more requests exempt from fee requirements.

Applicants, petitioners, and requestors who pay a fee cover the cost of processing requests that are fee-waived or fee-exempt. *Id.*[58] While a number of commenters suggested that USCIS expand the range of applications and petitions for which USCIS would consider a fee waiver, none provided a compelling argument for why a particular form that is not eligible for fee waivers should be made eligible in this final rule.

For example, one commenter recommended that USCIS make fee waivers available for all applications. DHS recognizes that some applicants cannot pay filing fees, and has established a fee waiver process for certain forms and benefit types. USCIS carefully considers the merits of each fee waiver request before making a decision. Expansion of fee waiver policy to include all immigration benefit request fees would significantly increase administrative and adjudicative costs. Although DHS recognizes that filing fees impose a heavy burden on people of limited financial means, the costs of allowing fee waivers across the board would be borne by all other fee payers, because the cost of providing services with a discount or without a fee must be transferred to those who pay a full fee. Thus, USCIS takes a relatively careful position with respect to transferring costs from one applicant to another through the expansion of fee waiver eligibility.

DHS notes that, in response to stakeholder concerns about the fee waiver process and rejections of fee waiver requests, USCIS recently published a new Request for Fee Waiver, Form I–912. It revised the form to clarify the instructions, make the form less complex, and reduce the number of incomplete fee waiver requests that are ultimately rejected. In addition, because many applicants have had difficulty providing all the requested information in the spaces provided on the previous form, USCIS also included text boxes that provide space for explanations. Those boxes reduce the need for attachments, and make the form more user-friendly.

As for fee exemptions, DHS already exempts from fees those requests with compelling circumstances. These exemptions include benefit requests for a range of humanitarian and protective services, such as refugee and asylum processing, assisting victims of crime and human trafficking, and other related services. USCIS also may allow fee exemptions based on economic necessity in the event of incidents such as an earthquake, hurricane, or other natural disasters affecting localized populations by using the authority of the Director of USCIS at 8 CFR 103.7(d). DHS proposed no new exemptions in the NPRM, and knows of no compelling reason for exempting a new group of applicants, petitioners, or requestors from a fee. Therefore, DHS has added no new exemptions in this final rule.

D. Naturalization

In the NPRM, DHS proposed to increase the fee for the Application for Naturalization, Form N–400, from $595 to $640. Proposed 8 CFR 103.7(b)(1)(i)(BBB); 81 FR 26939. DHS proposed to hold the increase for the Form N–400 to the reduced fee increase (8 percent) [59] to support naturalization. DHS also proposed an additional fee option for those non-military naturalization applicants with family incomes greater than 150 percent and not more than 200 percent of the Federal Poverty Guidelines. Proposed 8 CFR 103.7(b)(1)(i)(BBB)(1); 81 FR 26939. Specifically, DHS proposed that such applicants would receive a 50 percent discount, resulting in a fee of $320 for Form N–400. DHS proposed this reduced fee option to limit any potential economic disincentives that some eligible naturalization applicants may face when deciding whether or not to seek U.S. citizenship. The lower fee is intended to help ensure that those who have become eligible for naturalization are not prohibited from naturalizing due to their economic means.

Several commenters stated that the price of this benefit is already too high. Another commenter stated that the fee for Form N–400 should be increased based on the value of U.S. citizenship, not just the costs associated with adjudicating the form. And, while generally opposed to the fee increase, several commenters wrote in support of USCIS' efforts to alleviate some of the associated burdens by establishing a three-level fee for Form N–400, including a fee of $320 for certain low-income applicants who do not qualify for the existing fee waiver. The commenters stated that by doing so, USCIS will expand the pool of potential applicants.

DHS agrees with commenters that citizenship is a benefit that deserves special consideration and promotion. Therefore, DHS did not propose a fee

[57] The commenter did not mention Form I–193 applications, but such applications are similarly affected by this rulemaking.

[58] USCIS compares fee-paying receipts to the total number of receipts to determine a fee-paying percentage for each immigration benefit request. See page 16 of the supporting documentation in the rulemaking docket for an explanation of fee-paying volume and methodology.

[59] The proposed increase was a 7.5 percent due to rounding.

that reflected all of the costs associated with the relative complexity of the adjudication. The Application for Naturalization fee has not changed in nearly a decade. Additionally, the fee established in this rule for Form N–400 is less than it would be if the 2007 fee were simply adjusted for inflation. According to the Bureau of Labor Statistics, the semiannual average inflation from July 2007 to July 2016 was 16.1 percent.[60] If adjusted only for inflation, the current $595 fee would be $690, which is $50 more than the $640 fee set by this rule. DHS has not previously adjusted Form N–400 by CPI–U inflation, but provides this as a point of comparison.

As for the comment requesting that the Form N–400 fee be based on the value of U.S. citizenship, doing so would require quantifying that value, which assuming it is appropriate or even possible to do precisely, would be beyond the scope established by the proposed rule. The USCIS ABC model is based on estimated operational costs, and DHS has set the fee at a level that adheres to the fee review methodology, which includes full cost recovery. *See* new 8 CFR 103.7(b)(1)(i)(BBB). DHS therefore sets the fee for Form N–400 at $640, as proposed.

E. Improve Service and Reduce Inefficiencies

Many of the comments received that opposed fee increases cited delays in processing times and dissatisfaction with customer service. Some of these commenters stated that they would embrace the fee increases if they resulted in faster processing and improved customer service. A few commenters asserted that if DHS implements any type of USCIS fee increase, then USCIS should guarantee that it will reduce benefit request processing times. At least one commenter recommended increasing the fees further so there would be no excuse for delays in processing. Other commenters wrote about expanding electronic filing and receipting to reduce mail handling and shipping of paper. USCIS acknowledges that since it last adjusted fees in FY 2010, the agency has experienced elevated processing times compared to the goals established in the 2007 fee rule. See 72 FR 29858–29859. These processing delays have contributed to case processing backlogs. This can partially be attributed to having removed the surcharge previously applied to the IEFA fee schedule to recover costs related to RAIO, the SAVE program, and the Office of Citizenship. This was done in anticipation of congressional appropriations for these programs, consistent with the President's budget requests. As the anticipated budget request was not granted, since FY 2012 USCIS has used other fee revenue to support these programs. Under this final rule, DHS will adjust USCIS fees by a total weighted average increase of 21 percent; the total 21 percent weighted average increase will be allocated as follows:

- To reinstate a surcharge in the fee schedule to sustain the current operating levels of RAIO, the SAVE program, and the Office of Citizenship (approximately 8 percent);
- To account for reduced revenue stemming from an increase in fee waivers granted since FY 2010 (approximately 9 percent); and
- To recover the costs needed to sustain current operating levels while allowing for limited, strategic investments necessary to ensure the agency's information technology infrastructure is strengthened to protect against potential cyber intrusions, and to build the necessary disaster recovery and back-up capabilities required to effectively deliver the USCIS mission (approximately 4 percent).

Through this final rule, USCIS expects to collect sufficient fee revenue to sustain current operating levels of RAIO, the SAVE program, and the Office of Citizenship. This change will allow USCIS to discontinue diverting other fee revenue to fund these programs, thereby increasing the resources available to fund additional personnel[61] needed to improve case processing, reduce backlogs, and move toward processing times that are in line with the commitments in the FY 2007 fee rule.

While the agency remains committed to achieving the processing goal commitments in the 2007 fee rule, it acknowledges that these goals remain ambitious. By its very nature, the fee review cycle uses historical staffing and workload information to establish future needs, and as a result, cannot identify the exact resources necessary to guarantee future processing goals. In addition, superseding priorities may arise, which could not have been known at the time fee cycle calculations were made, that may impact USCIS' ability to meet customer expectations. USCIS will need to continue addressing emergent issues and their associated costs, which may impact case processing efficiency and backlogs. Nevertheless, the agency holds the 2007 processing goals to be among its highest priorities and recommits to achieving them as quickly as possible.

In addition, USCIS is committed to providing stakeholders and customers with the information they need, when they need it. To that end, USCIS is transforming how it calculates and posts processing time information to improve the timeliness of such postings, but more importantly, to achieve greater transparency of USCIS case processing. For instance, to make current published processing time information more transparent and less complex for customers to interpret, USCIS is evaluating the feasibility of calculating processing times using data generated directly from case management systems, rather than with self-reported performance data provided by Service Centers and Field Offices. Preliminary findings suggest that USCIS will be able to publish processing times sooner and with greater transparency by showing different processing times for each office and form type. USCIS is also considering publishing processing times using a range rather than using one number or date. This approach would show that, for example, half of cases are decided in between X and Y number of months.

USCIS also expects to improve the customer experience as it continues to transition to online filing and electronic processing of immigration applications and petitions. With the new person-centric electronic case processing environment, USCIS will possess the data needed to provide near-real-time processing updates to the customer that will identify the case status and time period that has elapsed between actions for each individual case. This will allow greater transparency to the public on how long it will take to process each case as it moves from stage to stage (*e.g.,* from biometrics collection, to interview, to decision).

DHS appreciates the comments requesting expansions of electronic filing, and USCIS is actively planning the expansion of its online case management system for the submission and adjudication of immigration benefits. As of the end of FY 2016, approximately 17 percent of the agency's intake was processed through

[60] The semiannual average consumer price index for all urban consumers (CPI–U) was 205.7 in July 2007 and 238.8 in July 2016. The change in the Index over 9 years was 33.1 or 16.1 percent. *See* U.S. Department of Labor, Bureau of Labor Statistics, All Urban Consumers (CPI–U) Semiannual Average tables, available at *http://www.bls.gov/cpi/cpi_dr.htm.*

[61] For additional information on staffing, see second bullet on pg. 13, Alignment of USCIS Staffing Allocation Model with the Fee Review on pg. 26, and Appendix XIII Table 12: IEFA Positions by Office in the supporting documentation.

online filing and we are striving to increase that level.

In sum, DHS appreciates the commenters' concerns for timely service. USCIS continually strives to meet timely adjudication goals while balancing security, eligibility analysis, and integrity in the immigration system. Fees have not been adjusted since 2010 and that fee rule did not include the surcharge for RAIO, the SAVE program, and the Office of Citizenship, which has resulted in the reprioritization of resources to cover those program costs. This fee rule is intended to address such shortfalls and provide resources necessary to ensure adequate service. USCIS would be unable to adequately perform its mission if DHS allowed fee levels to remain insufficient while USCIS continued to develop its search for additional efficiencies.

F. Premium Processing

Premium processing is a program by which filers may request 15-calendar-day processing of certain employment-based immigration benefit requests if they pay an extra amount. 8 CFR 103.7(b)(1)(i)(RR) and (e); proposed 8 CFR 103.7(b)(1)(i)(SS); 81 FR 26939. In 2000, Congress set the premium processing fee at $1,000 and authorized USCIS to adjust the fee for inflation, as determined by the Consumer Price Index (CPI). Section 286(u) of the INA, 8 U.S.C. 1356(u). USCIS adjusted the premium processing fee to $1,225 by using the CPI in the 2010 final rule.[62] *See* 75 FR 58979. DHS proposed no change to premium processing fees or regulations because forecasted premium processing revenue is sufficient to cover the projected costs of providing the premium service and other permissible infrastructure investments.

Several commenters wrote to request that USCIS expand premium processing to other forms, including family-based immigration benefit requests, naturalization, relief for victims of crimes who assist law enforcement, and forms related to the EB–5 Immigrant Investor Program. Some commenters stated that using premium processing revenue may alleviate backlogs. Other commenters stated that premium processing is essentially mandatory to ensure the timely and efficient processing of their employment-based petitions.

Assuming DHS has the general authority to offer expedited processing fees to additional forms, the timing requirements of many adjudications involve considerations that are out of USCIS' control. For example, background checks, the timing of which are not controlled by USCIS, are required for: The Application for Temporary Protected Status, Form I–821; the Application for Naturalization, Form N–400; the Application for Provisional Unlawful Presence Waiver, Form I–601A; and the Application to Register Permanent Residence or Adjust Status, Form I–485. These and many other forms are not suited for expedited processing. USCIS already seeks processing efficiencies where available and shifts workload to balance volume surges, seasonal demands, and competing priorities.

In addition, where expedited processing may be possible, it would be extraordinarily time-intensive to determine the appropriate fee amount, target adjudication timeframe, and staffing levels needed to implement a new expedited processing program. Expanding the premium processing program would require USCIS to estimate the costs of a service that does not currently exist with sufficient confidence that it can deliver the service promised and not impair service for other immigration benefit requests. Nevertheless, USCIS will continue considering additional premium processing services and its ability to improve services without creating new challenges. DHS made no changes in this final rule as a result of these comments.

G. Immigrant Investors

In the NPRM, DHS proposed a number of changes to fees related to the Employment-Based Immigrant Visa, Fifth Preference (EB–5) ''Immigrant Investor'' Program.[63] Specifically, DHS proposed to increase the fee for the Application for Regional Center Under the Immigrant Investor Program, Form I–924, from $6,230 to $17,795. *See* proposed 8 CFR 103.7(b)(1)(i)(WW); 81 FR 26939. DHS proposed to establish a new fee for the Annual Certification of Regional Center, Form I–924A, at $3,035. *See* proposed 8 CFR 103.7(b)(1)(i)(XX); 81 FR 26939. DHS proposed to increase the fee for the Immigrant Petition by Alien Entrepreneur, Form I–526, from $1,500 to $3,675. *See* proposed 8 CFR 103.7(b)(1)(i)(W); 81 FR 26938. Finally, DHS proposed to hold the fee for the Petition by Entrepreneur to Remove Conditions, Form I–829, at $3,750. *See* proposed 8 CFR 103.7(b)(1)(i)(PP); 81 FR 26939. With the exception of the proposed fee for Form I–829, each proposed EB–5 fee increase was the result of application of the standard USCIS fee methodology to the applicable benefit request.

Several commenters objected to the proposed increases, noting that these are some of the highest proposed fee increases, while the related benefit requests have some of the longest processing times. Another commenter wrote to applaud the increase to EB–5 fees in general, but requested that USCIS conduct site visits and evaluate whether regional centers are misrepresenting themselves to investors.

As an initial matter, and as noted previously, DHS is authorized to set fees at a level that ensures recovery of the full costs of providing immigration adjudication and naturalization services. Because USCIS relies almost entirely on fee revenue, in the absence of a fee schedule that ensures full cost recovery, USCIS would be unable to sustain an adequate level of service, let alone invest in program improvements. Full cost recovery means not only that fee-paying applicants and petitioners must pay their proportionate share of costs, but also that at least some fee-paying applicants and petitioners must pay a share of the immigration adjudication and naturalization services that DHS provides on a fee-exempt, fee-reduced, or fee-waived basis. DHS is therefore mindful to adhere to the standard USCIS fee methodology as often as possible, and to avoid overuse

[62] Premium processing fees are increased using the CPI through statutory authority. *See* INA sec. 286(u), 8 U.S.C. 1356(u).

[63] The EB–5 program was created by Congress in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors. The EB–5 ''regional center program'' was later added in 1992 by the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993. Pub. L. 102–395, sec. 610, 106 Stat 1828 (Oct. 6, 1992). The EB–5 immigrant classification allows qualifying individuals, and any accompanying or following to join spouses and children, to obtain lawful permanent resident (LPR) status if the qualifying individuals have invested, or are actively in the process of investing, $1 million in a new commercial enterprise. *See* INA sec. 203(b)(5)(A) and (C), 8 U.S.C. 1153(b)(5)(A) and (C). To qualify, the individual's investment must benefit the U.S. economy and create full-time jobs for 10 or more qualifying employees. INA sec. 203(b)(5)(A)(ii), 8 U.S.C. 1153(B)(5)(A)(ii). If the investment is in a Targeted Employment Area (TEA) (*i.e.,* a rural area or an area that has unemployment of at least 150% of the national average), the required capital investment amount is $500,000 rather than $1 million. INA sec. 203(b)(5)(C)(ii), 8 U.S.C. 1153(b)(5)(C)(ii); 8 CFR 204.6(f)(2). Entrepreneurs may meet the job creation requirements through the creation of indirect jobs by making qualifying investments within a new commercial enterprise associated with a regional center approved by USCIS for participation in the regional center program. INA sec. 203(b)(5), 8 U.S.C. 1153(b)(5); 8 CFR 204.6(e) and (m)(7). For more information on the EB–5 program, see *https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-eb-5-visa*.

of DHS's discretion to eliminate or reduce fees for special groups of beneficiaries.

The proposed fees for three of the four EB–5 Program forms resulted from application of the standard USCIS fee methodology,[64] because DHS did not find a compelling reason to shift the burden of adjudicating these forms onto other applicants. In addition, the relatively high fees for these requests result in part from the high costs associated with adjudicating them. For instance, USCIS has recently implemented several changes to refine and improve the delivery, security and integrity of the EB–5 Program. USCIS established the Immigrant Investor Program Office (IPO) in Washington, DC in 2012. Since that time, IPO has regularly added staff positions to focus both on managing the program and ensuring identification of fraud, national security, or public safety concerns within the program. In addition, USCIS plans to conduct increased site visits to regional centers and associated commercial enterprises to verify information provided in regional center applications and investor petitions and to clarify its EB–5 regulations. Currently, USCIS is in the process of hiring and training additional adjudicators, economists, and support staff needed to adjudicate the benefit requests associated with the EB–5 program. Part of the increase in fees for EB–5-related adjudications will bolster the fraud detection and national security capabilities of USCIS to investigate fraud and abuse at all levels of the EB–5 process, including investigating projects that receive funds from EB–5 investors and auditing regional center annual reports to enhance compliance with the program. *See* 81 FR 26918. Each of these factors contributed to the proposed EB–5 Program fees.

In the immediately succeeding section, as well as in the Paperwork Reduction Act section of this preamble, DHS responds to additional comments on the proposed EB–5 fees.

1. Application for Regional Center Under the Immigrant Investor Program, Form I–924

In the NPRM, DHS proposed to increase the fee for the Application for Regional Center Under the Immigrant Investor Program, Form I–924, from $6,230 to $17,795. *See* proposed 8 CFR 103.7(b)(1)(i)(WW); 81 FR 26939. The proposed fee increase was the result of application of the standard USCIS fee methodology to the benefit request.

At least one commenter wrote to oppose the proposed Form I–924 fee increase due to the possible impact on EB–5 regional centers. The commenter recommended a possible reduced fee for centers in existence for fewer than 5 years. The same commenter stated dissatisfaction with the level of customer service that USCIS has provided and suggested that USCIS create an electronic platform for EB–5 regional centers to monitor their applications and cases. Other commenters stated that the proposed fee increase were unreasonable and inflated, especially in light of long processing delays. At least one commenter stated that regional centers in rural and high-unemployment areas are less capable of withstanding long processing delays. The same commenter stated that the proposed 286 percent fee increase for the Form I–924 should be accompanied by an assurance that processing times would be cut by 75 percent. The commenter stated that an alternative to processing time reductions would be to create a process in which regional centers would be automatically approved if USCIS does not provide a notice of action within 4 months, or if USCIS does not summarily reject a petition for which there have been prior approvals on the same project. Another commenter stated that DHS could adopt a tiered fee structure for Form I–924 based on whether the associated investment project was an actual or exemplar project. At least one commenter mentioned the potential for legislation to alter the regional center requirements.

USCIS understands the desire of EB–5 regional centers to receive prompt and courteous service, and the agency strives to provide the best level of service possible. As the program has grown and applicants and projects have become more advanced, the current fee level has proven to be inadequate to ensure that USCIS has the resources it needs. The proposed fee increase was determined using USCIS's standard fee-setting methodology, based on the number of hours required to adjudicate Form I–924. These adjudications require economists and adjudications officers to thoroughly review extensive business documents, economic impact analyses, and other project-related documents. The proposed fee increase was, in part, calculated to allow USCIS to hire additional staff to process Forms I–924 and provide better and more thorough service.

Currently, USCIS does not have the data to quantify alternative fees for regional centers in existence for fewer than 5 years. In addition, USCIS does not track Form I–924 completion rates based on whether the project involves a rural or urban area, an area of high or low employment, or an actual or exemplar project. USCIS also cannot commit to across-the-board processing time reductions as adjudications involve case-by-case review of complex applications and related supplementary information, nor can it implement a process that automatically approves a regional center without a complete adjudication. Moreover, USCIS does not prioritize Form I–924 workloads based on whether regional center projects involve a rural or urban area, or an area of high or low employment. DHS may consider exploring the feasibility of such a change in the future, but will not implement a change at this time.

With respect to the commenter that identified the possibility of legislative changes, USCIS greatly appreciates the work of stakeholders towards reauthorization of the Regional Center Program and reform of the EB–5 program more generally. USCIS is cognizant of potential legislative changes to the EB–5 program and is also aware that such changes may require adjustments to USCIS adjudication processes. In the event that legislative changes are enacted, USCIS would assess any significant changes and reassess program requirements, adjudication process, and required fees. For now, however, and for the reasons stated previously, this rule sets the Form I–924 fee at $17,795, as proposed.

2. Immigrant Petition by Alien Entrepreneur, Form I–526

In the NPRM, DHS proposed to increase the fee for the Immigrant Petition by Alien Entrepreneur, Form I–526, from $1,500 to $3,675. *See* proposed 8 CFR 103.7(b)(1)(i)(W); 81 FR 26938. The proposed fee increase was the result of application of the standard USCIS fee methodology to the benefit request.

Some commenters wrote to request additional information on the proposed fee increase. Another commenter stated that a lack of processing efficiency can cause problems for Form I–526 applicants. Specifically, the commenter stated that EB–5 project sponsors sometimes agree to put an investor's money in escrow until the Form I–526 is approved. If the form is denied, project sponsors return those funds to the investor; if approved, the project sponsor uses those funds on the project. The commenter stated that such projects can languish when the investor's money is held in escrow for lengthy periods of

[64] The proposed fee for the Form I–829 was above the model output, as described in the proposed rule.

time. According to the commenter, although escrow arrangements provide substantial benefits to program integrity, they are becoming commercially untenable due to Form I–526 processing times. The commenter also asserted that projects themselves are also hurt by lengthy processing times, as projects may be well underway by the time USCIS denies the forms.

USCIS has taken multiple steps towards reducing Form I–526 processing times. As previously mentioned, USCIS is in the process of hiring and training additional adjudications officers, economists, and support staff for these form types. Additionally, USCIS is working to revise the EB–5 regulations and is preparing revisions to the EB–5 Policy Manual. USCIS is also improving the forms and form instructions for the EB–5 program. The EB–5 program fee increases will further these agency efforts with the goal of improving operational efficiencies while enhancing predictability and transparency in the adjudication process. USCIS understands that long delays in Form I–526 adjudications negatively impact both immigrant investors and the projects awaiting the release of their investment funds from escrow. USCIS strives to process Form I–526 filings as soon as practicable. In addition, regarding the release of escrowed funds, USCIS permits EB–5 financing to replace interim financing where the financing to be replaced was contemplated as temporary financing that would be replaced.[65] DHS made no changes to the proposed Form I–526 fee as a result of these comments, and is finalizing the fee at $3,675, as proposed.

3. Petition by Entrepreneur To Remove Conditions, Form I–829

In the NPRM, DHS proposed to hold the fee for the Petition by Entrepreneur to Remove Conditions, Form I–829, at $3,750. *See* proposed 8 CFR 103.7(b)(1)(i)(PP); 81 FR 26939. While the fee model calculated a fee of $2,353, DHS proposed to maintain the current fee for such petitions. *See* 81 FR 26918. Because of the recent and continued growth and maturation of the EB–5 Program, associated costs over the next few fiscal years are uncertain. Among other things, the final parameters of the program are still evolving, such as the number of USCIS employees and facilities necessary to carry out enhanced review of EB–5 filings, as well as site visits. This uncertainty makes it unclear whether EB–5 related fees will fully fund EB–5 program activities. DHS therefore proposed to keep the Form I–829 at the current fee, above the full cost recovery calculation, to shield USCIS against potential, but likely rising costs.[66]

At least one commenter indicated current USCIS processing times for Form I–829 extend beyond the 1-year automatic extension of the entrepreneur's conditional residence, imposing an additional burden on petitioners traveling outside of the United States. The commenter stated that delays in processing Form I–829 mean that investments must remain at risk for an extended period of time. The commenter added that USCIS could increase the efficiency of Form I–829 adjudications by consolidating the business-related portions of multiple Forms I–829 associated with a single investment project into a single adjudication. Another commenter recommended that USCIS implement electronic filing of this and other forms related to the Immigrant Investor Program to increase efficiency.

USCIS recognizes that lengthy Form I–829 processing times place a strain on EB–5 investors who are awaiting approval of their applications to adjust to LPR status. USCIS is working diligently to add staffing, and the agency plans to publish regulatory action, policy guidance, and revised forms with the goal of improving service delivery to applicants and improving the integrity of the EB–5 program. In part due to the tentative nature of these plans, DHS has no way to reliably quantify any potential cost savings that might be associated with these actions, and therefore could not propose to reduce the Form I–829 fee to account for such savings.

DHS appreciates the suggestions for improving EB–5 processing times. DHS clarifies that USCIS already has processes in place to streamline adjudication of the business-related portions of multiple Forms I–829 associated with a single, new investment project. Specifically, when USCIS receives a regional center-associated Form I–829 that involves a new commercial enterprise, USCIS reviews the first two petitions associated with that new commercial enterprise to determine if there are specific project-related issues that would apply to all petitioners associated with the new commercial enterprise. After completing that review, USCIS commences adjudication of all Forms I–829 associated with that new commercial enterprise filed within a given period. Similarly, when USCIS receives a regional center-associated Form I–829 that involves a previously reviewed commercial enterprise, USCIS immediately assigns that petition for adjudication. In other words, USCIS currently adjudicates Form I–829 petitions in ''first in, first out'' order by new commercial enterprises. USCIS constantly searches for new ways to increase efficiencies in the adjudications process, and for that reason cannot commit to a uniform queuing practice in this rule, or reduce associated fees in anticipation of heretofore unrealized savings.

USCIS does not have immediate plans to allow electronic filing for EB–5 requests, but appreciates commenters' desire to avoid voluminous paper filings. USCIS plans to allow electronic filing for EB–5 requests in the future. DHS made no changes to the proposed Form I–829 fee, or the policies regarding EB–5 adjudications, as a result of these comments. The final rule sets the Form I–829 fee at $3,750, as proposed.

H. Methods Used To Determine Fee Amounts

As described previously and in the NPRM, the standard USCIS fee-setting methodology is intended to ensure full cost recovery for USCIS immigration adjudication and naturalization services. DHS based the proposed USCIS fees on the estimated costs of providing immigration benefit adjudication and naturalization services. In addition, to the extent possible, and with limited exception, DHS based the proposed USCIS fees on the relative identifiable costs associated with providing each particular benefit or service. This fee methodology is consistent with government-wide fee-setting guidelines outlined by OMB Circular A–25, 58 FR 38142 (July 15, 1993);[67] the principles of the Chief Financial Officers Act of 1990, 31 U.S.C. 901–03; and the Federal Accounting Standards Advisory Board (FASAB) guidelines.[68] Additional information about the fee methodology can be found in this preamble, the preamble for the

[65] See Policy Memorandum, *EB–5 Adjudications Policy* (May 30, 2013) at *https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Approved%20as%20final%205-30-13).pdf.*

[66] If DHS had decided to adjust the fee consistent with the adjustment that DHS made to most other fees, the proposed fee would have decreased to $3,280. The proposed fee would have been higher than the model output because of Cost Reallocation. Other fees would also have been adjusted accordingly.

[67] Office of Management and Budget, Circular A–25, User Charges, available at *http://www.whitehouse.gov/omb/circulars_a025/.*

[68] Handbook, Version 14 (06/15), available at *http://files.fasab.gov/pdffiles/handbook_sffas_4.pdf.*

proposed rule, and the supporting documentation accompanying this rulemaking.[69]

DHS received a number of comments regarding the methods that DHS uses to determine fee amounts. Commenters made statements about the need for full cost recovery without appropriations, the decision to exclude revenue from certain benefits in the proposed fee schedule, potential alternative fee methodologies, and the potential for cost reductions. DHS responds to these comments below.

1. Recovery of Full Cost Without Appropriations

Some commenters suggested that USCIS seek appropriations to reduce immigration benefit request fees. Some commenters opposing the fee increase mentioned that immigrants in the United States pay Federal income taxes, Social Security taxes, and other fees and questioned whether those are being accounted for in USCIS fee calculations. Commenters stated that appropriations could help reduce processing times or fund programs that do not recover full cost on their own, such as RAIO, the SAVE program, and the Office of Citizenship.

DHS acknowledges that immigrants pay both Social Security and various Federal taxes and fees, but the decision whether to fund USCIS services through tax revenues belongs to the U.S. Congress. And in recent years, such funding has been unavailable. As noted in the NPRM, USCIS is almost entirely funded by fees and must recover the full cost of its operations. *See* 81 FR 26905–26912. Fees collected from individuals and entities filing immigration benefit requests are deposited into the IEFA and used to fund the cost of immigration benefits and naturalization. *Id.* USCIS has not received any substantial appropriations since FY 2011. Similarly, USCIS received no FY 2016 discretionary appropriations for the SAVE program or the Office of Citizenship. *See* DHS Appropriations Act 2016, Public Law 114–113, div. F. (Dec. 18, 2015) and 81 FR 26912. USCIS did not receive appropriations for refugee and asylum processing or the SAVE program after FY 2011. USCIS received $2.5 million for the immigrant integration grants program in FY 2013 (Pub. L. 113–6) and FY 2014 (Pub. L. 113–76), but the agency did not receive appropriations for that program in FY 2015 or FY 2016. The only USCIS appropriations for FY 2016 provided funding for the E-Verify employment eligibility verification program. *See* Consolidated Appropriations Act, 2016, Public Law 114–113, div. F, tit. IV (Dec. 18, 2015) (DHS Appropriations Act 2016). Other than as described, USCIS receives no appropriations to offset the cost of adjudicating immigration benefit requests. *Id.* As a consequence of this funding structure, taxpayers do not bear any costs related to the IEFA and bear only a nominal burden to fund USCIS. However, in the event appropriations are provided that will materially change IEFA fees, then DHS could pursue a rulemaking to adjust fees appropriately.

Finally, one commenter questioned why SAVE fees charged to local, state, and Federal agencies do not recover the full cost of the SAVE program. USCIS collects SAVE fees from federal government agencies under the authority of the Economy Act, 31 U.S.C. 1535, and from state or local government agencies under the authority of the Inter-Governmental Cooperation Act, 31 U.S.C. 6501. SAVE fees are included in Memoranda of Agreement (MOAs) with user agencies, which are updated based on the established periods of performance. As noted in the proposed rule, SAVE fees impact the IEFA fees established in this rule only as necessary to fund the SAVE costs that remain after taking into account revenue received under the MOAs. *See* 81 FR 26911. Fees charged to SAVE users do not cover the full cost of the SAVE program; rather, they only cover the estimated per-query cost of operating the verification system. IEFA funds are used to cover other costs of the program, especially personnel and overhead expenses. In short, then, the funding structure for SAVE is a dual one, in which some costs are covered by reimbursements, and other costs from IEFA funds. Congress has supported this funding arrangement in the past, noting ongoing budget constraints.[70] As the commenter requests, USCIS and DHS regularly examine SAVE fees, and may modify them in the future.

2. Exclusion of Temporary or Uncertain Costs, Items, and Programs

As noted in the NPRM, DHS excluded from the fee model the costs and revenue associated with certain programs that are time-limited or that may otherwise be narrowed or terminated, including because they are predicated on guidance and not preserved in regulations or statute.[71] *See* 81 FR 26914–26915. This exclusion applies to the Application for TPS, Form I–821; Consideration of Deferred Action for Childhood Arrivals (DACA), Form I–821D; and Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Pub. L. 105–100) (Nicaraguan Adjustment and Central American Relief Act (NACARA)), Form I–881. As stated in the NPRM, DACA and TPS are both administrative exercises of discretion that may be granted on a case-by-case basis for particular periods of time. Both TPS and DACA, and the individual grants under each, are subject to intermittent renewal or extension at DHS's discretion. For NACARA, the eligible population will eventually be exhausted due to relevant eligibility requirements, including the date by which an applicant was required to have entered the United States. Given that these initiatives or programs are temporary by definition and at the discretion of DHS, USCIS excluded the associated cost and workload from the fee review and did not propose to allocate overhead and other fixed costs to these workload volumes. *See* 81 FR 26915.

Some commenters wrote to question the rationale for excluding DACA and TPS from the fee review. Several commenters stated that it is a financial burden to have to renew DACA every 2 years and to renew TPS every 18 months. Other commenters stated that, by their own estimates, the cost of administering DACA is less than the revenue that the program generates. Some commenters stated that fee increases to Forms I–765 and I–131 would deter DACA and TPS renewals and initial applications.

Following consideration of the comments received, DHS retains its earlier position. The practice of excluding these initiatives or programs that are temporary by definition from the fee review mitigates an unnecessary revenue risk, by ensuring that USCIS

[69] The USCIS fee methodology is not intended to yield a profit for the agency nor the Federal Government. The sole purpose of USCIS IEFA fees is to achieve full cost recovery to allow the agency to provide an adequate level of service. USCIS filing fees are not designed to function as tariffs, to generate general revenue to support broader policy decisions, or to deter certain behavior. As previously stated in this final rule, filing fees are generally not intended to influence public policy in favor of or in opposition to immigration, support broader infrastructure, or cover costs beyond USCIS.

[70] H.R. Rep. No. 112–492 (May 23, 2012).

[71] As noted in the proposed rule, for the purposes of this rulemaking, DHS is including all requests funded from the IEFA in the term ''benefit request'' or ''immigration benefit request'' although the form or request may not be to request an immigration benefit. For example, DACA is solely an exercise of prosecutorial discretion by DHS and not an immigration benefit, and would fit under the definition of ''benefit request'' solely for purposes of this rule. For historic receipts and completion information, see USCIS immigration and citizenship data available at *https://www.uscis.gov/tools/reports-studies/immigration-forms-data.*

will have enough revenue to recover full cost regardless of DHS's discretionary decision to continue these initiatives. This allows DHS to maintain the integrity of its ABC model, ensure recovery of full costs, and mitigate revenue risk from unreliable sources.

For these reasons, the cost of adjudicating requests associated with these policies was not considered, and this final rule excludes from the ABC model the costs and revenue associated with aforementioned policies, as proposed.

3. Setting Fees by Benefit Type

A commenter stated that IEFA fees should be based on the specific immigration benefit sought by a filer, rather than the specific form type used. The commenter noted that USCIS tracks completion rate (*i.e.,* adjudication time) by form number, and that the agency generally establishes a fee for the form type rather than the benefit being sought through the filing, even if the same form can be used to obtain different immigration benefits. For example, Form I–129 is used to request several types of nonimmigrant visa classifications, and a different fee could conceivably be calculated for each such classification.[72]

USCIS already sets some of its fees based on benefit sought, rather than form type used. For example, USCIS sets different fees for Form I–131 depending on the benefit sought, and the agency provides fee exemptions to certain filers of Form I–360. For other forms that have multiple uses, USCIS has not calculated the completion rate with enough precision to determine fees based on the benefits sought by filers of those forms. USCIS officers are required to manually report the time they spend on adjudicating forms; requiring reporting for sub-uses of those forms would divert time from processing requests. In addition, tracking whether filers are submitting the appropriate fees for the specific benefit sought would increase complexity for the agency and the public, potentially adding to processing delays. Nonetheless, DHS will continue considering this comment and may further refine its fee-setting methodology in the future to determine if different fees for the same form can be justified, as well as accurately and efficiently determined, without causing confusion and delay for adjudicators and the public. DHS made no changes in this final rule as a result of this comment.

4. Income-Based Fee Structure

Some commenters stated that DHS should generally base fees on the filer's income level or cost of living. Although USCIS is adopting a limited income-based fee structure in the naturalization context, adjusting all fees based on income or cost of living would be administratively complex and would require even higher costs to administer. A tiered fee system would require staff dedicated to income verification and necessitate significant information system changes to accommodate multiple fee scenarios for every form. The costs and administrative burden associated with implementing such a system would require additional overall fee revenue. As a result, DHS does not support making the entire fee schedule contingent on income or cost of living and DHS has made no changes in this final rule as a result of these comments.

5. Reduction in USCIS Costs

A number of commenters recommended that USCIS reduce costs internally instead of raising fees to fully recover costs. For instance, some commenters stated that USCIS employees' salaries were too high. No commenters proposed a methodology that DHS could use to adjust the proposed fee schedule to account for unrealized cost reductions.

USCIS is continually exploring opportunities to increase efficiency and reduce unnecessary costs without negatively affecting the delivery of benefits. Although USCIS will continue seeking out cost reductions, and may incorporate the results of such cost reductions in future fee reviews, DHS cannot set aside the need for full cost recovery indefinitely. Accordingly, DHS made no changes in this final rule as a result of these comments.

I. Dishonored Payments

In the NPRM, in a set of proposals separate and distinct from the proposed fee schedule, DHS proposed to eliminate three rules requiring that cases be held while deficient payments are corrected. *See* proposed 8 CFR 103.2(a)(7)(ii), 103.7(a)(2); 81 FR 26936; *see also* previous 8 CFR 103.2(a)(7)(ii), (a)(2); 8 CFR 103.17(b)(1). Instead, DHS proposed that if a financial instrument used to pay a fee were returned as unpayable after one re-presentment, USCIS would reject the filing and impose a standard $30 charge. The purpose of the proposed change was to reduce the USCIS administrative costs for holding and tracking immigration benefit requests when the accompanying payment has already been rejected.

DHS received several comments concerning these proposed changes. Some commenters suggested that USCIS maintain the current procedure or allow for several attempts to process a payment. These commenters noted that some payment problems are due to circumstances beyond the filer's control. These commenters stated that dishonored payments may result from errors at a USCIS Lockbox facility or a temporary disruption to a bank or Automated Clearing House (ACH)[73] network. These commenters also stated that the rejection of a benefit request can have serious repercussions for the filer. Commenters asserted that a payment failure may be especially disruptive if, for example, an underlying labor certification application for Form I–140 is about to expire, a derivative applicant is about to age out of eligibility, the priority date for an application for adjustment of status is scheduled to retrogress, or an applicant's current status will expire imminently and the pendency and approval of the application would otherwise result in an extension of status. These commenters stated that time-sensitive immigration benefit requests could be delayed by months or years because of the proposed changes. One commenter also noted that the rejected filings may require over a month to be returned to filers.

DHS agrees that ACH and bank network outages can sometimes result in a rejection or delay payments for a few days.[74] In the past, USCIS has addressed the possibility of ACH and network outages by arranging for the Department of the Treasury (Treasury) to automatically re-present a rejected payment twice to see if it clears on the second or third attempt before sending the filer the bill for the rejected payment.[75] Re-depositing a rejected

[72] Currently, the fee is the same for each Form I–129 filed. This fee has historically been calculated based on the average level of complexity for the adjudication of the form.

[73] The ACH Network is a nationwide electronic fund transfer system that provides for the inter-bank clearing of electronic credit and debit transactions and for the exchange of payment-related information among participating financial institutions.

[74] Treasury notifies USCIS of the reasons the payment was dishonored. Sometimes the reason is a lack of funds and sometimes the reason is a system outage. DHS will apply the dishonored payment provisions in this rule to all dishonored payments, regardless of the reason provided by Treasury. DHS believes that the safeguards described in the remainder of this section appropriately balance the interests of applicants and beneficiaries, on the one hand, and USCIS's interest in sound and efficient administration, on the other.

[75] USCIS implemented this internal policy in an effort to reduce the number of bad checks under the

Continued

check, known as ''re-presentment,'' was not required by the regulations, but USCIS arranged for Treasury to do this as a courtesy to filers.[76]

To address the concerns raised by commenters that a dishonored payment may be due to circumstances beyond the filer's control, DHS has decided to continue this practice, and to codify it (with slight revision) in this final rule. To make sure that a payment rejection is the result of insufficient funds and not due to USCIS error or network outages, USCIS (through Treasury) will re-submit rejected payment instruments to the appropriate financial institution one time. *See* new 8 CFR 103.2(a)(7)(ii)(D).[77] In effect, DHS will implement as a regulatory requirement the current practice under which USCIS re-presents rejected payments, but this rule will only require USCIS to re-submit the payment once, not twice. USCIS estimates that this change, based on its experience with how many days are required for financial instruments to clear, will provide a total of approximately 10 days before Treasury notifies USCIS that the payment (including re-presentment) has failed. The change codifies in regulation a practice that reduces instances in which requests are erroneously rejected because a bank erroneously rejects the relevant financial instrument.

This final rule also corrects an oversight in the NPRM related to how USCIS treats benefit requests that have already been approved when the agency learns that the financial instrument used to pay the associated fee is unpayable. Under current 8 CFR 103.2(a)(7)(ii), if USCIS has approved a benefit request before the payment has cleared, and the filer, having received notice of failed payment, fails to pay the filing fee and associated service charge within 14 days, USCIS automatically revokes the approval, or reopens and denies the request, due to improper filing. *See, e.g.,* previous 8 CFR 103.2(a)(1) (''Each benefit request or other document must be filed with fee(s) as required by regulation.''); 8 CFR 103.5(a)(5). As a result, a filer could not retain an approved benefit if the financial instrument used to pay the fee was subsequently returned as unpayable.[78] Unfortunately, the proposed rule erroneously omitted this existing regulatory authority, *see* proposed 8 CFR 103.2(a)(7)(ii); 81 FR 26936, and also erroneously failed to include conforming updates to a related provision, *see* previous 8 CFR 205.1(a)(2) (providing for automatic revocation of certain petitions ''[i]f the filing fee and associated service charge are not paid within 14 days of the notification to the remitter that his or her check or other financial instrument used to pay the filing fee has been returned as not payable'').

As the NPRM and this rule make clear, however, the ability of USCIS to collect fees is a fundamental aspect of its ability to function. USCIS must be able to continue requiring proper fee payments as a condition of eligibility for immigration benefits. Individuals who file a benefit request with a fee payment that is dishonored should, therefore, have no expectation that they might benefit from early processing of their filing.

Given that background, the only alternative to continuing to provide for revocation would be for USCIS to hold each benefit request until the financial instrument used to pay the fee has finally cleared or been rejected. In the interest of administrative efficiency and prompt processing of benefit requests, DHS has rejected that alternative. Therefore, DHS has provided in this final rule that if a remittance in payment of any fee submitted with a request is not honored by the bank or financial institution on which it is drawn, and the request was approved, USCIS will initiate revocation of the approval by issuing a notice of intent to revoke (NOIR). *See* new 8 CFR 103.7(a)(2)(iii).[79] The applicant, petitioner or requestor will be provided an opportunity to respond to the NOIR with evidence that the payment was honored and the revocation would be in error. To assuage concerns about procedural safeguards in such a situation, USCIS has decided to provide a notice in advance of the revocation in response to public comments that stated that a mistake by USCIS or a contractor could result in a dishonored payment. The applicant, petitioner or requestor may not, however, pay the rejected fee in response to the NOIR.

DHS emphasizes that this provision applies if *any* fee submitted with a benefit request is returned as dishonored. If a benefit request requires multiple fees, all fee instruments submitted with the request must be honored by the remitting bank; if any one fee instrument is dishonored after approval of the request, USCIS will revoke the approval after notice and will retain any filing fees properly paid. For instance, for the past five fiscal years, an average of 231 petitions per year were submitted with a Request for Premium Processing Service, Form I–907, accompanied by a check that was dishonored by the remitting bank. If a benefit approved under these circumstances is not revoked, petitioners would have the perverse incentive to request premium processing services in order to receive a swift approval, knowing they would not suffer any consequences once the bank dishonors the payment submitted for premium processing.[80] If the bank dishonors the Form I–907 payment after USCIS has approved the benefit request underlying the Form I–907, USCIS may revoke the approval after notice and, in that event, would retain the filing fees for the underlying benefit.[81]

In short, USCIS is fee funded and it must be able to adjudicate requests, including those which it has committed to approve in an expedited manner, without concerns that the fee payment will be declined. Accordingly, under this final rule, USCIS will intake the benefit request, deposit the fee, and begin processing the filing. If the payment is rejected, Treasury will re-present the payment instrument on USCIS's behalf. If the payment is rejected on the second try, Treasury will notify USCIS and USCIS, solely under

assumption that the payor may deposit funds during the intervening period and to preclude the need for USCIS to hold the bad check case while the payor has 14 days to correct it.

[76] DHS notes that the proposed rule's preamble erroneously stated that ''DHS is proposing that USCIS will not begin processing the benefit request until the payment has cleared.'' *See* 81 FR 26920. No provisions were proposed that would require USCIS to hold cases. As in the past, USCIS strives to intake and begin processing every benefit request as soon as practicable, without regard for whether or not the payment has cleared.

[77] This policy will not apply to credit card payments.

[78] In such a case, USCIS would either (1) revoke the approval automatically, (2) send a notice of intent to revoke the approval, or (3) reopen the approved case and deny it. *See, e.g.,* 8 CFR 103.5(a)(5) (motion by Service officer); 205.1(a)(2) (automatic revocation of immigrant petitions); 205.2 (revocation on notice); 214.2(h)(11)(iii)(A)(*5*), (l)(9)(iii)(A)(*5*), (o)(8)(iii)(A)(*5*), (p)(10)(iii)(A)(*5*), (q)(9)(iii)(D) & (r)(18)(iii)(A)(*5*); 274a.14(b) (revocation for erroneous approval); *see also, e.g.,* 6 U.S.C. 112; INA secs. 103, 204, 205, 214, 216, 216A, 244, 274A, and 286; 8 U.S.C. 1103, 1154, 1155, 1184, 1186a, 1186b, 1254a, 1324a, and 1356.

[79] DHS considers an NOIR process to provide superior notice to requestors, as compared to the automatic revocation provision in previous 8 CFR 103.2(a)(7)(ii).

[80] Currently, in the case of a request for premium processing, if the Form I–907 check is returned for insufficient funds, USCIS will process the case as a regular submission and will not revoke the approval even if the Form I–907 check is never honored. Unless DHS can also revoke the underlying petition, some premium processing requesters will benefit from a swift adjudication for which they have not paid.

[81] Just as USCIS does not refund filing fees for a denied benefit, USCIS will not refund filing fees for a revoked benefit. After USCIS has fully adjudicated the request, it will have performed the same amount of work and expended the same resources for the adjudication that it would have expended if the case had been approved or denied.

its own authority, will reject the filing for fee non-payment. If the filing has been approved, USCIS will initiate revocation of the approval. *See id.* The elimination of the 14-day waiting period will reduce the need for special handling of cases involving a dishonored payment. The requirement to re-present rejected payments will address commenters' concerns about rejections that occur through no fault of the filer. And the requirement to revoke an approved request if the payment has ultimately been rejected will help ensure the integrity of the benefits adjudication system.

J. Refunds

In the NPRM, DHS proposed a minor change in the provision regarding USCIS fee refunds. *See* proposed 8 CFR 103.2(a)(1); 81 FR 26936. In general, and except for a premium processing fee under 8 CFR 103.7(e)(2)(i), USCIS does not refund a fee regardless of the decision on the immigration benefit. However, USCIS will refund a fee if the agency determines that an administrative error occurred resulting in the incorrect collection of a fee. *See* 81 FR 26920–26921. DHS proposed to revise 8 CFR 103.2(a)(1) to provide that fees are ''generally'' not refunded. This would address concerns that the current regulatory text does not explicitly permit refunds at DHS discretion. DHS currently grants such refunds because as electronic filings and associated electronic payments have increased, there has been an increase in the number of erroneous payments where refunds are appropriate.

Some commenters stated that they supported the regulatory change to clarify that USCIS does not generally allow refunds, but that a refund may occur as a result of administrative error or unnecessary payment. *See* 81 FR 26936. DHS has made no change based on these comments. DHS is finalizing this provision as proposed.

K. Visa Allocation

Some commenters wrote that they generally opposed the fee increases in the proposed rule due to long waits for immigrant visas. Although these long waits are due to visa retrogression in oversubscribed categories, some attributed it to USCIS processing inefficiencies and questioned a fee hike in the face of such delays.[82] Some commenters stated that USCIS should be able to move visa priority dates forward if fee increases are implemented.

Significant improvements have been made in the visa coordination process between DHS and the Department of State (DOS). In September 2015, DOS, in coordination with DHS, revised the procedures for determining immigrant visa availability and authorization for issuance for both employment-based and family-sponsored applicants for adjustment of status in the United States. *See* Department of State Visa Bulletin for October 2015.[83] These revisions were made to better align with DOS' immigrant visa overseas consular processing application procedures and to enhance DOS' ability to better predict overall immigrant visa demand and determine cut-off dates for visa issuance published in the Visa Bulletin. *Id.*

DHS appreciates the concerns raised by individuals who may have been affected by long visa waits and visa retrogression. However, requests to make further revisions to the visa allocation process and priority dates must be done in coordination with DOS and are outside the scope of this rulemaking.

L. Credit Card Payments

Finally, some commenters criticized USCIS for not allowing credit card payments for additional immigration benefit requests. USCIS accepts credit card payments made in person at all domestic field offices that accept payments.[84] USCIS began allowing credit card payments for paper-filed Applications for Naturalization, Forms N–400, on September 19, 2015.[85] Currently, this is the only immigration benefit that can be paid for with a credit card when filed by mail. USCIS also accepts credit card payments for immigration benefit requests made through the electronic immigration system. DHS made no changes in this final rule as a result of these comments. Nonetheless, in the future, USCIS will allow credit cards payments for all immigration benefit request fees when they are filed at a Lockbox facility as soon as this capability can be made available.

V. Statutory and Regulatory Reviews

A. Regulatory Flexibility Act—Final Regulatory Flexibility Analysis

In accordance with the Regulatory Flexibility Act (RFA), 5 U.S.C. 601(6), DHS examined the impact of this rule on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632), a small not-for-profit organization, or a small governmental jurisdiction (locality with fewer than 50,000 people). Below is a summary of the small entity analysis. A more detailed analysis is available in the rulemaking docket at *http://www.regulations.gov.*

Individuals rather than entities submit the majority of immigration and naturalization benefit applications and petitions. Entities that will be affected by this rule are those that file and pay the fees for certain immigration benefit applications and petitions. There are four categories of benefits that DHS analyzed in the Initial Regulatory Flexibility Analysis (IRFA) for this rule: Petition for a Nonimmigrant Worker, Form I–129; Immigrant Petition for an Alien Worker, Form I–140; Application for Civil Surgeon Designation, Form I–910; and the Application for Regional Center Designation Under the Immigrant Investor Program, Form I–924.[86] Additionally, DHS has analyzed as part of the following Final Regulatory Flexibility Analysis (FRFA) requests related to genealogy information, Forms G–1041 and G–1041A, and the Petition for Amerasian Widow(er) or Special Immigrant, Form I–360, in response to public comment on the impact to small entities that file these forms.

Following the review of available data, DHS does not believe that the increase in fees in this final rule will have a significant economic impact on a substantial number of small entities that are filing Form I–129, Form I–140, or Form I–910. However, DHS does not have sufficient data on the revenue collected through administrative fees by regional centers to definitively determine the economic impact on small entities that may file Form I–924. DHS also does not have sufficient data on the requestors that file genealogy forms to determine whether such filings were made by entities or individuals,

[82] Visa retrogression occurs when more people apply for a visa in a particular category or country than there are visas available for that month *https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/visa-retrogression.*

[83] Available at *https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-october-2015.html.*

[84] *See* U.S. Citizenship and Immigration Services, Paying Immigration Fees (7/7/2014), available at *https://www.uscis.gov/forms/paying-immigration-fees.*

[85] *See* USCIS to Welcome More Than 36,000 Citizens During Annual Constitution Day and Citizenship Day Celebrations (9/17/2015), available at *https://www.uscis.gov/news/news-releases/uscis-welcome-more-36000-citizens-during-annual-constitution-day-and-citizenship-day-celebrations.*

[86] Also captured in the dataset for Form I–924 is the Supplement Form I–924A, which regional centers must file annually to certify their continued eligibility for regional center designation.

and thus is unable to determine if the fee increase for genealogy searches is likely to have a significant economic impact on a substantial number of small entities. Finally, DHS has added in this FRFA an analysis of the effects on small entities from the fee increase for Form I–360 and does not believe that the increase in fees will have a significant economic impact on these small entities. DHS is publishing this FRFA to respond to public comments, and provide further information on the likely impact of this rule on small entities.

1. A Statement of the Need for, and Objectives of, the Rule

DHS issues this final rule consistent with INA section 286(m),[87] which authorizes DHS to charge fees for adjudication and naturalization services at a level to ''ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants,'' and the CFO Act,[88] which requires each agency's CFO to review, on a biennial basis, the fees imposed by the agency for services it provides, and to recommend changes to the agency's fees. DHS is adjusting the fee schedule for DHS immigration and naturalization benefit applications after conducting a comprehensive fee review for the FY 2016/2017 biennial period and determining that current fees do not recover the full costs of services provided. DHS has determined that adjusting the fee schedule is necessary to fully recover costs and maintain adequate service.

2. A Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, A Statement of the Assessment of the Agency of Such Issues, and A Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

DHS published the NPRM along with the IRFA on May 4, 2016 (81 FR 26903) with the comment period ending July 6, 2016. During the 60-day comment period, DHS received 475 comments from interested individuals and organizations. DHS received several comments that directly or indirectly referred to aspects of the small entity analysis or IRFA presented with the NPRM. The comments, however, did not result in any major revisions to the small entity analysis in this final rule that are relevant to the effects on small businesses, small organizations, and small governmental jurisdictions presented in this FRFA. DHS summarizes and responds to these comments in this Final Rule.

a. Comments on Form I–129

One commenter wrote about the 42-percent increase ($135) of the fee for the Petition for a Nonimmigrant Worker, Form I–129. The commenter explained that such a significant increase in visa fees for H–2A category visas for temporary agricultural workers will negatively affect the ability of both large and small farmers to use those visas to ensure a sufficient and stable work force. Form I–129, which is used to petition for H–2A workers, is often used by a large and an increasing portion of small business employers according to this commenter. The commenter discussed the impact this 42-percent increase has on an employer hiring only one employee compared to an employer hiring 100 employees. This commenter was especially concerned with the impact of this rule on smaller farmers, many of whom petition for 1 to 5 workers, but whose farming operations could not continue without these workers. This commenter also stated that the impact of the rule on small entities was not quantitatively considered and/or disclosed.

Several other commenters wrote about the fee increase for Form I–129 and its impact on small entities in terms of small traveling musicians that cross over the border, particularly those along the United States and Canadian border. The commenters stated that these musicians routinely perform in small venues or small festivals and it currently takes about 3 separate performances to recoup the expenses of the current fee for Form I–129. The commenters stated that this increase in fees presents considerable hardship for these small performers and also compromises the ability to organize small tours that would result in break-even revenues.

Other commenters also wrote about the increase for Form I–129 and its impact on small religious orders and communities who petition for foreign-born religious workers. The commenters stated that this increase is particularly burdensome since extensions have to continually be filed for work authorizations as well. They noted that these added costs impact smaller parishes and lower-income neighborhoods disproportionately. In addition to the fee increases for Form I–129, these commenters also expressed similar concern for Forms I–360 and I–485.

DHS respectfully disagrees with the commenter who stated that the impact of the rule on small entities was not quantitatively considered and/or disclosed. DHS used recent data to examine the direct impacts to small entities for Forms I–129, I–140, I–910, and I–924. DHS prepared an IRFA that complied with the Regulatory Flexibility Act (RFA) and that was published with the NPRM. DHS also published a more comprehensive small entity analysis of the potential impact of the Form I–129 fee increase on *www.regulations.gov* in the docket for this rule along with other supporting documentation. DHS has also added an analysis of Forms G–1041, G–1041A, and I–360 in this FRFA in response to public comments.

In terms of the range for Form I–129, among the 284 small entities with reported revenue data identified in the small entity analysis, all experienced an economic impact of considerably less than 1.0 percent of revenue in the analysis, with the exception of two entities. Using the methodology described in the comprehensive small entity analysis, the greatest economic impact imposed by this fee change totaled 2.55 percent. This small entity with the highest economic impact imposed by the fee increase is in the theater companies and dinner theaters industry, which submitted 18 of the total 482,190 Form I–129 petitions in the 12-month period analyzed. The small entity with the second highest economic impact (2.05 percent) imposed by the fee increase is in the custom computer programming services industry, which submitted 50 of the total 482,190 Form I–129 petitions. DHS notes that out of the 10 small entities that face the highest economic impact due to this fee increase, a majority are in industries that are not related to musicians, farmers, or religious organizations. Table 2 shows the industry in which these top 10 impacted small entities belong, as well as the number of petitions submitted by each entity.

[87] *See* 8 U.S.C. 1356(m).

[88] *See* 31 U.S.C. 901–03.

TABLE 2—FORM I–129 NAICS INDUSTRY OF THE SMALL ENTITIES WITH THE HIGHEST ECONOMIC IMPACT IMPOSED BY THE FEE INCREASE *

NAICS Industry	Number of petitions submitted	Economic impact on entity's revenue imposed by fee increase (percent)
Theater Companies and Dinner Theaters	18	2.55
Custom Computer Programming Services	50	2.05
All Other Business Support Services	2	0.90
Dance Companies	4	0.90
Other Scientific and Technical Consulting Services	7	0.53
Computer Systems Design Services	2	0.46
All Other Business Support Services	1	0.45
Custom Computer Programming Services	3	0.37
All Other Business Support Services	2	0.34
All Other Business Support Services	2	0.34

Source: DHS, USCIS, Office of Performance and Quality.
* North American Industry Classification System (NAICS).

DHS also analyzed the 284 small entities with reported revenue data in our sample of Form I–129 petitions to see how many small entities were specifically in NAICS codes related to musicians, farmers, or religious organizations. Of these small entities, a total of 26 small entities were found in one of these related NAICS, 3 of the small entities were in the agricultural industry; 8 small entities were in the performing arts, spectator sports, and related industries; and 15 small entities were religious organizations. Looking only at this subset of 26 entities, only one small entity had an economic impact above 1 percent with one other small entity just under 1 percent, both of which were in the performing arts industries. The 24 other small entities in these categories had economic impacts that were well below 1 percent. Twelve of these small entities had an economic impact between 0.34 percent and 0.10 percent, while the remaining 12 small entities had economic impacts below 0.10 percent. Therefore, while DHS sympathizes with small farmers, small traveling musicians, and small religious entities, the evidence suggests that the additional fee imposed by this rule does not represent a significant economic impact on most of these types of entities.

b. Comments on Forms I–360 and I–485

DHS also received comments about the impact of this rule on small religious organizations who file on behalf of religious workers utilizing Forms I–485 and I–360. Form I–485, Application to Register Permanent Residence or Adjust Status, was not considered in this small entity analysis because it is submitted by individuals seeking to receive benefits, not entities. DHS selected forms that are filed by entities for the small entity analysis in the NPRM. DHS recognizes, however, that entities may also file the Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360, on behalf of a religious worker and acknowledges it is appropriate to include Form I–360 in the small entity analysis for the final rule.

The fee for Form I–360 will increase from $405 to $435, a $30 (7 percent) increase. DHS was able to obtain internal data on petitioners who file Form I–360 for Special Immigrant Religious Workers provided by the Office of Performance and Quality for this final rule. There were a total of 4,399 religious foreign worker Form I–360 petitions submitted in FY 2015 by 1,890 unique entities. Of these 1,890 unique entities, approximately 96 percent were churches, mosques, synagogues, temples, or other places of worship. Due to the overwhelming number of entities that were places of worship and therefore, likely designated as non-profit organizations, DHS assumed that all 1,890 entities are small.

Of the unique entities, about 51 percent of entities had submitted just one petition in the FY 2015 (Table 3). Over 83 percent submitted only one or two petitions. At the other end of scale, only about half a percent of entities submitted more than 20 petitions. An average of 2.4 petitions per entity was submitted in FY 2015. Based on a $30 increase in fees per petition for Form I–360, the average additional cost to these entities is $72.[89]

TABLE 3—FORM I–360 PETITIONS PER ENTITY

Petitions per entity	Entities	Percentage of total (percent)	Cumulative percentage (percent)
1	959	50.7	50.7
2	617	32.6	83.3
3	91	4.8	88.2
4	78	4.1	92.3
5	21	1.1	93.4
6 to 10	87	4.6	98.0
11 to 20	30	1.6	99.6
21 to 50	5	0.3	99.9

[89] Calculation: 2.4 average petitions per entity × $30 increase in fees = $72 average additional cost to entities.

TABLE 3—FORM I–360 PETITIONS PER ENTITY—Continued

Petitions per entity	Entities	Percentage of total (percent)	Cumulative percentage (percent)
51+	2	0.1	100.0
Total	1,890	100.0	

Source: DHS, USCIS, Office of Performance and Quality.

DHS also analyzed the costs imposed by this rule on the petitioning entities relative to the costs of the typical employee's salary. Guidelines suggested by the Small Business Administration (SBA) Office of Advocacy indicate that the impact of a rule could be significant if the cost of the regulation exceeds 5 percent of the labor costs of the entities in the sector.[90] According to the Bureau of Labor Statistics (BLS), the mean annual salary is $48,150 for clergy,[91] $45,160 for directors of religious activities and education,[92] and $35,160 for all other religious workers.[93] Based on an average of 2.4 religious workers petitioned-for per entity, the additional average annual cost will be $72 per entity.[94] Thus, the additional costs per entity imposed by this rule represent only 0.15 percent of the average salary for clergy, 0.16 percent of the average salary for directors of religious of activities and education, and 0.20 percent of the average salary for all other religious workers. Therefore, using average annual labor cost guidelines, the additional regulatory compliance costs imposed by this rule are not significant.

c. Comments on Forms G–1041 and G–1041A

Several commenters also expressed concern about the impact the proposed increase in fees related to genealogy searches would have on individual businesses. The commenters stated that such large increases in fees would be prohibitive to many individual genealogists that submit requests. Some commenters suggested that the fee increase should be phased-in over several years to help mitigate the impact of this total cost increase.

DHS appreciates the comments on the impact this fee increase will have on the individual businesses who request information from the genealogy program. The fee for Genealogy Index Search Request, Form G–1041, will increase from $20 to $65 (a 225 percent increase). The fee for Genealogy Index Search Request, Form G–1041, will increase from $20 to $65 (a 225 percent increase). Currently there are two fees for the Genealogy Records Request, Form G–1041A; the appropriate fee depends on whether the filing requests copies from microfilm (currently $20) or copies from textual records (currently $35). The new fee for Form G–1041A will increase to $65, regardless of the type of media involved. This represents a fee increase of 86 to 225 percent over current fee levels.

Based on DHS records related to the genealogy program, an average of 4,022 Index Search requests and 2,166 Records requests were made annually over the 4 calendar year span from 2012 to 2015 (Table 4). However, DHS does not have sufficient data on these requests to determine whether they were submitted by entities or individuals. Additionally, DHS cannot break out how many Genealogy Records Requests are copies from microfilm or from textual records. The case management tracking system used by DHS for these genealogy requests does not allow for requestor data to be readily pulled, nor does it allow for a break out in the Form G–1041A requests by record type.

TABLE 4—GENEALOGY FORM RECEIPTS

[Calendar Year]

Form Type	2012	2013	2014	2015	Average
Genealogy Index Search Request, Form G–1041	3361	3662	4167	4897	4022
Genealogy Records Request, Form G–1041A	2066	2219	2036	2344	2166

Source: DHS, USCIS, Immigration Records and Identity Services Directorate.

DHS has previously determined that requests for historical records are usually made by individuals.[95] If professional genealogists and researchers submitted such requests in the past, they did not identify themselves as commercial requesters and thus could not be segregated in the data. Genealogists typically advise clients on how to submit their own requests. For those that submit requests on behalf of clients, DHS does not know the extent to which they can pass along the fee increases to their individual clients. Therefore, DHS does not currently have sufficient data to definitively assess the impact on small entities for these requests.

DHS has decided to recover the full cost of the genealogy program from the genealogy program fees. As previously stated in this final rule, reducing the filing fee for any one benefit request submitted to DHS simply transfers the additional cost to process this request to other immigration and naturalization filing fees. Furthermore, DHS is not able

[90] Office of Advocacy, Small Business Administration, ''A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act'': *https://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf.*

[91] Bureau of Labor Statistics, U.S. Department of Labor, ''Occupational Employment Statistics, May 2015, ''Clergy'': *http://www.bls.gov/oes/current/oes212011.htm.*

[92] Bureau of Labor Statistics, U.S. Department of Labor, ''Occupational Employment Statistics, May 2015, ''Directors of Religious Activities and Education'': *http://www.bls.gov/oes/current/oes212021.htm.*

[93] Bureau of Labor Statistics, U.S. Department of Labor, ''Occupational Employment Statistics, May 2015, ''Religious Workers, All Other'': *http://www.bls.gov/oes/current/oes212099.htm.*

[94] Calculation: 2.4 average petitions per entity × $30 new petition fee = $72 additional total cost per entity.

[95] *See* ''Establishment of a Genealogy Program; Proposed Rule,'' 8 CFR 103, 299 (Apr. 20, 2006), available at *https://www.regulations.gov/document?D=USCIS-2006-0013-0001.*

to accommodate a phased-in approach of costs over several years due to the statutory guidelines on how DHS is able to increase its fees.

d. Comments on Form I–924A

One commenter indicated that fees for the new Form I–924A would create particular burdens on regional centers with less than 30 investors. The new fee for the annual filings of Supplement Form I–924A is $3,035.

As discussed in the small entity analysis of this final rule, while DHS cannot definitively claim that there is no significant economic impact to these small entities based on existing information at the time of this final rule, DHS would assume existing regional centers that have revenues equal to or less than $303,500 per year [96] (some of which DHS assumes would be derived from administrative fees charged to individual investors) could experience a significant economic impact if DHS assumes a fee increase that represents 1 percent of annual revenue is a ''significant'' economic burden under the RFA. DHS also assumes newly designated regional centers that have revenues equal to or less than $1,779,500 per year [97] could also experience a significant impact.

Searching through several public Web sites, DHS gathers that administrative fees charged to investors could range between $30,000 and $100,000 per investor.[98] DHS was able to obtain some sample data on 440 regional centers operating 5,886 projects. These 5,886 projects had a total of 54,506 investors, averaging 124 investors per regional center.[99] Assuming an average of 124 investors is a representative proxy for regional centers, and that $30,000 is the minimum administrative fee charged by regional centers, then such fees would represent approximately $3,720,000 in revenue. In that case, DHS expects that the proposed filing fee increase for Form I–924 and the creation of a new fee for Form I–924A would not cause a significant economic impact to these entities.

DHS does not currently have information on how many regional centers may have 30 or fewer investors. However, DHS expects that the fee for the annual filing of Form I–924A is greater than 1 percent of annual revenue for only those regional centers with 10 or fewer investors.[100] Regional centers with 11 or more investors are not likely to experience a significant economic impact due to this rule. While DHS cannot definitively state the number of regional centers that have fewer than 10 investors, we do not believe it is a substantial number of regional centers.

3. The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of Any Change Made to the Proposed Rule in the Final Rule as a Result of the Comments

No comments were filed by the Chief Counsel for Advocacy of SBA.

4. A Description of and an Estimate of the Number of Small Entities To Which the Rule Will Apply or an Explanation of Why No Such Estimate is Available

Entities affected by this final rule are those that file and pay fees for certain immigration benefit applications and petitions on behalf of a foreign national. These applications include Petition for Nonimmigrant Worker, Form I–129; Immigrant Petition for Alien Worker, Form I–140; Civil Surgeon Designation, Form I–910; Application for Regional Center Designation Under the Immigrant Investor Program, Form I–924; and Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360. Annual numeric estimates of small entities affected by this fee increase total (in parentheses): Form I–129 (70,211), Form I–140 (17,812), Form I–910 (589), Form I–924 (412), and Form I–360 (1,890).

This rule applies to small entities including businesses, not-for-profit organizations, and governmental jurisdictions filing for the above benefits. Form I–129 and Form I–140 will see a number of industry clusters affected by this rule (see Appendix A of the Small Entity Analysis for a list of affected industry codes). Of the total 444 small entities in the sample for Form I–129, most entities were small businesses (401), with 41 small not-for-profit entities and only 2 small governmental jurisdictions. Similarly, of the total 393 small entities in the sample for Form I–140, most entities were small businesses (364), with 26 small not-for-profit entities and 3 small governmental jurisdictions. The fee for the Application for Civil Surgeon Designation, Form I–910, will apply to physicians requesting such designation. There were 322 small entities in the sample for Form I–910, consisting of two small governmental jurisdictions and 320 small entities that were either small businesses or small not-for-profits. DHS was unable to further break down the composition of small entities between small businesses and small not-for-profits due to difficulties in determining the structure of these small entities. The Form I–924 will apply to any entity requesting approval and designation as a regional center under the Immigrant Investor Program or filing an amendment to an approved regional center application. Also captured in the dataset for Form I–924 is the Supplement Form I–924A, which regional centers must file annually to certify their continued eligibility for regional center designation. The Form I–360 will apply to any entity petitioning on behalf of a religious worker.

DHS does not have sufficient data on the requestors for the genealogy forms, Forms G–1041 and G–1041A, to determine if entities or individuals submitted these requests. DHS has previously determined that requests for historical records are usually made by individuals.[101] If professional genealogists and researchers submitted such requests in the past, they did not identify themselves as commercial requesters and thus could not be segregated in the data. Genealogists typically advise clients on how to submit their own requests. For those that submit requests on behalf of clients, DHS does not know the extent to which they can pass along the fee increases to their individual clients. Therefore, DHS does not currently have sufficient data to definitively assess the estimate of small entities for these requests.

a. Petition for a Nonimmigrant Worker, Form I–129

The fee for the Petition for a Nonimmigrant Worker, Form I–129, will increase from $325 to $460, a $135 (42 percent) increase. DHS used a 12-month period of data on filings of Form I–129 from September 1, 2014 to August 31, 2015, to collect internal data for each filing organization including the name, Employer Identification Number, city, state, ZIP Code, and number/type of filings. Each entity may make multiple filings; for instance, there were 482,190 Form I–129 petitions, but only 84,490

[96] Calculation: 1 percent of $303,500 = $3,035 (the new proposed fee for Form I–924A).

[97] Calculation: 1 percent of $1,779,500 = $17,995 (the new proposed fee for Form I–924).

[98] Yen, Christine et al., ''A Report on Source of Funds: Perils of the Administrative Fee.'' EB5 Investors Magazine (Aug. 20, 2015), available at: *http://www.eb5investors.com/magazine/article/A-Report-on-Source-of-Funds;* see also Green, Merritt. ''The Costs of an EB–5 Regional Center Project Investment.'' (June 27, 2014), available at: *http://www.generalcounsellaw.com/the-cost-of-an-eb-5-regional-center-project-investment/.*

[99] Department of Homeland Security, USCIS, Immigrant Investor Program Office.

[100] Assuming $30,000 administrative fee × 10 investors = $300,000 regional center revenue.

[101] See ''Establishment of a Genealogy Program; Proposed Rule,'' 8 CFR 103, 299 (Apr. 20, 2006), available at: *https://www.regulations.gov/document?D=USCIS-2006-0013-0001.*

unique entities that filed those petitions. Since the filing statistics do not contain information such as the revenue of the business, DHS looked for this information by researching databases from third-party sources. DHS used the subscription-based online database from Hoover's, as well as three open-access databases from Manta, Cortera, and Guidestar, to help determine an organization's small entity status and apply SBA size standards.

DHS devised a methodology to conduct the small entity analysis based on a representative sample of the affected population for each form. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of 84,490 unique entities for Form I–129, DHS used the standard statistical formula to determine a minimum sample size of 382 entities was necessary. Based on past experience, DHS expected to find about 40 to 50 percent of the filing organizations in the online subscription and public databases. Accordingly, DHS selected a sample size approximately 40 percent larger than the minimum necessary in order to allow for non-matches (filing organizations that could not be found in any of the four databases). Therefore, DHS conducted searches on 534 randomly selected entities from the population of 84,490 unique entities for Form I–129.

The 534 searches for Form I–129 resulted in 444 small entities, 287 of which were determined to be small entities based on their reported revenue or employee count and their NAICS code. Combining non-matches (130), matches missing data (27), and small entity matches (287), enables us to classify 444 of the 534 entities as small for Form I–129.

With an aggregated total of 444 out of a sample size of 534 entities searched, DHS inferred that a majority, or 83.1 percent, of the entities filing Form I–129 petitions during the period were small entities. Furthermore, 284 of the 534 entities searched were small entities with the sales revenue data needed to estimate the economic impact of the rule. Because these 284 small entities were a subset of the random sample of 534 searches, they were statistically significant in the context of this research. In order to calculate the economic impact of this rule, DHS estimated the total costs associated with the fee increase annually for each entity, divided by the annual sales revenue of that entity.[102] Based on the fee increase of $135 for Form I–129, this will amount to an average impact of 0.08 percent on all 284 small entities with reported revenue data.

In terms of range, among the 284 small entities with reported revenue data, all experienced an economic impact of considerably less than 1.0 percent in the analysis, with the exception of two entities. Using the above methodology, the greatest economic impact imposed by this fee change totaled 2.55 percent and the smallest totaled 0.0001 percent.

The evidence suggests that the additional fee imposed by this rule does not represent a significant economic impact on these entities.

b. Immigrant Petition for an Alien Worker, Form I–140

The fee for the Immigrant Petition for an Alien Worker, Form I–140, will increase from $580 to $700, a $120 (21 percent) increase. Using a 12-month period of data on filings of Form I–140 petitions from September 1, 2014 to August 31, 2015, DHS collected internal data similar to that of Form I–129. There were 101,245 Form I–140 petitions, but only 23,284 unique entities that filed those petitions. Again, DHS used the third party sources of data mentioned previously to search for revenue and employee count information.

DHS used the same methodology as with Form I–129 to conduct the small entity analysis based on a representative sample of the affected population. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of 23,284 unique entities for Form I–140, DHS used the standard statistical formula to determine that a minimum sample size of 378 entities was necessary. Again, based on past experience, DHS expected to find about 40 to 50 percent of the filing organizations in the online subscription and public databases. Accordingly, DHS oversampled in order to allow for non-matches (filing organizations that could not be found in any of the four databases).

DHS conducted searches on 514 randomly selected entities from the population of 23,284 unique entities for Form I–140. The 514 searches resulted in 430 instances where the name of the filing organization was successfully matched in the databases and 84 instances where the name of the filing organization was not found in the databases. Based on previous experience conducting regulatory flexibility analyses, DHS assumes filing organizations not found in the online databases are likely to be small entities. In order not to underestimate the number of small entities affected by this rule, DHS makes the conservative assumption to consider all of the non-matched entities as small entities for the purpose of this analysis. Among the 430 matches for Form I–140, 290 were determined to be small entities based on their reported revenue or employee count and their NAICS code. Combining non-matches (84), matches missing data (19), and small entity matches (290), enables us to classify 393 of 514 entities as small for Form I–140.

With an aggregated total of 393 out of a sample size of 514 entities searched, DHS inferred that a majority, or 76.5 percent, of the entities filing Form I–140 petitions during the period were small entities. Furthermore, 287 of the 514 entities searched were small entities with the sales revenue data needed to estimate the economic impact of the rule. Because these 287 small entities were a subset of the random sample of 514 searches, they were statistically significant in the context of this research. Similar to the analysis involving Form I–129, DHS estimated the total costs associated with the Form I–140 fee increase annually for each entity, divided by the annual sales revenue of that entity in order to calculate the economic impact of this rule.

Among the 287 small entities with reported revenue data, all experienced an economic impact considerably less than 1.0 percent in the analysis. Using the above methodology, the greatest economic impact imposed by this fee change totaled 0.68 percent and the smallest totaled 0.000002 percent. The average impact on all 287 small entities with revenue data was 0.04 percent. The evidence suggests that the additional fee imposed by this rule does not represent a significant economic impact on these entities.

Additionally, DHS analyzed any cumulative impacts to small entities resulting from the fee increases to both Forms I–129 and I–140. DHS isolated those entities that overlapped in both samples of Forms I–129 and I–140 by Employer Identification Number (EIN). Only three entities had EINs that overlapped in both samples. Of these three entities, two of them were small entities and one was not a small entity. Only one entity submitted multiple Form I–129 petitions, while all three entities submitted multiple Form I–140 petitions. Due to little overlap in entities in the samples and the relatively minor impacts on revenue of fee increases of Forms I–129 and I–140, DHS does not expect the combined impact of these two forms to be an economically significant burden on a substantial number of small entities.

[102] Total Cost to Entity = (Number of Petitions × $135)/Entity Sales Revenue.

c. Application for Civil Surgeon Designation, Form I–910

The fee for the Application for Civil Surgeon Designation, Form I–910, will increase from $615 to $785, a $170 (28 percent) increase. Using a 12-month period of August 1, 2014 to July 31, 2015, DHS collected internal data on applicants of this form. There were 719 Form I–910 applications, but only 602 unique entities that filed such applications. Again, DHS used third party sources of data mentioned previously to search for revenue and employee count information.

Using the same methodology employed with Forms I–129 and I–140, DHS conducted the small entity analysis based on a representative sample, with a 95 percent confidence level and a 5 percent confidence interval, of the population of 602 unique entities for Form I–910. DHS determined that a minimum sample size of 235 entities was necessary. DHS oversampled and conducted searches on 329 randomly selected entities for Form I–910.

The 329 searches for Form I–910 resulted in 252 instances in which the name of the filing organization was successfully matched in the databases and 77 instances in which the name of the filing organization was not found in the databases. DHS assumed again that filing organizations not found in the online databases are likely to be small entities, so DHS considered all of the non-matched entities as small entities for the purpose of this analysis. Among the 252 matches for Form I–910, 240 were determined to be small entities based on their reported revenue or employee count and their NAICS code. Combining non-matches (77), matches missing data (5), and small entity matches (240), DHS classified 322 of 329 entities as small for Form I–910.

With an aggregated total of 322 out of a sample size of 329 entities searched, DHS inferred that a majority, or 97.9 percent, of the entities filing Form I–910 applications were small entities. Furthermore, 238 of the 329 entities searched were small entities with the sales revenue data needed in order to estimate the economic impact of the rule. Because these 238 small entities were a subset of the random sample of 329 searches, they were statistically significant in the context of this research.

Similar to the analysis involving Forms I–129 and I–140, DHS estimated the total costs associated with the Form I–910 fee increase for each entity. Among the 238 small entities with reported revenue data, all experienced an economic impact considerably less than 1.0 percent in the analysis. The greatest economic impact imposed by this fee change totaled 0.61 percent and the smallest totaled 0.00002 percent. The average impact on all 238 small entities with revenue data was 0.09 percent. The evidence suggests that the additional fee imposed by this rule does not represent a significant economic impact on these entities.

d. Regional Center Designation Under the Immigrant Investor Program, Forms I–924 and I–924A

Congress created the EB–5 Program in 1990 under section 203(b)(5) of the INA to stimulate the U.S. economy through job creation and capital investment by foreign investors. Foreign investors have the opportunity to obtain LPR status in the United States for themselves, their spouses, and their minor unmarried children through a certain level of capital investment and associated job creation or preservation. There are two distinct EB–5 pathways for a foreign investor to gain LPR status: The Basic Program and the Regional Center Program. Both options require a capital investment from the foreign investor in a new commercial enterprise located within the United States. The capital investment amount is generally set at $1,000,000, but may be reduced to $500,000 if the investment is made in a ''Targeted Employment Area.''

A regional center is an economic entity, public or private, that promotes economic growth, regional productivity, job creation, and increased domestic capital investment. Regional centers pool funds into development loans or equity for commercial and real estate development projects. As of July 15, 2016, there were 847 DHS-approved regional centers.[103] Entities seeking designation as regional centers file Form I–924 along with supporting materials. Approved regional centers are currently required to file the Supplement to Form I–924, Form I–924A, on an annual basis to demonstrate continued eligibility for regional center designation. DHS is proposing to change the name of the Form I–924A annual filing to ''Annual Certification of Regional Center.''

DHS is increasing the fee for the Application for Regional Center Designation Under the Immigrant Investor Program, Form I–924, from $6,230 to $17,795, an $11,565 (186 percent) increase. Additionally, DHS introduces a filing fee of $3,035 for Form I–924A. In establishing this fee, DHS is also clarifying the related regulations that provide for the annual regional center review related to Form I–924A. Currently, there is no procedure for regional centers seeking to withdraw their designation and discontinue their participation in the program. Formal termination is currently processed by DHS issuing a Notice of Intent to Terminate and a subsequent termination notice. The withdrawal procedure will allow a regional center to proactively request withdrawal without the need for the more formal notices sent out by DHS. This procedure will reduce administrative costs and time for the Department, while timely clarifying status to the requesting regional center. Over a 13-month period of August 1, 2014 through August 31, 2015, DHS received a total of 412 Form I–924 applications.[104] These applications include the request for newly designated regional centers, as well as requests for continued designation for existing regional centers.

DHS was not able to determine the numbers of regional centers that are considered small entities. Regional centers are difficult to assess because there is a lack of official data on employment, income, and industry classification for these entities. Regional centers also pose a challenge for analysis as their structure is often complex and can involve many related business and financial activities not directly involved with EB–5 activities. Regional centers can be made up of several layers of business and financial activities that focus on matching foreign investor funds to development projects to capture above market return differentials. While DHS attempted to treat the regional centers similar to the other entities in this analysis, we were not able to identify most of the entities in any of the online databases. Furthermore, while regional centers are an integral component of the EB–5 program, DHS does not collect data on the administrative fees the regional centers charge to the foreign investors who are investing in one of their projects. DHS did not focus on the bundled capital investment amounts (either $1 million or $500,000 per investor) that the regional center invests into a new commercial enterprise. Such investment amounts are not necessarily indicative of whether the regional center is appropriately characterized as a small entity for purposes of the RFA.

Due to the lack of regional center revenue data, DHS assumes regional centers collect revenue through the

[103] USCIS Immigrant Investor Regional Centers: *http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers#table.*

[104] Supplemental Form I–924A (Supplement to Form I–924) is captured in this dataset.

administrative fees charged to investors. Searching through several public Web sites, DHS gathers that administrative fees charged to investors could range between $30,000 and $100,000 per investor.[105] DHS assumes administrative fees charged to investors are $30,000 per investor for the purposes of this analysis. DHS does not know the extent to which these regional centers can pass along fee increases to individual investors. Passing along the costs from this rule could reduce or eliminate the economic impacts to the regional centers. While DHS cannot definitively state there is no significant economic impact to these small entities based on existing information, DHS assumes existing regional centers that have revenues equal to or less than $303,500 per year[106] (some of which we assume will be derived from administrative fees charged to individual investors) could experience a significant economic impact if we assume a fee increase that represents 1 percent of annual revenue is a ''significant'' economic burden under the RFA. DHS also assumes newly designated regional centers that have revenues equal to or less than $1,779,500 per year[107] could also experience a significant impact.

DHS was able to obtain some sample data on 440 regional centers operating 5,886 projects. These 5,886 projects had a total of 54,506 investors, averaging 124 investors per regional center.[108] Assuming an average of 124 investors is a representative proxy of the regional centers, and that $30,000 is the minimum administrative fee charged by regional centers, then such fees will represent approximately $3.7 million in revenue. In that case, DHS expects that the filing fee increase for Form I–924 and the creation of a new fee for Form I–924A will not cause a significant economic impact to these entities.

e. Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360

As previously described in this analysis, the fee for Form I–360 will increase from $405 to $435, a $30 (7 percent) increase. DHS was able to obtain internal data for FY 2015 showing 1,890 unique entities submitted 4,399 Form I–360 petitions for religious workers. Of these 1,890 unique entities, approximately 96 percent were churches, mosques, synagogues, temples, or other places of worship, and DHS thus chose to consider all 1,890 entities to be small entities. Most entities only submitted 1 or 2 petitions. As previously described, DHS analysis showed that the costs per entity imposed by this rule represent only 0.15 percent of the average salary for clergy; 0.16 percent of the average salary for directors of religious of activities and education, and 0.20 percent of the average salary for all other religious workers. As all of these are under the 5 percent average annual labor cost SBA guidelines, DHS determined that the additional regulatory costs imposed by this rule are not significant.

5. A Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

This final rule imposes higher fees for filers of Forms I–129, I–140, I–910, I–924, I–924A, and I–360. The new fee structure, as it applies to the small entities outlined above, results in the following fees: Form I–129 ($460), Form I–140 ($700), Form I–910 ($785), Form I–924 ($17,795), Form I–924A ($3,035), and Form I–360 ($435). This final rule does not require any new professional skills for reporting.

6. A Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including services provided without charge to asylum applicants and certain other applicants. In addition, DHS must fund the costs of providing services without charge by using a portion of the filing fees collected for other immigration benefits. Without an increase in fees, DHS will not be able to maintain the level of service for immigration and naturalization benefits that it now provides. DHS has considered the alternative of maintaining fees at the current level with reduced services and increased processing times, but has determined that this will not be in the interest of applicants and petitioners. Therefore, this alternative was rejected.

While most immigration benefit fees apply to individuals, as described previously, some also apply to small entities. DHS seeks to minimize the impact on all parties, but in particular small entities. Another alternative to the increased economic burden of the fee adjustment is to maintain fees at their current level for small entities. The strength of this alternative is that it assures that no additional fee-burden is placed on small entities; however, small entities will experience negative effects due to the service reductions that will result in the absence of the fee adjustments in this final rule.

Without the fee adjustments provided in this rule, significant operational changes to DHS would be necessary. Given current filing volume and other economic considerations, DHS requires additional revenue to prevent immediate and significant cuts in planned spending. These spending cuts would include reductions in areas such as Federal and contract staff, infrastructure spending on information technology and facilities, and training. Depending on the actual level of workload received, these operational changes would result in longer processing times, a degradation in customer service, and reduced efficiency over time. These cuts would ultimately represent an increased cost to small entities by causing delays in benefit processing and reductions in customer service.

B. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) requires certain actions to be taken before an agency promulgates any notice of rulemaking ''that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year.[109] While this rule may result in the expenditure of more than $100 million by the private sector annually, the rulemaking is not a ''Federal

[105] *See* Yen, Christine et al., ''A Report on Source of Funds: Perils of the Administrative Fee.'' EB5 Investors Magazine (Aug. 20, 2015), available at: *http://www.eb5investors.com/magazine/article/A-Report-on-Source-of-Funds; see also* Green, Merritt. ''The Costs of an EB–5 Regional Center Project Investment.'' (June 27, 2014), available at: *http://www.generalcounsellaw.com/the-cost-of-an-eb-5-regional-center-project-investment/.*

[106] Calculation: 1 percent of $303,500 = $3,035 (the new fee for Form I–924A).

[107] Calculation: 1 percent of $1,779,500 = $17,995 (the new fee for Form I–924).

[108] DHS, USCIS, Immigrant Investor Program Office.

[109] *See* 2 U.S.C. 1532(a).

mandate'' as defined for UMRA purposes,[110] as the payment of immigration benefit fees by individuals or other private sector entities is, to the extent it could be termed an enforceable duty, one that arises from participation in a voluntary Federal program, applying for immigration status in the United States.[111] Therefore, no actions were deemed necessary under the provisions of the UMRA.

C. Small Business Regulatory Enforcement Fairness Act

This rulemaking is a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rulemaking will result in an annual effect on the economy of more than $100 million (adjusted annually for inflation) in order to generate the revenue necessary to fully fund all adjudication and naturalization services. The increased costs will be recovered through the fees charged for various immigration benefit requests. As small businesses may be impacted under this regulation, DHS has prepared a RFA analysis.

D. Congressional Review Act

The Congressional Review Act [112] requires rules to be submitted to Congress before taking effect. DHS will submit a report regarding the issuance of this final rule before its effective date, as required by 5 U.S.C. 801 to Congress and the Comptroller General of the United States. This rule is deemed a major rule and will therefore have a 60-day delayed effective date.

E. Executive Orders 12866 and 13563 (Regulatory Planning and Review)

1. Background and Purpose of the Final Rule

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated an ''economically significant regulatory action'' under section 3(f)(1) of Executive Order 12866. Accordingly, OMB has reviewed this final rule.

DHS projects an annual budget of $3.038 billion in FY 2016/2017, a $767 million (34 percent) increase over the FY 2010/FY 2011 fee review-adjusted annual budget of $2.271 billion. This final rule is estimated to provide DHS with an average of $546 million in annual fee revenue above the FY 2010/FY 2011 levels, based on a projected annual fee-paying volume of 4.9 million immigrant benefit requests and 2.6 million requests for biometric services.[113] DHS will use this increase in revenue under subsections 286(m) and (n) of the INA, 8 U.S.C. 1356(m) and (n), to fund the full costs of processing immigration benefit requests and associated support benefits; the full cost of providing similar benefits to asylum and refugee applicants at no charge; and the full cost of providing similar benefits to others at no charge.

If DHS does not adjust the current fees to recover the full costs of processing immigration benefit requests, it will be forced to make reductions in services provided to applicants and petitioners. These will reverse the considerable progress DHS has made over the last several years to reduce the backlogs of immigration benefit filings, to increase the integrity of the immigration benefit system, and to protect national security and public safety. The revenue increase is based on DHS costs and volume projections available at the time the rule was drafted. DHS has placed in the rulemaking docket a detailed analysis that explains the basis for the annual fee increase.

DHS has included an accounting statement detailing the annualized impacts of the rule in Table 5 below. DHS makes a correction from the NPRM by adding in the opportunity costs of time for filing Form I–942 as discussed later in this analysis. Thus, DHS notes the higher cost in this final rule.

TABLE 5—ACCOUNTING STATEMENT, FY 2016 THROUGH FY 2017

Category	Primary estimate	Maximum estimate
Benefits:		
Un-quantified Benefits	Maintain current level of service with respect to processing times, customer service, and efficiency levels.	
Costs:		
Quantified Costs	$717,724	$717,724
Transfers:		
Annualized Monetized Transfers at 3 percent.	546,429,650	546,429,650
Annualized Monetized Transfers at 7 percent.	546,429,650	546,429,650
Category	**Effects**	**Source**
Effects on State, local, and/or tribal governments.	For those state, local, and/or tribal governments that submit petitions for nonimmigrant and immigrant workers, they will face an increase in filing fees.	Final Rule, Executive Order 12866/13563 Analysis.
Effects on small businesses	For those small businesses that submit petitions for nonimmigrant and immigrant workers, they will face an increase in filing fees.	Final Rule, Executive Order 12866/13563 Analysis, Small Entity Analysis.

[110] *See* 2 U.S.C. 658(6).

[111] *See* 2 U.S.C. 658(7)(A)(ii).

[112] *See* 5 U.S.C. 801 *et seq.*

[113] This estimate is based on FY 2016/FY 2017 fee study volume projections.

2. Amendments and Impacts of Regulatory Change

This rule is intended to adjust current fees to ensure that DHS is able to recover the full costs of the immigration services it provides and maintain adequate service.[114] In addition to increasing fees, this final rule includes the following provisions: Provisions that DHS will reject an immigration benefit request paid with a dishonored check; provisions that DHS will reject an application that does not include the required biometric services fee; the institution of a reduced fee for the Application for Naturalization, Form N–400; and provisions that DHS will provide fee refunds at its discretion.

a. Dishonored Payments

This final rule changes how DHS will treat a benefit request filing accompanied by fee payment (in the form of check or other financial instrument) that is subsequently returned as not payable.[115] Current regulations provide that when a check or other financial instrument used to pay a filing fee is subsequently returned as not payable, the remitter will be notified and requested to pay the filing fee and associated service charge within 14 calendar days, without extension.[116] If the benefit request is pending and these charges are not paid within 14 days, the benefit request will be rejected as improperly filed. In addition, a receipt issued by a DHS officer for any remittance will not be binding upon DHS if the remittance is found uncollectable, and legal and statutory deadlines will not be deemed to have been met if payment is not made within 10 business days after notification by DHS of the dishonored payment.[117] In accordance with these current provisions, when a payment is returned as not payable, DHS places the immigration benefit request on hold, and suspends adjudication. If payment fails, DHS assesses a $30 penalty and pursues the unpaid fee and penalty using administrative debt collection procedures.[118] If payment (the unpaid fee plus $30) is made within the allotted 14 day time period, DHS resumes processing the benefit request. If a payment is not corrected by the applicant, DHS rejects the filing for nonpayment.[119]

In this final rule, DHS is eliminating provisions that require USCIS to hold benefit request filings while deficient payments are corrected. Under the amendment, if a check or other financial instrument used to pay a filing fee is subsequently returned as not payable, DHS will now reject the filing when Treasury notifies DHS that the payment has failed; USCIS will no longer hold the filing and provide 14 days for the deficient payment to be corrected.

To ensure that a payment rejection is the result of insufficient funds and not due to ACH and bank network outages, DHS has made a minor revision to the proposed amendment in the NPRM. Under the final rule, DHS will submit all rejected payments to the applicant's bank two times (once upon original deposit and once again if the original attempt to deposit the payment is unsuccessful). Based on the typical time required for a payment instrument to clear a financial institution, this will allow approximately 5 additional days for payments to clear.[120] DHS estimates the new mandatory rejected payment re-presentment requirement will therefore provide approximately 10 days for payments to be corrected before DHS receives notification that the payment has failed and rejects the filing or imposes the $30 returned check fee.[121]

Under the new process, DHS will continue to intake benefit requests, attempt to deposit fees, and begin processing filings as soon as possible.[122] In cases where the payment is initially rejected, Treasury will re-attempt to deposit the payment. However, if the payment is rejected a second time, Treasury will notify DHS and DHS, solely under its own authority, will reject the filing for non-payment of the required fee. In such cases where the benefit request has already been approved when DHS is notified of the failed payment, DHS will send the approved applicant or petitioner a notice of intent to revoke the approval. Regardless of the disposition of the benefit request, if the payment to DHS is rejected, the remitter will be charged a $30 returned check service charge.[123] In order to estimate the number of applicants who will make a payment that is ultimately dishonored, DHS analyzed the count of all returned and subsequently corrected payments of a credit card or check from fiscal years 2012 to 2015.[124] In FY 2015, a total of 10,818 payments were returned (Table 6). Of those 10,818 returned payments, 6,399 (59.2 percent) were later corrected. The average annual number of returned payments from FY 2012 to FY 2015 was 9,781 with an annual average of 6,478 payments (66.2 percent) later corrected. Assuming all included the current service fee of $30, the resulting total annual cost to applicants for returned payments is $293,430.[125]

TABLE 6—COUNT OF RETURNED AND CORRECTED CREDIT CARD/CHECK PAYMENTS, FY 2012–2015

Year	Total returned payments	Total corrected payments	Percentage of corrected payments
2015	10,818	6,399	59.2
2014	9,200	6,467	70.3
2013	9,785	6,496	66.4
2012	9,322	6,550	70.3

[114] For comparison between current fees, USCIS estimates for costs of underlying services, and changes to fees, see Appendix VI, Table 4 in the supporting documentation.

[115] USCIS will immediately reject and not accept for processing any applications and petitions submitted with invalid payments, *e.g.,* an unsigned check or invalid bank account on an electronic payment. The subsequent identification as not payable will occur when an attempt is made to process the payment through a bank, but the bank does not honor the payment (*e.g.,* because of insufficient funds).

[116] *See* 8 CFR 103.2(a)(7)(ii).

[117] *See* 8 CFR 103.2(a)(7)(ii), 103.7(a)(2).

[118] *See* 8 CFR 103.7(a)(2).

[119] *See* 8 CFR 103.2(a)(7)(ii).

[120] *See* 8 CFR 103.2(a)(7)(ii)(D).

[121] A commenter wrote that a fee payment may be submitted even when the applicant knows the account lacks the funds to cover the payment because a document is due to expire or a deadline is approaching.

[122] USCIS will not store and hold any case. The adjudicator will intake and begin processing every benefit request as soon as practicable and will presume that all fee payments are valid. If the payment is rejected (which could take 10-days to know) and the adjudicator has not approved the request, Treasury will notify USCIS of the rejected payment, and USCIS will collect the request package and reject it. If the fees have been deposited and the benefit request has not yet been adjudicated, USCIS will process a refund. If the request is approved, USCIS may revoke after notice without a refund.

[123] *See* amended 8 CFR 103.7(a)(2).

[124] Corrected payments include any payment collected by USCIS after the return of an initial payment.

[125] Calculation: 9,781 (average number of returned payments) × $30 (current service fee charge) = $293,430 (total cost for returned payments)).

TABLE 6—COUNT OF RETURNED AND CORRECTED CREDIT CARD/CHECK PAYMENTS, FY 2012–2015—Continued

Year	Total returned payments	Total corrected payments	Percentage of corrected payments
Average	9,781	6,478	66.2

Source: Department of Homeland Security, Immigration and Customs Enforcement, Burlington Finance Center.

As stated previously, with the implementation of this final rule, the regulations will no longer require DHS to hold benefit requests, and applicants will no longer be allowed to correct payments directly. Instead, all rejected payments will be re-presented to the relevant financial institution a second time, which will allow approximately another 5 days for it to clear.[126] DHS' current policy is to re-present a rejected payment twice to see if it clears on the second or third attempt before sending the filer the bill for the rejected payment. Under this final rule, Treasury will only re-present the payment on one occasion to save time. The average 9,781 returned payments (Table 6) will now be rejected unless the payments clear when re-presented by Treasury. This re-presentation by Treasury has no additional cost since Treasury currently includes this step in the process to deposit DHS fee payments. DHS anticipates that the prospect of rejection will encourage filers to provide the correct filing fees at the time they submit their benefit requests. However, DHS recognizes that there will continue to be filers who file benefit requests with incorrect or deficient fees.

For filers, filing fees are a required and fundamental aspect of the benefit being requested. By providing a 14-day window to correct dishonored payments, the regulation currently permits a benefit request paid with a dishonored payment instrument to secure a place in line ahead of a benefit request that was accompanied by a proper payment, including in programs that are time sensitive or involve numerically limited visas. In all cases, rejected filings may be refiled immediately with the proper payment but there are some slight differences depending on whether the submission is paper-based or electronically filed. The DHS online filing system will permit the rejected applications to remain accessible for the applicant to print and view. The original rejected electronic submission will not be available for resubmission with a new payment; however, the rejected submission may be used as a reference when a new application is being completed. In cases where the rejected submission is paper-based, the entire application/petition/request and supporting documentation are returned when rejected and can generally be refiled with the proper payment instrument.

The changes in this final rule will provide several benefits to DHS. These changes lower DHS administrative costs for holding and tracking benefit requests during the 14-day period currently provided to correct dishonored payments. The holding and tracking of benefit requests requires physical storage space that will no longer be required with these revisions. DHS currently incurs administrative costs through tracking payments in postage costs and adjudicator time among other costs. This change in process also provides parity to those individuals who file benefit requests with the correct fees, particularly in programs that are time sensitive or involve numerically limited visas.

DHS recognizes the unique impact that these changes may have in the context of the H–1B program regulations, which make visa numbers available to petitions in the order in which the petitions are filed.[127] The H–1B regulations allow the final receipt date to be any of the first 5 business days on which petitions subject to the applicable numerical limit may be received. DHS then conducts a random selection among the petitions received during any of those 5 business days, known as the ''H–1B lottery.'' Currently, petitions remain eligible for the H–1B lottery despite having failed payments, as long as the payments are corrected within the provided 14-day or 10-day timeframe.[128] Under the changes in this final rule, however, DHS will remove petitions from the H–1B lottery as soon as DHS receives notification of a failed payment, typically within 10 days of the receipt date. DHS does not have data at this time to estimate the impact on how many petitions may be affected by these changes. DHS is also unable to monetize the cost to the applicant of having a petition removed from selection for the H–1B lottery.

b. Failure To Pay the Biometric Services Fees

DHS is also eliminating provisions governing non-payment of the biometric services fee in this final rule. Currently, if a benefit request is received by DHS without the correct biometric services fee, DHS will notify the filer of the deficiency and take no further action on the benefit request until payment is received.[129] Failure to submit the correct biometric services fee within the time allotted in the notice will result in denial of the benefit request. If the required biometric services fee is missing, DHS suspends adjudication and places the benefit request on hold. If payment is made within the allotted time, DHS resumes processing the benefit request. If the biometric services fee is not paid, the benefit request is denied as abandoned.

Through this final rule, DHS is deleting the regulatory provisions that permitted benefit requests to be held while deficient payments are corrected. As a result of these deletions, DHS will reject a benefit request if, for instance, it is received without the correct biometric services fee, as specified in the form instructions.

In order to analyze the number of people who do not pay the correct biometric services fee, DHS updated the numbers from the NPRM with more recent data and gathered 7 months of data from DHS lockbox facilities.[130] The data covers the period from December 1, 2015 to June 30, 2016. During this 7-month period, DHS lockbox facilities accepted 2,624,825 benefit requests. Of these, a total of 6,179 (.24 percent) of filers were issued a notice alerting them that their biometric services fees were missing. Assuming this 7-month trend is typical of the number of deficient biometric services fee notices, the new provision will affect less than 1 percent of all benefit requests received at DHS lockbox facilities. As previously mentioned, rejected filings may be refiled immediately. While filers do not incur monetary costs (except for

[126] *See* 8 CFR 103.2(a)(7)(ii)(D).

[127] *See* 8 CFR 214.2(h)(8)(ii)(B).

[128] *See* 8 CFR 103.2(a)(7)(ii).

[129] *See* 8 CFR 103.17(b)(1).

[130] While USCIS prefers to base assumptions on a longer time period (ideally 5 years), 7 months was the longest time period for which this data was available.

additional postage fees) associated with the rejection of a benefit request, reapplying for benefits with the correct fees requires time. Again, DHS anticipates this new provision will encourage individuals to file with the appropriate fees.

Additionally, this change will streamline DHS' process for handling benefit requests when biometrics services fees are not submitted when required. DHS costs are reduced by eliminating the administrative handling costs associated with holding cases while biometric services fees are collected.

c. Reduced Fee for Application for Naturalization

The current fee for the Application for Naturalization, Form N–400, is $595. In most cases, applicants must also pay an $85 biometrics services fee, so the total cost for most applicants is $680. If an applicant cannot pay the fee, he or she can file a Request for Fee Waiver, Form I–912, along with their Form N–400. DHS considers anyone with a household income at or below 150 percent of the Federal Poverty Guidelines to be eligible for a fee waiver. If DHS approves an applicant's fee waiver, both the $595 Form N–400 fee and the $85 biometrics services fee, where applicable, are waived.

DHS will increase the Form N–400 fee from $595 to $640, a $45 (8 percent) increase in this final rule. The biometric services fee will remain unchanged at $85. Therefore, the new costs of Form N–400 plus the biometric services fee will total $725. DHS is introducing an additional fee option for those non-military naturalization applicants with family incomes greater than 150 percent and not more than 200 percent of the Federal Poverty Guidelines. Specifically, applicants will receive a 50 percent discount and only be required to pay a filing fee of $320 for the N–400, plus an additional $85 biometric services fee (for a total of $405). This reduced fee option is intended to limit any potential economic disincentives that some eligible naturalization applicants face when deciding whether or not to seek citizenship. The lower fee will help ensure that those who have worked hard to become eligible for naturalization are not limited by their economic means. In order to qualify for this fee, the eligible applicant will have to submit the newly created Form I–942, Request for Reduced Fee, along with their Form N–400. Form I–942 will require the names of everyone in the household and documentation of the household income to determine if the applicant's household income is greater than 150 and not more than 200 percent of the Federal Poverty Guidelines.

As described in the NPRM, DHS estimates that approximately 11 percent of all Form N–400 applicants, excluding military applicants, could qualify for the reduced fee. Given the non-military Form N–400 volume projection estimate of 821,500 annually, over the biennial period, DHS expects that 90,365 filers will be included in the population eligible for the fee reduction.[131] While these 90,365 filers represent only the current number of applicants who will be eligible for the fee reduction, DHS anticipates an increase in Form N–400 filings as a result of the changes in this final rule. DHS anticipates that the reduced fee for applicants with qualifying incomes will remove economic barriers associated with the costs of associated fees and thus encourage more eligible applicants to file their Form N–400 applications. While DHS anticipates an increase in Form N–400 filings due to this fee reduction, we cannot predict how many more eligible applicants will file their N–400 applications at this time.

DHS has factored the estimated revenue loss from this product line into its fee model, so those costs are reallocated over other fee paying benefit requests. While the costs of the reduced fee are being reallocated to other fee-paying customers, DHS believes the benefits of facilitating access to citizenship outweighs the cost reallocation impacts.

As previously mentioned, an eligible applicant will have to submit a Form I–942 along with a Form N–400 application to qualify for this reduced fee. While DHS is not imposing an additional fee for Form I–942, DHS has estimated the opportunity cost of time to applicants to complete the form. The total annual opportunity cost of time for applicants will be $717,724, if all 90,365 eligible applicants apply for the reduced fee.[132] The Federal minimum wage rate [133] of $7.25 was used as the hourly wage rate because the anticipated applicants are asserting they cannot afford to pay the full DHS fee and DHS thus assumes that such applicants earn less than average incomes. The BLS reports the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. Using these data from BLS, DHS calculated compensation-to-wage multiplier of 1.46 to estimate the full opportunity costs to applicants, including employee wages, salaries, and the full costs of benefits, such as paid leave, insurance, and retirement.[134] To anticipate the full opportunity cost of time to applicants, we multiplied the Federal minimum wage rate by 1.46 to account for the full cost of employee benefits for a total of $10.59. The time burden estimate was developed by DHS with an average of 45 minutes (or .75 of an hour) to complete Form I–942, resulting in an opportunity cost of time per petition of $7.94.[135] This additional burden is offset by the benefits received from the $320 fee reduction.

d. Refunds. DHS is also amending regulations for fee refunds in this final rule. In general, and except for a premium processing fee under 8 CFR 103.7(e)(2)(i), DHS does not refund a fee regardless of the decision on the immigration benefit request. DHS makes very rare exceptions when DHS determines that an administrative error occurred resulting in the inadvertent collection of a fee. DHS errors may include:

- *Unnecessary filings.* Cases in which DHS (or DOS in the case of an immigration benefit request filed overseas) erroneously requests that an individual file an unnecessary form along with the associated fee; and
- *Accidental Payments.* Cases in which an individual pays a required fee more than once or otherwise pays a fee in excess of the amount due and DHS (or the DOS in the case of an immigration benefit request filed overseas) erroneously accepts the erroneous fee.

DHS is codifying the process of continuing to provide these refunds in cases involving obvious DHS error. Individuals will continue to request a refund through the current established process, which requires calling the customer service line or submitting a written request for a refund to the office having jurisdiction over the relevant immigration benefit request.

Any DHS refunds provided are generally due to obvious DHS errors resulting from electronic system

[131] Calculation: 821,500 * 11 percent.

[132] Total Opportunity Costs of Time to Applicants = Expected Filers (90,365) * (Full Cost of Employee Benefits ($10.59) * Time Burden (.75 hr.)).

[133] U.S. Department of Labor, Wage and Hour Division. The minimum wage in effect as of July 13, 2016. *See http://www.dol.gov/general/topic/wages/minimumwage.*

[134] The compensation-to-wage multiplier is calculated as follows: (All Workers Total Employee Compensation per hour)/(Wages and Salaries per hour). *See* Economic News Release, U.S. Department of Labor, BLS, Table 1. Employer Costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (Sept. 2015), available at *http://www.bls.gov/news.release/pdf/ecec.pdf.*

[135] Calculation: $10.59 hourly wage rate * .75 hours.

behavior issues or human error. The anticipation of increased electronic filings in the future also spurs the need for this provision. Currently, DHS provides fee refunds to applicants as shown in Table 7. Over the past 3 fiscal years, DHS issued an annual average of 5,363 refunds, resulting in an average of $2.1 million refunded. This is approximately $396 per refund. These numbers and amounts of refunds do not include premium processing refunds regulated under 8 CFR 103.7(e)(2)(i). In the context of the total number of fees collected by DHS across all benefits, this average amount of refunds is still less than 1 percent of the total fees collected.

TABLE 7—AMOUNT AND NUMBER OF FEE REFUNDS PROVIDED BY USCIS

Fiscal year	Amount refunded	Number of refunds
2013	$2,674,290	7,405
2014	1,805,006	4,198
2015	1,890,638	4,485
Average	2,123,311	5,363

Source: Department of Homeland Security, U.S. Immigration and Customs Enforcement, Burlington Finance Center.

The changes in the final rule will benefit applicants who accidently submit payments twice. DHS anticipates this to be a bigger issue as more forms and associated fees begin to be collected through electronic means. Applicants will recoup any fees that were submitted erroneously due to electronic systems issues. DHS benefits by having clear regulatory authority concerning the relatively few cases in which refunds are provided.

There may be some administrative costs associated with the issuance of refunds. DHS may see a potential initial increase in requests for refunds due to the visibility of this rule; however, DHS does not anticipate a sustained increase as DHS is not anticipating any changes to the conditions for issuing refunds. There may also be a potential increase in the time burden costs for DHS adjudicators to process these potential initial increases in refund requests. DHS does not have cost estimates at this time indicating the number of hours required to process and issue these refunds. There may also be some opportunity costs of time to filers who submit refund requests; however, DHS anticipates this cost is offset by the benefit gained in receiving a refund.

F. Executive Order 13132 (Federalism)

This rulemaking 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. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this rulemaking does not have sufficient Federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

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

H. Family Assessment

DHS has determined that this rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, *Public Law 105–277,* 112 Stat. 2681 (1998). By increasing immigration benefit request fees, this action will impose a slightly higher financial burden on some families that petition for family members to join them in the United States. On the other hand, the rule will provide USCIS with the funds necessary to carry out adjudication and naturalization services and provide similar services for free to disadvantaged populations, including asylees, refugees, individuals with Temporary Protected Status, and victims of human trafficking. DHS has determined that the benefits of the action justify the financial impact that it will place on some families.

I. Paperwork Reduction Act—Comments on the Proposed Information Collection Changes

Under the Paperwork Reduction Act of 1995, all Departments are required to submit to OMB, for review and approval, any reporting and recordkeeping requirements inherent in a rule. *See* 44 U.S.C. 3507. This final rule requires changes to OMB control number 1615–0052, the Application for Naturalization, Form N–400, to collect information necessary to document the applicant's eligibility for the reduced fee proposed in this final rule at 8 CFR 103.7(b)(1)(i)(AAA)(*1*); OMB control number 1615–0061, Annual Certification of Regional Center, Form I–924A, and the Application for Regional Center Designation Under the Immigrant Investor Program, Form I–924, to add the instructions necessary to require the annual fee; and OMB control number 1615–NEW, Request for Reduced Fee, Form I–942, to document the applicant's eligibility for the reduced fee. DHS specifically requested public comments on the proposed changes to the forms and form instructions in the NPRM in accordance with 5 CFR 1320.11(a). OMB reviewed the request filed in connection with the NPRM and also filed comments in accordance with 5 CFR 1320.11(c). DHS summarized the comments received from the public and responded below:

1. Request for Reduced Fee, Form I–942

USCIS received some comments on the Request for Reduced Fee, Form I–942, which was part of the NPRM docket. USCIS proposed to require Form I–942 for an applicant to request the $320 reduced fee for the Application for Naturalization. The comments indicated that the Form I–942's sections related to preparer and interpreter certifications were unnecessarily lengthy, as was the section for signatures of additional family members. The comments stated that these sections make the form appear longer and more onerous than it needs to be. The commenters also recommended that the form be optional, similar to the optional Request for Fee Waiver, Form I–912.

USCIS designed the Request for Reduced Fee to be very similar to the Request for Fee Waiver. USCIS anticipates that preparers will benefit from having similar forms with similar formats. Additionally, USCIS does not believe that Form I–942 should be optional for reduced fee requests in the same way that Form I–912 is optional. With respect to Form I–912, USCIS recognizes that applicants may be able to address certain criteria, such as financial hardship, in a letter more

easily than through a form. However, the proposed sole basis for submitting a Request for Reduced Fee is the applicant's household income level. *See* 81 FR 26916. To qualify for the reduced fee, an applicant's household income must be greater than 150 and not more than 200 percent of the Federal Poverty Guidelines. *Id.* USCIS believes that such income information is more easily conveyed to the agency, and accessed by the agency, if it is presented in a uniform manner through a form, rather than through a letter. To provide additional flexibility to reduced fee applicants, USCIS has also decided to permit multiple family members living in the same household who are each submitting an Application for Naturalization, and who are each within the relevant income levels for the reduced fee, to jointly submit one Form I–942 with their naturalization applications.[136] USCIS determined that permitting multiple requests on one form would impose less of a burden overall than requiring multiple members of the same household to file separate reduced fee requests. As a result of these comments, DHS changed the form to permit multiple family members to file on Form I–942 with respect to multiple naturalization applications.

2. Annual Certification of Regional Center, Form I–924A

At least one commenter recommended standardizing the questions for Form I–924A and indicated that the form provides little to no value to USCIS. USCIS believes the revised form and instructions better explain the annual reporting process and requirements, and provide more useful information to USCIS, than the previous version of the form. In addition, USCIS believes the revised forms address the commenter's concerns by eliminating many redundant and lengthy questions and instructions. While the form contains new questions, it is intended to result in more comprehensive reviews and to require fewer and simpler follow-up inquiries from USCIS in response to annual I–924A filings. DHS made no changes to the draft form or the proposed rule as a result of these comments. The form and fee are finalized as proposed. New CFR 204.6(m).

[136] In such cases, each family member who is requesting a reduced fee for their Application for Naturalization must sign the Form I–942. Applicants must submit the Form I–942 in the same envelope as the naturalization applications for which they are requesting fee waivers.

List of Subjects

8 CFR Part 103

Administrative practice and procedures, Authority delegations (government agencies), Freedom of Information, Privacy, Reporting and recordkeeping requirements, and Surety bonds.

8 CFR Part 204

Administrative practice and procedure, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 205

Administrative practice and procedure, Immigration.

Accordingly, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

PART 103—IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552(a); 6 U.S.C. 112, 8 U.S.C. 1101, 1103, 1154, 1155, 1185, 1186a, 1186b, 1254a, 1304, 1324a, 1356; 31 U.S.C. 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557; 3 CFR, 1982 Comp., p. 166; 8 CFR part 2; Pub. L. 112–54.

■ 2. Section 103.2 is amended by:
■ a. Revising paragraph (a)(1);
■ b. Revising paragraph (a)(7); and
■ c. Revising paragraph (b)(9).

The revisions read as follows:

§ 103.2 Submission and adjudication of benefit requests.

(a) * * *

(1) *Preparation and submission.* Every form, benefit request, or other document must be submitted to DHS and executed in accordance with the form instructions regardless of a provision of 8 CFR chapter I to the contrary. The form's instructions are hereby incorporated into the regulations requiring its submission. Each form, benefit request, or other document must be filed with the fee(s) required by regulation. Filing fees generally are non-refundable and, except as otherwise provided in this chapter I, must be paid when the benefit request is filed.

* * * * *

(7) *Benefit requests submitted.* (i) USCIS will consider a benefit request received and will record the receipt date as of the actual date of receipt at the location designated for filing such benefit request whether electronically or in paper format.

(ii) A benefit request which is rejected will not retain a filing date. A benefit request will be rejected if it is not:

(A) Signed with valid signature;

(B) Executed;

(C) Filed in compliance with the regulations governing the filing of the specific application, petition, form, or request; and

(D) *Submitted with the correct fee(s).* If a check or other financial instrument used to pay a fee is returned as unpayable, USCIS will re-submit the payment to the remitter institution one time. If the instrument used to pay a fee is returned as unpayable a second time, the filing will be rejected and a charge will be imposed in accordance with 8 CFR 103.7(a)(2).

(iii) A rejection of a filing with USCIS may not be appealed.

(b) * * *

(9) *Appearance for interview or biometrics.* USCIS may require any applicant, petitioner, sponsor, beneficiary, or individual filing a benefit request, or any group or class of such persons submitting requests, to appear for an interview and/or biometric collection. USCIS may require the payment of the biometric services fee in 8 CFR 103.7(b)(1)(i)(C) or that the individual obtain a fee waiver. Such appearance and fee may also be required by law, regulation, form instructions, or **Federal Register** notice applicable to the request type. USCIS will notify the affected person of the date, time and location of any required appearance under this paragraph. Any person required to appear under this paragraph may, before the scheduled date and time of the appearance, either:

(i) Appear before the scheduled date and time;

(ii) For good cause, request that the biometric services appointment be rescheduled; or

(iii) Withdraw the benefit request.

* * * * *

■ 4. Section 103.7 is amended by revising paragraphs (a)(2) and (b)(1) to read as follows:

§ 103.7 Fees.

* * * * *

(a) * * *

(2) Remittances must be drawn on a bank or other institution located in the United States and be payable in United States currency. Remittances must be made payable in accordance with the guidance specific to the applicable U.S. Government office when submitting to a Department of Homeland Security office located outside of the United States. Remittances to the Board of Immigration Appeals must be made payable to the ''United States Department of Justice,'' in accordance with 8 CFR 1003.8. If a remittance in payment of a fee or any

other matter is not honored by the bank or financial institution on which it is drawn:

(i) A charge of $30.00 will be imposed;

(ii) The provisions of 8 CFR 103.2(a)(7)(ii) apply, no receipt will be issued, and if a receipt was issued, it is void and the benefit request loses its receipt date; and

(iii) If the benefit request was approved, the approval may be revoked upon notice. If the approved benefit request requires multiple fees, this provision will apply if any fee submitted is not honored. Other fees that were paid for a benefit request that is revoked under this provision will be retained and not refunded. A revocation of an approval because the fee submitted is not honored may be appealed to the USCIS Administrative Appeals Office, in accordance with 8 CFR 103.3 and the applicable form instructions.

(b) *Amounts of fees*—(1) *Established fees and charges*—(i) *USCIS fees.* A request for immigration benefits submitted to USCIS must include the required fee as established under this section. The fees established in this section are associated with the benefit, the adjudication, or the type of request and not solely determined by the form number listed below. The term ''form'' as defined in 8 CFR part 1, may include a USCIS-approved electronic equivalent of such form as USCIS may provide on its official Web site at *http://www.uscis.gov.*

(A) *Certification of true copies:* $2.00 per copy.

(B) *Attestation under seal:* $2.00 each.

(C) *Biometric services fee.* For capturing, storing, and using biometric information (Biometric Fee). A service fee of $85 will be charged to pay for background checks and have their biometric information captured, stored, and used for any individual who is required to submit biometric information for an application, petition, or other request for certain immigration and naturalization benefits (other than asylum or refugee status) or actions. USCIS will not charge a biometric services fee when:

(*1*) An applicant under 8 CFR 204.3 submits to USCIS a written request for an extension of the approval period of an Application for Advance Processing of an Orphan Petition (Application), if the request is submitted before the approval period expires and the applicant has not yet filed a Petition to Classify Orphan as an Immediate Relative (Petition) in connection with the approved Application. The applicant may submit only one extension request without having to pay an additional biometric services fee. If the extension of the approval expires before the applicant files an associated Petition, then the applicant must file either a new Application or a Petition, and pay a new filing fee and a new biometric services fee.

(*2*) The application or petition fee for the associated request has been waived under paragraph (c) of this section; or

(*3*) The associated benefit request is one of the following:

(*i*) Application for Posthumous Citizenship, Form N–644;

(*ii*) Refugee/Asylee Relative Petition, Form I–730;

(*iii*) Application for T Nonimmigrant Status, Form I–914;

(*iv*) Petition for U Nonimmigrant Status, Form I–918;

(*v*) Application for Naturalization, Form N–400, by an applicant who meets the requirements of sections 328 or 329 of the Act with respect to military service under paragraph (b)(1)(i)(WW) of this section;

(*vi*) Application to Register Permanent Residence or Adjust Status, Form I–485, from an asylee under paragraph (b)(1)(i)(U) of this section;

(*vii*) Application To Adjust Status under Section 245(i) of the Act, Supplement A to Form I–485, from an unmarried child less than 17 years of age, or when the applicant is the spouse, or the unmarried child less than 21 years of age of a legalized foreign national and who is qualified for and has applied for voluntary departure under the family unity program from an asylee under paragraph (b)(1)(i)(V) of this section; or

(*viii*) Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360, meeting the requirements of paragraphs (b)(1)(i)(T)(*1*), (*2*), (*3*) or (*4*) of this section.

(D) *USCIS Immigrant Fee.* For DHS domestic processing and issuance of required documents after an immigrant visa is issued by the U.S. Department of State: $220.

(E) *Request for a search of indices to historical records to be used in genealogical research,* Form G–1041: $65. The search request fee is not refundable.

(F) *Request for a copy of historical records to be used in genealogical research,* Form G–1041A: $65. USCIS will refund the records request fee only when it is unable to locate the file previously identified in response to the index search request.

(G) *Application to Replace Permanent Resident Card,* Form I–90. For filing an application for a Permanent Resident Card, Form I–551, to replace an obsolete card or to replace one lost, mutilated, or destroyed, or for a change in name: $455.

(H) *Application for Replacement/Initial Nonimmigrant Arrival-Departure Document,* Form I–102. For filing a petition for an application for Arrival/Departure Record Form I–94, or Crewman's Landing Permit Form I–95, to replace one lost, mutilated, or destroyed: $445.

(I) *Petition for a Nonimmigrant Worker,* Form I–129. For filing a petition for a nonimmigrant worker: $460.

(J) *Petition for Nonimmigrant Worker in CNMI,* Form I–129CW. For an employer to petition on behalf of one or more beneficiaries: $460 plus a supplemental CNMI education funding fee of $150 per beneficiary per year. The CNMI education funding fee cannot be waived.

(K) *Petition for Alien Fiancé(e),* Form I–129F. For filing a petition to classify a nonimmigrant as a fiancée or fiancé under section 214(d) of the Act: $535; there is no fee for a K–3 spouse as designated in 8 CFR 214.1(a)(2) who is the beneficiary of an immigrant petition filed by a United States citizen on a Petition for Alien Relative, Form I–130.

(L) *Petition for Alien Relative,* Form I–130. For filing a petition to classify status of a foreign national relative for issuance of an immigrant visa under section 204(a) of the Act: $535.

(M) *Application for Travel Document,* Form I–131. For filing an application for travel document:

(*1*) $135 for a Refugee Travel Document for an individual age 16 or older.

(*2*) $105 for a Refugee Travel Document for a child under the age of 16.

(*3*) $575 for advance parole and any other travel document.

(*4*) No fee if filed in conjunction with a pending or concurrently filed Form I–485 with fee that was filed on or after July 30, 2007.

(N) *Immigrant Petition for Alien Worker,* Form I–140. For filing a petition to classify preference status of an alien on the basis of profession or occupation under section 204(a) of the Act: $700.

(O) *Application for Advance Permission to Return to Unrelinquished Domicile,* Form I–191. For filing an application for discretionary relief under section 212(c) of the Act: $930.

(P) *Application for Advance Permission to Enter as a Nonimmigrant,* Form I–192. For filing an application for discretionary relief under section 212(d)(3) of the Act, except in an emergency case or where the approval of the application is in the interest of

the United States Government: $930. If filed with and processed by CBP: $585.

(Q) *Application for Waiver for Passport and/or Visa,* Form I–193. For filing an application for waiver of passport and/or visa: $585.

(R) *Application for Permission to Reapply for Admission into the United States After Deportation or Removal,* Form I–212. For filing an application for permission to reapply for an excluded, deported or removed alien, an alien who has fallen into distress, an alien who has been removed as an alien enemy, or an alien who has been removed at government expense instead of deportation: $930.

(S) *Notice of Appeal or Motion,* Form I–290B. For appealing a decision under the immigration laws in any type of proceeding over which the Board of Immigration Appeals does not have appellate jurisdiction: $675. The fee will be the same for appeal of a denial of a benefit request with one or multiple beneficiaries. There is no fee for an appeal or motion associated with a denial of a petition for a special immigrant visa filed by or on behalf of an individual seeking special immigrant visa or status as an Iraqi or Afghan national who was employed by or on behalf of the U.S. Government in Iraq or Afghanistan.

(T) *Petition for Amerasian, Widow(er), or Special Immigrant,* Form I–360. For filing a petition for an Amerasian, Widow(er), or Special Immigrant: $435. The following requests are exempt from this fee:

(*1*) A petition seeking classification as an Amerasian;

(*2*) A self-petition for immigrant status as a battered or abused spouse, parent, or child of a U.S. citizen or lawful permanent resident; or

(*3*) A petition for special immigrant juvenile status; or

(*4*) A petition seeking special immigrant visa or status an Iraqi or Afghan national who was employed by or on behalf of the U.S. Government in Iraq or Afghanistan.

(U) Application to Register Permanent Residence or Adjust Status, Form I–485. For filing an application for permanent resident status or creation of a record of lawful permanent residence:

(1) $1,140 for an applicant 14 years of age or older; or

(2) $750 for an applicant under the age of 14 years who submits the application concurrently with the Form I–485 of a parent.

(3) There is no fee if an applicant is filing as a refugee under section 209(a) of the Act.

(V) *Application to Adjust Status under Section 245(i) of the Act,* Supplement A to Form I–485. Supplement to Form I–485 for persons seeking to adjust status under the provisions of section 245(i) of the Act: $1,000. There is no fee when the applicant is an unmarried child less than 17 years of age, when the applicant is the spouse, or the unmarried child less than 21 years of age of an individual with lawful immigration status and who is qualified for and has applied for voluntary departure under the family unity program.

(W) *Immigrant Petition by Alien Entrepreneur,* Form I–526. For filing a petition for an alien entrepreneur: $3,675.

(X) *Application To Extend/Change Nonimmigrant Status,* Form I–539. For filing an application to extend or change nonimmigrant status: $370.

(Y) *Petition to Classify Orphan as an Immediate Relative,* Form I–600. For filing a petition to classify an orphan as an immediate relative for issuance of an immigrant visa under section 204(a) of the Act. Only one fee is required when more than one petition is submitted by the same petitioner on behalf of orphans who are brothers or sisters: $775.

(Z) *Application for Advance Processing of Orphan Petition,* Form I–600A. For filing an application for advance processing of orphan petition. (When more than one petition is submitted by the same petitioner on behalf of orphans who are brothers or sisters, only one fee will be required.): $775. No fee is charged if Form I–600 has not yet been submitted in connection with an approved Form I–600A subject to the following conditions:

(*1*) The applicant requests an extension of the approval in writing and the request is received by USCIS before the expiration date of approval; and

(*2*) The applicant's home study is updated and USCIS determines that proper care will be provided to an adopted orphan.

(*3*) A no fee extension is limited to one occasion. If the Form I–600A approval extension expires before submission of an associated Form I–600, then a complete application and fee must be submitted for any subsequent application.

(AA) *Application for Waiver of Ground of Inadmissibility,* Form I–601. For filing an application for waiver of grounds of inadmissibility: $930.

(BB) *Application for Provisional Unlawful Presence Waiver,* Form I–601A. For filing an application for provisional unlawful presence waiver: $630.

(CC) *Application for Waiver of the Foreign Residence Requirement (under Section 212(e) of the Immigration and Nationality Act, as Amended),* Form I–612. For filing an application for waiver of the foreign-residence requirement under section 212(e) of the Act: $930.

(DD) *Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act,* Form I–687. For filing an application for status as a temporary resident under section 245A(a) of the Act: $1,130.

(EE) *Application for Waiver of Grounds of Inadmissibility under Sections 245A or 210 of the Immigration and Nationality Act,* Form I–690. For filing an application for waiver of a ground of inadmissibility under section 212(a) of the Act as amended, in conjunction with the application under sections 210 or 245A of the Act, or a petition under section 210A of the Act: $715.

(FF) *Notice of Appeal of Decision under Sections 245A or 210 of the Immigration and Nationality Act* (or a petition under section 210A of the Act), Form I–694. For appealing the denial of an application under sections 210 or 245A of the Act, or a petition under section 210A of the Act: $890.

(GG) *Application to Adjust Status from Temporary to Permanent Resident* (Under Section 245A of Pub. L. 99–603), Form I–698. For filing an application to adjust status from temporary to permanent resident (under section 245A of Pub. L. 99–603): $1,670. The adjustment date is the date of filing of the application for permanent residence or the applicant's eligibility date, whichever is later.

(HH) *Petition to Remove Conditions on Residence,* Form I–751. For filing a petition to remove the conditions on residence based on marriage: $595.

(II) *Application for Employment Authorization,* Form I–765. $410. No fee if filed in conjunction with a pending or concurrently filed Form I–485 with fee that was filed on or after July 30, 2007.

(JJ) *Petition to Classify Convention Adoptee as an Immediate Relative,* Form I–800.

(*1*) There is no fee for the first Form I–800 filed for a child on the basis of an approved Application for Determination of Suitability to Adopt a Child from a Convention Country, Form I–800A, during the approval period.

(*2*) If more than one Form I–800 is filed during the approval period for different children, the fee is $775 for the second and each subsequent petition submitted.

(*3*) If the children are already siblings before the proposed adoption, however, only one filing fee of $775 is required,

regardless of the sequence of submission of the immigration benefit.

(KK) *Application for Determination of Suitability to Adopt a Child from a Convention Country,* Form I–800A. For filing an application for determination of suitability to adopt a child from a convention country: $775.

(LL) *Request for Action on Approved Application for Determination of Suitability to Adopt a Child from a Convention Country,* Form I–800A, Supplement 3. This filing fee is not charged if Form I–800 has not been filed based on the approval of the Form I–800A, and Form I–800A Supplement 3 is filed in order to obtain a first extension of the approval of the Form I–800A: $385.

(MM) *Application for Family Unity Benefits,* Form I–817. For filing an application for voluntary departure under the Family Unity Program: $600.

(NN) *Application for Temporary Protected Status,* Form I–821. For first time applicants: $50. There is no fee for re-registration.

(OO) *Application for Action on an Approved Application or Petition,* Form I–824. For filing for action on an approved application or petition: $465.

(PP) *Petition by Entrepreneur to Remove Conditions,* Form I–829. For filing a petition by entrepreneur to remove conditions: $3,750.

(QQ) *Application for Suspension of Deportation or Special Rule Cancellation of Removal* (Pursuant to Section 203 of Pub. L. 105–100), Form I–881:

(*1*) $285 for adjudication by DHS, except that the maximum amount payable by family members (related as husband, wife, unmarried child under 21, unmarried son, or unmarried daughter) who submit applications at the same time will be $570.

(*2*) $165 for adjudication by the Immigration Court (a single fee of $165 will be charged whenever applications are filed by two or more foreign nationals in the same proceedings).

(*3*) The $165 fee is not required if the Form I–881 is referred to the Immigration Court by DHS.

(RR) *Application for Authorization to Issue Certification for Health Care Workers,* Form I–905: $230.

(SS) *Request for Premium Processing Service,* Form I–907. $1,225. The Request for Premium Processing Service fee:

(*1*) Must be paid in addition to, and in a separate remittance from, other filing fees.

(*2*) May be adjusted annually by notice in the **Federal Register** based on inflation according to the Consumer Price Index (CPI).

(*3*) May not be waived.

(TT) *Application for Civil Surgeon Designation,* Form I–910. For filing an application for civil surgeon designation: $785. There is no fee for an application from a medical officer in the U.S. Armed Forces or civilian physician employed by the U.S. Government who examines members and veterans of the Armed Forces and their dependents at a military, Department of Veterans Affairs, or U.S. Government facility in the United States.

(UU) *Application for T Nonimmigrant Status,* Form I–914. No fee.

(VV) *Application for U Nonimmigrant Status,* Form I–918. No fee.

(WW) *Application for Regional Center Designation under the Immigrant Investor Program,* Form I–924. For filing an application for regional center designation under the Immigrant Investor Program: $17,795.

(XX) *Annual Certification of Regional Center,* Form I–924A. To provide updated information and certify that an Immigrant Investor Regional Center has maintained their eligibility: $3,035.

(YY) *Petition for Qualifying Family Member of a U–1 Nonimmigrant,* Form I–929. For U–1 principal applicant to submit for each qualifying family member who plans to seek an immigrant visa or adjustment of U status: $230.

(ZZ) *Application to File Declaration of Intention,* Form N–300. For filing an application for declaration of intention to become a U.S. citizen: $270.

(AAA) *Request for a Hearing on a Decision in Naturalization Proceedings (Under section 336 of the Act),* Form N–336. For filing a request for hearing on a decision in naturalization proceedings under section 336 of the Act: $700. There is no fee if filed on or after October 1, 2004, by an applicant who has filed an Application for Naturalization under sections 328 or 329 of the Act with respect to military service and whose application has been denied.

(BBB) *Application for Naturalization,* Form N–400. For filing an application for naturalization: $640. Except:

(*1*) The fee for an applicant whose documented income is greater than 150 percent and not more than 200 percent of the Federal poverty level is $320.

(*2*) No fee is charged an applicant who meets the requirements of sections 328 or 329 of the Act with respect to military service.

(CCC) *Application to Preserve Residence for Naturalization Purposes,* Form N–470. For filing an application for benefits under section 316(b) or 317 of the Act: $355.

(DDD) *Application for Replacement Naturalization/Citizenship Document,* Form N–565. For filing an application for a certificate of naturalization or declaration of intention in place of a certificate or declaration alleged to have been lost, mutilated, or destroyed; for a certificate of citizenship in a changed name under section 343(c) of the Act; or for a special certificate of naturalization to obtain recognition as a citizen of the United States by a foreign state under section 343(b) of the Act: $555. There is no fee when this application is submitted under 8 CFR 338.5(a) or 343a.1 to request correction of a certificate that contains an error.

(EEE) *Application for Certificate of Citizenship,* Form N–600. For filing an application for a certificate of citizenship under section 309(c) or section 341 of the Act: $1,170. There is no fee for any application filed by a member or veteran of any branch of the United States Armed Forces.

(FFF) *Application for Citizenship and Issuance of Certificate under section 322 of the Act,* Form N–600K. For filing an application for citizenship and issuance of certificate under section 322 of the Act: $1,170.

(GGG) *American Competitiveness and Workforce Improvement Act (ACWIA) fee.* For filing certain H–1B petitions as described in 8 CFR 214.2(h)(19) and USCIS form instructions: $1,500 or $750.

(HHH) *Fraud detection and prevention fee.* For filing certain H–1B and L petitions, and $150 for H–2B petitions as described in 8 CFR 214.2(h)(19): $500.

(III) *9–11 Response and Biometric Entry-Exit Fee for H–1B Visa.* For certain petitioners who employ 50 or more employees in the United States if more than 50 percent of the petitioner's employees are in H–1B, L–1A or L–1B nonimmigrant status: $4,000. Collection of this fee is scheduled to end on September 30, 2025.

(JJJ) *9–11 Response and Biometric Entry-Exit Fee for L–1 Visa.* For certain petitioners who employ 50 or more employees in the United States, if more than 50 percent of the petitioner's employees are in H–1B, L–1A or L–1B nonimmigrant status: $4,500. Collection of this fee is scheduled to end on September 30, 2025.

* * * * *

■ 5. Section 103.16 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 103.16 Collection, use and storage of biometric information.

(a) *Use of biometric information.* An individual may be required to submit biometric information by law, regulation, **Federal Register** notice or

the form instructions applicable to the request type or if required in accordance with 8 CFR 103.2(b)(9). * * *

* * * * *

■ 6. Section 103.17 is amended by revising paragraph (b) to read as follows:

§ 103.17 Biometric services fee.

* * * * *

(b) *Non-payment.* If a benefit request is received by DHS without the correct biometric services fee as provided in the form instructions, DHS will reject the benefit request.

PART 204—IMMIGRANT PETITIONS

■ 7. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1184, 1186a, 1255, 1641; 8 CFR part 2.

■ 8. Section 204.6 is amended by revising paragraph (m)(6) to read as follows:

§ 204.6 Petitions for employment creation aliens.

* * * * *

(m) * * *

(6) *Continued participation requirements for regional centers.* (i) Regional centers approved for participation in the program must:

(A) Continue to meet the requirements of section 610(a) of the Appropriations Act.

(B) Provide USCIS with updated information annually, and/or as otherwise requested by USCIS, to demonstrate that the regional center is continuing to promote economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment in the approved geographic area, using a form designated for this purpose; and

(C) Pay the fee provided by 8 CFR 103.7(b)(1)(i)(XX).

(ii) USCIS will issue a notice of intent to terminate the designation of a regional center in the program if:

(A) A regional center fails to submit the information required in paragraph (m)(6)(i)(B) of this section, or pay the associated fee; or

(B) USCIS determines that the regional center no longer serves the purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

(iii) A notice of intent to terminate the designation of a regional center will be sent to the regional center and set forth the reasons for termination.

(iv) The regional center will be provided 30 days from receipt of the notice of intent to terminate to rebut the ground or grounds stated in the notice of intent to terminate.

(v) USCIS will notify the regional center of the final decision. If USCIS determines that the regional center's participation in the program should be terminated, USCIS will state the reasons for termination. The regional center may appeal the final termination decision in accordance with 8 CFR 103.3.

(vi) A regional center may elect to withdraw from the program and request a termination of the regional center designation. The regional center must notify USCIS of such election in the form of a letter or as otherwise requested by USCIS. USCIS will notify the regional center of its decision regarding the withdrawal request in writing.

* * * * *

PART 205—REVOCATION OF APPROVAL OF PETITIONS

■ 9. The authority citation for part 205 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1155, 1182, and 1186a.

■ 10. Section 205.1 is amended by removing and reserving paragraph (a)(2).

§ 205.1 Automatic revocation.

(a) * * *

(2) [Reserved]

* * * * *

Jeh Charles Johnson,

Secretary.

[FR Doc. 2016–25328 Filed 10–21–16; 8:45 am]

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