AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

FEDERAL REGISTER

Vol. 81 Tuesday,
No. 211 November 1, 2016

Pages 75671–76270

OFFICE OF THE FEDERAL REGISTER

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

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

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

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

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

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

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

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

How To Cite This Publication: Use the volume number and the page number. Example: 81 FR 12345.

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

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**
Single copies/back copies:	
Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

Printed on recycled paper.

Contents

Federal Register

Vol. 81, No. 211

Tuesday, November 1, 2016

Separate Parts In This Issue

Reader Aids

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

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

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

Rules and Regulations

Federal Register

Vol. 81, No. 211

Tuesday, November 1, 2016

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210, 220, and 226

[FNS–2011–0029]

RIN 0584–AE18

Child and Adult Care Food Program: Meal Pattern Revisions Related to the Healthy, Hunger-Free Kids Act of 2010; Corrections

AGENCY: Food and Nutrition Service, USDA.

ACTION: Correcting amendments.

SUMMARY: This document contains technical corrections to the final rule published in the **Federal Register** on April 25, 2016, ''Child and Adult Care Food Program: Meal Pattern Revisions Related to the Healthy, Hunger-Free Kids Act of 2010.''

DATES: This document is effective November 1, 2016. Compliance with the provisions of this rule must begin October 1, 2017 except as otherwise noted in the final rule.

FOR FURTHER INFORMATION CONTACT: Andrea Farmer or Laura Carroll, Policy and Program Development Division, Child Nutrition Programs, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 1206, Alexandria, Virginia 22302–1594; 703–305–2590.

SUPPLEMENTARY INFORMATION: The Food and Nutrition Service (FNS) published a final rule in the **Federal Register**, 81 FR 24348, on April 25, 2016, to update the meal pattern requirements for the Child and Adult Care Food Program and extended several of the changes to the National School Lunch Program, School Breakfast Program, and Special Milk Program. The final rule included typographical errors in 7 CFR 210.10(a)(1)(i), 220.8(a)(1), 220.8(o)(1), and 220.8(p)(1), the incorrect information for the serving size of yogurt in the infant meal pattern that appears in 7 CFR 210.10(q)(2), 220.8(p)(2), 226.20(b)(4)(ii)(A) and 226.20(b)(5), and a technical error for offer versus serve in 7 CFR 226.20(o). In addition, FNS is correcting the breakfast cereal sugar limit. The final rule provided a sugar limit of no more than 6 grams of sugar per dry ounce (no more than 21 grams sucrose and other sugars per 100 grams of dry cereal). The intent of that limit was to be consistent with the Special Supplemental Nutrition Program for Woman, Infants, and Children (WIC). However, due to rounding, the breakfast cereal sugar limit in the final rule that appears in 7 CFR 210.10(o)(3)(ii), 210.10(o)(4)(ii), 210.10(p)(2), 220.8(o)(2), 226.20(a)(4)(ii), 226.20(b)(5), and 226.20(c)(1) through 226.20(c)(3) is inconsistent with WIC's breakfast cereal sugar limit of no more 21.2 grams of sucrose and other sugars per 100 grams of dry cereal. This correction amends the breakfast cereal sugar limit to align with WIC's breakfast cereal sugar limit and corrects the other errors described above. Note that the Special Milk Program regulations at 7 CFR part 215 were amended in the final rule, but no technical corrections are necessary in this amendment.

List of Subjects

7 CFR Part 210

Children, Commodity School Program, Food assistance programs, Grants programs—social programs, National School Lunch Program, Nutrition, Reporting and recordkeeping requirements, Surplus agricultural commodities.

7 CFR Part 220

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Reporting and recordkeeping requirements, School breakfast and lunch programs.

7 CFR Part 226

Accounting, Aged, American Indians, Day care, Food assistance programs, Grant programs, Grant programs—health, Individuals with disabilities, Infants and children, Intergovernmental relations, Loan programs, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR parts 210, 220, and 226 are corrected by making the following correcting amendments:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 42 U.S.C. 1751–1760, 1779.

■ 2. In § 210.10:

■ a. Revise the fourth sentence in paragraph (a)(1)(i);

■ b. Revise the table in paragraph (o)(3)(ii);

■ c. Revise the table in paragraph (o)(4)(ii);

■ d. Revise the table in paragraph (p)(2); and

■ e. Revise the table in paragraph (q)(2).

The revisions read as follows:

§ 210.10 Meal requirements for lunches and requirements for afterschool snacks.

(a) * * *

(1) * * *

(i) * * * Schools offering lunches to children ages 1 through 4 and infants must meet the meal pattern requirements in paragraphs (p) and (q), as applicable, of this section. * * *

* * * * *

(o) * * *

(3) * * *

(ii) * * *

PRESCHOOL SNACK MEAL PATTERN

	Ages 1-2	Ages 3-5
Food Components and Food Items[1]	Minimum Quantities	
Fluid milk[2]	4 fluid ounces	4 fluid ounces
Meats/meat alternates Edible portion as served		
Lean meat, poultry, or fish	½ ounce	½ ounce
Tofu, soy products, or alternate protein products[4]	½ ounce	½ ounce
Cheese	½ ounce	½ ounce
Large egg	½	½
Cooked dry beans or peas	⅛ cup	⅛ cup
Peanut butter or soy nut butter or other nut or seed butters	1 Tbsp	1 Tbsp
Yogurt, plain or flavored unsweetened or sweetened[5]	2 ounces or ¼ cup	2 ounces or ¼ cup
Peanuts, soy nuts, tree nuts, or seeds	½ ounce	½ ounce
Vegetables[3]	½ cup	½ cup
Fruits[3]	½ cup	½ cup
Grains (oz eq)[6,7]		
Whole grain-rich or enriched bread	½ slice	½ slice
Whole grain-rich or enriched bread product, such as biscuit, roll, muffin	½ serving	½ serving
Whole grain-rich, enriched or fortified cooked breakfast cereal[8], cereal grain, and/or pasta	¼ cup	¼ cup
Whole grain-rich, enriched or fortified ready-to-eat breakfast cereal (dry, cold)[8,9]		
Flakes or rounds	½ cup	½ cup
Puffed cereal	¾ cup	¾ cup
Granola	⅛ cup	⅛ cup

[1] Select two of the five components for a reimbursable snack. Only one of the two components may be a beverage.

[2] Must be unflavored whole milk for children age one. Must be unflavored low-fat (1 percent) or unflavored fat-free (skim) milk for children two through five years old.

[3] Pasteurized full-strength juice may only be used to meet the vegetable or fruit requirement at one meal, including snack, per day.

[4] Alternate protein products must meet the requirements in appendix A to part 226 of this chapter.

[5] Yogurt must contain no more than 23 grams of total sugars per 6 ounces.

[6] At least one serving per day, across all eating occasions, must be whole grain-rich. Grain-based desserts do not count towards meeting the grains requirement.

[7] Beginning October 1, 2019, ounce equivalents are used to determine the quantity of creditable grains.

[8] Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

[9] Beginning October 1, 2019, the minimum serving sizes specified in this section for ready-to-eat breakfast cereals must be served. Until October 1, 2019, the minimum serving size for any type of ready-to-eat breakfast cereals is ¼ cup for children ages 1-2, and 1/3 cup for children ages 3-5.

(4) * * *

(ii) * * *

INFANT SNACK MEAL PATTERN

Infants	Birth through 5 months	6 through 11 months
Snack	4-6 fluid ounces breastmilk[1] or formula[2]	2-4 fluid ounces breastmilk[1] or formula[2]; and 0-½ slice bread[3,4]; or 0-2 cracker[3,4]; or 0-4 tablespoons infant cereal[2,3,4] or ready-to-eat breakfast cereal[3,4,5,6]; and 0-2 tablespoons vegetable or fruit, or a combination of both[6,7]

[1] Breastmilk or formula, or portions of both, must be served; however, it is recommended that breastmilk be served in place of formula from birth through 11 months. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered, with additional breastmilk offered at a later time if the infant will consume more.

[2] Infant formula and dry infant cereal must be iron-fortified.

[3] A serving of grains must be whole grain-rich, enriched meal, or enriched flour

[4] Beginning October 1, 2019, ounce equivalents are used to determine the quantity of creditable grains.

[5] Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

[6] A serving of this component is required when the infant is developmentally ready to accept it.

[7] Fruit and vegetable juices must not be served.

(p) * * *

(2) * * *

(q) * * *

(2) * * *

PRESCHOOL LUNCH MEAL PATTERN

	Ages 1-2	Ages 3-5
Food Components and Food Items[1]	Minimum Quantities	
Fluid milk[2]	4 fluid ounces	6 fluid ounces
Meat/meat alternates Edible portion as served:		
Lean meat, poultry, or fish	1 ounce	1½ ounces
Tofu, soy products, or alternate protein products[3]	1 ounce	1½ ounces
Cheese	1 ounce	1½ ounces
Large egg	½	¾
Cooked dry beans or peas	¼ cup	⅜ cup
Peanut butter or soy nut butter or other nut or seed butters	2 Tbsp	3 Tbsp
Yogurt, plain or flavored unsweetened or sweetened[4]	4 ounces or ½ cup	6 ounces or ¾ cup
The following may be used to meet no more than 50 percent of the requirement: Peanuts, soy nuts, tree nuts, or seeds, as listed in program guidance, or an equivalent quantity of any combination of the above meat/meat alternates (1 ounce of nuts/seeds = 1 ounce of cooked lean meat, poultry or fish)	½ ounce = 50%	¾ ounce = 50%
Vegetables[5]	⅛ cup	¼ cup
Fruits[5,6]	⅛ cup	¼ cup
Grains (oz eq)[7,8]		
Whole grain-rich or enriched bread	½ slice	½ slice
Whole grain-rich or enriched bread product, such as biscuit, roll, muffin	½ serving	½ serving
Whole grain-rich, enriched or fortified cooked breakfast cereal[9], cereal grain, and/or pasta	¼ cup	¼ cup

[1] Must serve all five components for a reimbursable meal.

[2] Must be unflavored whole milk for children age one. Must be unflavored low-fat (1 percent) or unflavored fat-free (skim) milk for children two through five years old.

[3] Alternate protein products must meet the requirements in appendix A to part 226 of this chapter.

[4] Yogurt must contain no more than 23 grams of total sugars per 6 ounces.

[5] Pasteurized full-strength juice may only be used to meet the vegetable or fruit requirement at one meal, including snack, per day.

[6] A vegetable may be used to meet the entire fruit requirement. When two vegetables are served at lunch or supper, two different kinds of vegetables must be served.

[7] At least one serving per day, across all eating occasions, must be whole grain-rich. Grain-based desserts do not count towards the grains requirement.

[8] Beginning October 1, 2019, ounce equivalents are used to determine the quantity of the creditable grain.

[9] Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

INFANT LUNCH MEAL PATTERN

Infants	Birth through 5 months	6 through 11 months
Lunch	4-6 fluid ounces breastmilk[1] or formula[2]	6-8 fluid ounces breastmilk[1] or formula[2]; and 0-4 tablespoons infant cereal[2,3] meat, fish, poultry, whole egg, cooked dry beans, or cooked dry peas; or 0-2 ounces of cheese; or 0-4 ounces (volume) of cottage cheese; or, 0-4 ounces or ½ cup of yogurt[4]; or a combination of the above[5]; and 0-2 tablespoons vegetable or fruit, or a combination of both[5,6]

[1] Breastmilk or formula, or portions of both, must be served; however, it is recommended that breastmilk be served in place of formula from birth through 11 months. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered, with additional breastmilk offered at a later time if the infant will consume more.

[2] Infant formula and dry infant cereal must be iron-fortified.

[3] Beginning October 1, 2019, ounce equivalents are used to determine the quantity of creditable grains.

[4] Yogurt must contain no more than 23 grams of total sugars per 6 ounces.

[5] A serving of this component is required when the infant is developmentally ready to accept it.

[6] Fruit and vegetable juices must not be served.

PART 220—SCHOOL BREAKFAST PROGRAM

■ 3. The authority citation for part 220 continues to read as follows:

Authority: 42 U.S.C. 1773, 1779, unless otherwise noted.

■ 4. In § 220.8:

■ a. Revise the fourth sentence in paragraph (a)(1).

■ b. Revise paragraph (o)(1);

■ c. Revise the table in paragraph (o)(2);

■ d. Revise paragraph (p)(1); and

■ e. Revise the table in paragraph (p)(2).

The revisions read as follows:

§ 220.8 Meal requirements for breakfasts.

(a) * * *

(1) * * * Schools offering breakfasts to children ages 1 to 4 and infants must meet the meal pattern requirements in paragraphs (o) and (p), as applicable, of this section. * * *

* * * * *

(o) * * *

(1) *Breakfasts served to preschoolers.* Schools serving breakfast to children ages 1 through 4 under the School Breakfast Program must serve the meal components and quantities required in the breakfast meal pattern established for the Child and Adult Care Food Program under § 226.20(a), (c)(1), and (d) of this chapter. In addition, schools serving breakfasts to this age group must comply with the requirements set forth in paragraphs (a), (c)(3), (g), (k), (l), and (m) of this section as applicable.

(2) * * *

PRESCHOOL BREAKFAST MEAL PATTERN

	Ages 1-2	Ages 3-5
Food Components and Food Items[1]	Minimum Quantities	
Fluid milk[2]	4 fluid ounces	6 fluid ounces
Vegetables, fruits, or portions of both[3]	¼ cup	½ cup
Grains (oz eq)[4,5,6]		
Whole grain-rich or enriched bread	½ slice	½ slice
Whole grain-rich or enriched bread product, such as biscuit, roll, muffin	½ serving	½ serving
Whole grain-rich, enriched or fortified cooked breakfast cereal[7], cereal grain, and/or pasta	¼ cup	¼ cup
Whole grain-rich, enriched or fortified ready-to-eat breakfast cereal (dry, cold)[7,8]		
Flakes or rounds	½ cup	½ cup
Puffed cereal	¾ cup	¾ cup
Granola	⅛ cup	⅛ cup

[1] Must serve all three components for a reimbursable meal.

[2] Must be unflavored whole milk for children age one. Must be unflavored low-fat (1 percent) or unflavored fat-free (skim) milk for children two through five years old.

[3] Pasteurized full-strength juice may only be used to meet the vegetable or fruit requirement at one meal, including snack, per day.

[4] At least one serving per day, across all eating occasions, must be whole grain-rich. Grain-based desserts do not count towards meeting the grains requirement.

[5] Meat and meat alternates may be used to meet the entire grains requirement a maximum of three times a week. One ounce of meat and meat alternates is equal to one ounce equivalent of grains.

[6] Beginning October 1, 2019, ounce equivalents are used to determine the quantity of creditable grains.

[7] Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

[8] Beginning October 1, 2019, the minimum serving size specified in this section for ready-to-eat breakfast cereals must be served. Until October 1, 2019, the minimum serving size for any type of ready-to-eat breakfast cereals is ¼ cup for children ages 1-2, and 1/3 cup for children ages 3-5.

(p) * * *

(1) *Breakfasts served to infants.* Schools serving breakfasts to infants ages birth through 11 months under the School Breakfast Program must serve the food components and quantities required in the breakfast meal pattern established for the Child and Adult Care Food Program, under § 226.20(a), (b), and (d) of this chapter. In addition, schools serving breakfasts to infants must comply with the requirements set forth in paragraphs (a), (c)(3), (g), (k), (l), and (m) of this section as applicable.

(2) * * *

INFANT BREAKFAST MEAL PATTERN

Infants	Birth through 5 months	6 through 11 months
Breakfast	4-6 fluid ounces breastmilk[1] or formula[2]	6-8 fluid ounces breastmilk[1] or formula[2]; and 0-4 tablespoons infant cereal[2,3] meat, fish, poultry, whole egg, cooked dry beans, or cooked dry peas; or 0-2 ounces of cheese; or 0-4 ounces (volume) of cottage cheese; or, 0-4 ounces or ½ cup of yogurt[4]; or a combination of the above[5]; and 0-2 tablespoons vegetable or fruit, or a combination of both[5,6]

[1] Breastmilk or formula, or portions of both, must be served; however, it is recommended that breastmilk be served in place of formula from birth through 11 months. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered, with additional breastmilk offered at a later time if the infant will consume more.

[2] Infant formula and dry infant cereal must be iron-fortified.

[3] Beginning October 1, 2019, ounce equivalents are used to determine the quantity of creditable grains.

[4] Yogurt must contain no more than 23 grams of total sugars per 6 ounces.

[5] A serving of this component is required when the infant is developmentally ready to accept it.

[6] Fruit and vegetable juices must not be served.

PART 226—CHILD AND ADULT CARE FOOD PROGRAM

■ 5. The authority citation for part 226 continues to read as follows:

Authority: Secs. 9, 11, 14, 16, and 17, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766).

■ 6. In § 226.20:

■ a. Revise the second sentence in paragraph (a)(4)(ii);

■ b. Amend the first sentence in paragraph (b)(4)(ii)(A) by removing the words ''0 to 8 ounces'' and adding in their place the words ''0 to 4 ounces'';

■ c. Revise the table in paragraph (b)(5);

■ d. Revise the table in paragraph (c)(1);

■ e. Revise the table in paragraph (c)(2);

■ f. Revise the table in paragraph (c)(3); and

■ g. Revise paragraph (o).

The revisions read as follows:

§ 226.20 Requirements for meals.

(a) * * *

(4) * * *

(ii) * * * Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

* * * * *

(b) * * *

(5) * * *

INFANT MEAL PATTERNS

Infants	Birth through 5 months	6 through 11 months
Breakfast, Lunch, or Supper	4-6 fluid ounces breastmilk[1] or formula[2]	6-8 fluid ounces breastmilk[1] or formula[2]; and 0-4 tablespoons infant cereal[2,3] meat, fish, poultry, whole egg, cooked dry beans, or cooked dry peas; or 0-2 ounces of cheese; or 0-4 ounces (volume) of cottage cheese; or, 0-4 ounces or ½ cup of yogurt[4]; or a combination of the above[5]; and 0-2 tablespoons vegetable or fruit, or a combination of both[5,6]
Snack	4-6 fluid ounces breastmilk[1] or formula[2]	2-4 fluid ounces breastmilk[1] or formula[2]; and 0-½ slice bread[3,7]; or 0-2 cracker[3,7]; or 0-4 tablespoons infant cereal[2,3,7] or ready-to-eat breakfast cereal[3,5,7,8]; and 0-2 tablespoons vegetable or fruit, or a combination of both[5,6]

[1] Breastmilk or formula, or portions of both, must be served; however, it is recommended that breastmilk be served in place of formula from birth through 11 months. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered, with additional breastmilk offered at a later time if the infant will consume more.

[2] Infant formula and dry infant cereal must be iron-fortified.

[3] Beginning October 1, 2019, ounce equivalents are used to determine the quantity of creditable grains.

[4] Yogurt must contain no more than 23 grams of total sugars per 6 ounces.

[5] A serving of this component is required when the infant is developmentally ready to accept it.

[6] Fruit and vegetable juices must not be served.

[7] A serving of grains must be whole-grain rich, enriched meal, or enriched flour.

[8] Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

(c) * * *

(1) * * *

BREAKFAST MEAL PATTERN FOR CHILDREN AND ADULTS

	Ages 1-2	Ages 3-5	Ages 6-12	Ages 13-18[1] (at-risk afterschool programs and emergency shelters)	Adult
Food Components and Food Items[2]	Minimum Quantities				
Fluid milk[3]	4 fl oz	6 fl oz	8 fl oz	8 fl oz	8 fl oz
Vegetables, fruits, or portions of both[4]	¼ cup	½ cup	½ cup	½ cup	½ cup
Grains (oz eq)[5,6,7]					
Whole grain-rich or enriched bread	½ slice	½ slice	1 slice	1 slice	2 slices
Whole grain-rich or enriched bread product, such as biscuit, roll, muffin	½ serving	½ serving	1 serving	1 serving	2 servings
Whole grain-rich, enriched or fortified cooked breakfast cereal[8], cereal grain, and/or pasta	¼ cup	¼ cup	½ cup	½ cup	1 cup
Whole grain-rich, enriched or fortified ready-to-eat breakfast cereal (dry, cold)[8,9]					
Flakes or rounds	½ cup	½ cup	1 cup	1 cup	2 cups
Puffed cereal	¾ cup	¾ cup	1 ¼ cups	1 ¼ cups	2 ½ cups
Granola	⅛ cup	⅛ cup	¼ cup	¼ cup	½ cup

[1] Larger portion sizes than specified may need to be served to children 13 through 18 years old to meet their nutritional needs.

[2] Must serve all three components for a reimbursable meal. Offer versus serve is an option for only adult and at-risk afterschool participants.

[3] Must be unflavored whole milk for children age one. Must be unflavored low-fat (1 percent) or unflavored fat-free (skim) milk for children two through five years old. Must be unflavored low-fat (1 percent), unflavored fat-free (skim), or flavored fat-free (skim) milk for children six years old and older and adults. For adult participants, 6 ounces (weight) or ¾ cup (volume) of yogurt may be used to meet the equivalent of 8 ounces of fluid milk once per day when yogurt is not served as a meat alternate in the same meal.

[4] Pasteurized full-strength juice may only be used to meet the vegetable or fruit requirement at one meal, including snack, per day.

[5] At least one serving per day, across all eating occasions, must be whole grain-rich. Grain-based desserts do not count towards meeting the grains requirement.

[6] Meat and meat alternates may be used to meet the entire grains requirement a maximum of three times a week. One ounce of meat and meat alternates is equal to one ounce equivalent of grains.

[7] Beginning October 1, 2019, ounce equivalents are used to determine the quantity of creditable grains.

[8] Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

[9] Beginning October 1, 2019, the minimum serving size specified in this section for ready-to-eat breakfast cereals must be served. Until October 1, 2019, the minimum serving size for any type of ready-to-eat breakfast cereals is ¼ cup for children ages 1-2; 1/3 cup for children ages 3-5; ¾ cup for children ages 6-12 and ages 13-18; and 1 ½ cups for adults.

(2) * * *

LUNCH AND SUPPER MEAL PATTERN FOR CHILDREN AND ADULTS

	Ages 1-2	Ages 3-5	Ages 6-12	Ages 13-18[1] (at-risk afterschool programs and emergency shelters)	Adult
Food Components and Food Items[2]	Minimum Quantities				
Fluid milk[3]	4 fl oz	6 fl oz	8 fl oz	8 fl oz	8 fl oz[4]
Meat/meat alternates Edible portion as served:					
Lean meat, poultry, or fish	1 ounce	1½ ounces	2 ounces	2 ounces	2 ounces
Tofu, soy products, or alternate protein products[5]	1 ounce	1½ ounces	2 ounces	2 ounces	2 ounces
Cheese	1 ounce	1½ ounces	2 ounces	2 ounces	2 ounces
Large egg	½	¾	1	1	1
Cooked dry beans or peas	¼ cup	⅜ cup	½ cup	½ cup	½ cup
Peanut butter or soy nut butter or other nut or seed butters	2 Tbsp	3 Tbsp	4 Tbsp	4 Tbsp	4 Tbsp
Yogurt, plain or flavored unsweetened or sweetened[6]	4 ounces or ½ cup	6 ounces or ¾ cup	8 ounces or 1 cup	8 ounces or 1cup	8 ounces or 1cup
The following may be used to meet no more than 50 percent of the requirement: Peanuts, soy nuts, tree nuts, or seeds, as listed in program guidance, or an equivalent quantity of any combination of the above meat/meat alternates (1 ounce of nuts/seeds = 1 ounce of cooked lean meat, poultry or fish)	½ ounce = 50%	¾ ounce = 50%	1 ounce = 50%	1 ounce = 50%	1 ounce = 50%
Vegetables[7]	⅛ cup	¼ cup	½ cup	½ cup	½ cup
Fruits[7,8]	⅛ cup	¼ cup	¼ cup	¼ cup	½ cup
Grains (oz eq)[9,10]					
Whole grain-rich or enriched bread	½ slice	½ slice	1 slice	1 slice	2 slices
Whole grain-rich or enriched bread product, such as biscuit, roll, muffin	½ serving	½ serving	1 serving	1 serving	2 servings
Whole grain-rich, enriched or fortified cooked breakfast cereal[11], cereal grain, and/or pasta	¼ cup	¼ cup	½ cup	½ cup	1 cup

[1] Larger portion sizes than specified may need to be served to children 13 through 18 years old to meet their nutritional needs.

[2] Must serve all five components for a reimbursable meal. Offer versus serve is an option for only adult and at-risk afterschool participants.

[3] Must be unflavored whole milk for children age one. Must be unflavored low-fat (1 percent) or unflavored fat-free (skim) milk for children two through five years old. Must be unflavored low-fat (1 percent), unflavored fat-free (skim), or flavored fat-free (skim) milk for children six years old and older and adults. For adult participants,

6 ounces (weight) or ¾ cup (volume) of yogurt may be used to meet the equivalent of 8 ounces of fluid milk once per day when yogurt is not served as a meat alternate in the same meal.

[4] A serving of fluid milk is optional for suppers served to adult participants.

[5] Alternate protein products must meet the requirements in appendix A to part 226 of this chapter.

[6] Yogurt must contain no more than 23 grams of total sugars per 6 ounces.

[7] Pasteurized full-strength juice may only be used to meet the vegetable or fruit requirement at one meal, including snack, per day.

[8] A vegetable may be used to meet the entire fruit requirement. When two vegetables are served at lunch or supper, two different kinds of vegetables must be served.

[9] At least one serving per day, across all eating occasions, must be whole grain-rich. Grain-based desserts do not count towards the grains requirement.

[10] Beginning October 1, 2019, ounce equivalents are used to determine the quantity of the creditable grain.

[11] Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

(3) * * *

SNACK MEAL PATTERN FOR CHILDREN AND ADULTS

	Ages 1-2	Ages 3-5	Ages 6-12	Ages 13-18[1] (at-risk afterschool programs and emergency shelters)	Adult
Food Components and Food Items[2]	Minimum Quantities				
Fluid milk[3]	4 fl oz	4 fl oz	8 fl oz	8 fl oz	8 fl oz
Meats/meat alternates Edible portion as served:					
Lean meat, poultry, or fish	½ ounce	½ ounce	1 ounce	1 ounce	1 ounce
Tofu, soy products, or alternate protein products[4]	½ ounce	½ ounce	1 ounce	1 ounce	1 ounce
Cheese	½ ounce	½ ounce	1 ounce	1 ounce	1 ounce
Large egg	½	½	½	½	½
Cooked dry beans or peas	⅛ cup	⅛ cup	¼ cup	¼ cup	¼ cup
Peanut butter or soy nut butter or other nut or seed butters	1 Tbsp	1 Tbsp	2 Tbsp	2 Tbsp	2 Tbsp
Yogurt, plain or flavored unsweetened or sweetened[5]	2 ounces or ¼ cup	2 ounces or ¼ cup	4 ounces or ½ cup	4 ounces or ½ cup	4 ounces or ½ cup
Peanuts, soy nuts, tree nuts, or seeds	½ ounce	½ ounce	1 ounce	1 ounce	1 ounce
Vegetables[6]	½ cup	½ cup	¾ cup	¾ cup	½ cup
Fruits[6]	½ cup	½ cup	¾ cup	¾ cup	½ cup
Grains (oz eq)[7,8]					
Whole grain-rich or enriched bread	½ slice	½ slice	1 slice	1 slice	1 slice
Whole grain-rich or enriched bread product, such as biscuit, roll, muffin	½ serving	½ serving	1 serving	1 serving	1 serving
Whole grain-rich, enriched or fortified cooked breakfast cereal[9], cereal grain, and/or pasta	¼ cup	¼ cup	½ cup	½ cup	½ cup
Whole grain-rich, enriched or fortified ready-to-eat breakfast cereal (dry, cold)[9,10]					
Flakes or rounds	½ cup	½ cup	1 cup	1 cup	1 cup
Puffed cereal	¾ cup	¾ cup	1 ¼ cup	1 ¼ cups	1 ¼ cups
Granola	⅛ cup	⅛ cup	¼ cup	¼ cup	¼ cup

[1] Larger portion sizes than specified may need to be served to children 13 through 18 years old to meet their nutritional needs.

[2] Select two of the five components for a reimbursable snack. Only one of the two components may be a beverage.

[3] Must be unflavored whole milk for children age one. Must be unflavored low-fat (1 percent) or unflavored fat-free (skim) milk for children two through five years old. Must be unflavored low-fat (1 percent), unflavored fat-free (skim), or flavored fat-free (skim) milk for children six years old and older and adults. For adult participants, 6 ounces (weight) or ¾ cup (volume) of yogurt may be used to meet the equivalent of 8 ounces of fluid milk once per day when yogurt is not served as a meat alternate in the same meal.

[4] Alternate protein products must meet the requirements in appendix A to part 226 of this chapter.

[5] Yogurt must contain no more than 23 grams of total sugars per 6 ounces.

[6] Pasteurized full-strength juice may only be used to meet the vegetable or fruit requirement at one meal, including snack, per day.

[7] At least one serving per day, across all eating occasions, must be whole grain-rich. Grain-based desserts do not count towards meeting the grains requirement.

[8] Beginning October 1, 2019, ounce equivalents are used to determine the quantity of creditable grains.

[9] Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

[10] Beginning October 1, 2019, the minimum serving sizes specified in this section for ready-to-eat breakfast cereals must be served. Until October 1, 2019, the minimum serving size for any type of ready-to-eat breakfast cereals is ¼ cup for children ages 1-2; 1/3 cup for children ages 3-5; ¾ cup for children ages 6-12, children ages 13-18, and adults.

* * * * *

(o) *Offer versus serve.* (1) Each adult day care center and at-risk afterschool program must offer its participants all of the required food servings as set forth in paragraphs (c)(1) and (c)(2) of this section. However, at the discretion of the adult day care center or at-risk afterschool program, participants may be permitted to decline:

(i) *For adults.* (A) *One of the four* food items required at breakfast (one serving of fluid milk; one serving of vegetable or fruit, or a combination of both; and two servings of grains, or meat or meat alternates);

(B) *Two of the five* food components required at lunch (fluid milk; vegetables; fruit; grain; and meat or meat alternate); and

(C) *One of the four* food components required at supper (vegetables; fruit; grain; and meat or meat alternate).

(ii) *For children. Two of the five* food components required at supper (fluid milk; vegetables; fruit; grain; and meat or meat alternate).

(2) In pricing programs, the price of the reimbursable meal must not be affected if a participant declines a food item.

* * * * *

Dated: October 24, 2016.

Telora T. Dean,

Acting Administrator, Food and Nutrition Service.

[FR Doc. 2016–26339 Filed 10–31–16; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 250

[FNS–2014–0040]

RIN 0584–AE29

Requirements for the Distribution and Control of Donated Foods and the Emergency Food Assistance Program: Implementation of the Agricultural Act of 2014

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final rule published in the **Federal Register** on April 19, 2016, ''Requirements for the Distribution and Control of Donated Foods—The Emergency Food Assistance Program: Implementation of the Agricultural Act of 2014.''

DATES: This document is effective November 1, 2016.

FOR FURTHER INFORMATION CONTACT: Carolyn Smalkowski, Program Analyst, Policy Branch, Food Distribution Division, Food and Nutrition Service, 3101 Park Center Drive, Room 500, Alexandria, Virginia 22302, or by telephone (703) 305–2680.

SUPPLEMENTARY INFORMATION: The Food and Nutrition Service published a final rule in the **Federal Register**, 81 FR 23086, on April 19, 2016, to amend Food Distribution regulations at 7 CFR part 250 to revise and clarify requirements to ensure that USDA donated foods are distributed, stored and managed in the safest, most efficient and cost-effective manner, at State and recipient agency levels. This final rule correction makes a technical correction in 7 CFR 250.30(c)(2) by correcting the prior amendatory instructions to allow the paragraph at (c)(2) to publish in the CFR in lieu of a ''reserved'' paragraph. All other information in the final rule remains unchanged.

List of Subjects in 7 CFR Part 250

Disaster assistance, Food assistance programs, Grant programs—social programs, Reporting and recordkeeping requirements.

Accordingly, 7 CFR part 250 is corrected by making the following correcting amendments:

PART 250—DONATION OF FOODS FOR USE IN THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS AND AREAS UNDER ITS JURISDICTION

■ 1. The authority citation for part 250 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 612c, 612c note, 1431, 1431b, 1431e, 1431 note, 1446a–1, 1859, 2014, 2025; 15 U.S.C. 713c; 22 U.S.C. 1922; 42 U.S.C. 1751, 1755, 1758, 1760, 1761, 1762a, 1766, 3030a, 5179, 5180.

■ 2. In § 250.30, add paragraph (c)(2) to read as follows:

§ 250.30 State processing of donated foods.

* * * * *

(c) * * *

(2) These criteria will be reviewed by the appropriate FNS Regional Office during the management evaluation review of the distributing agency. Distributing agencies and subdistributing agencies which enter into contracts on behalf of recipient agencies but which do not limit the types of end products which can be sold or the number of processors which can sell end products within the State are not required to follow the selection

criteria. In addition to utilizing these selection criteria, when a contracting agency enters into a contract both for the processing of donated food and the purchase of the end products produced from the donated food, the procurement standards set forth in 2 CFR part 200, subpart D and Appendix II, Contract Provisions for Non-Federal Entity Contracts Under Federal Awards and USDA implementing regulations at 2 CFR part 400 and part 416 must be followed. Recipient agencies which purchase end products produced under Statewide agreements are also required to comply with 2 CFR part 200, subpart D and USDA implementing regulations at 2 CFR part 400 and part 416. Contracting agencies shall not enter into contracts with processors which cannot demonstrate the ability to meet the terms and conditions of the regulations and the distributing agency agreements; furnish prior to the delivery of any donated foods for processing, a performance bond, an irrevocable letter of credit or an escrow account in an amount sufficient to protect the contract value of donated food on hand and on order; demonstrate the ability to distribute end products to eligible recipient agencies; provide a satisfactory record of integrity, business ethics and performance and provide adequate storage.

* * * * *

Dated: October 24, 2016.

Telora T. Dean,

Acting Administrator, Food and Nutrition Service.

[FR Doc. 2016–26329 Filed 10–31–16; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1293; Directorate Identifier 2012–NE–45–AD; Amendment 39–18700; AD 2016–22–11]

RIN 2120–AA64

Airworthiness Directives; Engine Alliance Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are superseding airworthiness directive (AD) 2013–02–06 for all Engine Alliance (EA) GP7270 and GP7277 turbofan engines with certain part number (P/N) high-pressure turbine (HPT) stage 2 nozzle segments installed. AD 2013–02–06 required initial and repetitive borescope inspections (BSI) and removal from service of these nozzles before further flight if one or more burn holes were detected in any HPT stage 2 nozzle segment. AD 2013–02–06 also required removal from service of these HPT stage 2 nozzle segments at the next engine shop visit. This AD requires the same inspections as AD–2013–02–06, requires removal of affected HPT stage 2 nozzles at next piece-part exposure, and adds certain P/Ns to the applicability. This AD was prompted by another report of inadequate cooling of the HPT stage 1 shroud and stage 2 nozzle, leading to damage to the HPT stage 2 nozzle, burn-through of the turbine case, and in-flight shutdown. We are issuing this AD to prevent HPT stage 2 nozzle failure, uncontrolled fire, in-flight shutdown, and damage to the airplane.

DATES: This AD is effective November 16, 2016.

We must receive any comments on this AD by December 16, 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 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2012–1293; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Martin Adler, Aerospace Engineer, Engine & Propeller Directorate, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7157; fax: 781–238–7199; email: *martin.adler@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On January 15, 2013, we issued AD 2013–02–06, Amendment 39–17327 (78 FR 5710, January 28, 2013), (''AD 2013–02–06''), for all Engine Alliance GP7270 and GP7277 turbofan engines with an HPT stage 2 nozzle, P/N 2101M24G01, 2101M24G02, or 2101M24G03, installed. AD 2013–02–06 required initial and repetitive BSIs and removal from service of these nozzles before further flight if any burn holes were detected in the affected nozzles. AD 2013–02–06 also required removal from service of the affected nozzles at the next engine shop visit. AD 2013–02–06 resulted from a report of inadequate cooling of the HPT stage 2 nozzle, leading to damage to the HPT stage 2 nozzle, burn-through of the turbine case, and in-flight shutdown. We issued AD 2013–02–06 to prevent HPT stage 2 nozzle failure, uncontrolled fire, in-flight shutdown, and damage to the airplane.

Actions Since AD 2013–02–06 Was Issued

Since we issued AD 2013–02–06, we received another report of inadequate cooling of the HPT stage 1 shroud and stage 2 nozzle, leading to damage to the HPT stage 2 nozzle, burn-through of the turbine case, and in-flight shutdown. This event occurred with HPT stage 2 nozzle, P/N 2101M24G04, 2101M24G05, or 2101M24G06 installed. Investigation revealed that the event was caused by damage to the HPT stage 2 nozzle due to inadequate part cooling. We are issuing this AD to prevent HPT stage 2 nozzle failure, uncontrolled fire, in-flight shutdown, and damage to the airplane.

Related Service Information

We reviewed EA Service Bulletins EAGP7–72–190, dated December 6, 2012 and EAGP7–72–262, Revision No. 5, dated December 18, 2015. This service information describes procedures for inspecting the HPT stage 2 nozzle segments.

FAA's Determination

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

AD Requirements

This AD requires initial and repetitive BSIs of the HPT stage 1 shroud and HPT stage 2 nozzle segments and removal from service of these nozzle segments before further flight if one or more burn holes are detected on the HPT stage 2 nozzle or if the HPT stage 1 shroud is found distorted. This AD also requires removal from service of any HPT stage 2 nozzle segment, P/N 2101M24G01, 2101M24G02, 2101M24G03, 2101M24G04, 2101M24G05, or 2101M24G06, at next piece-part exposure.

FAA's Justification and Determination of the Effective Date

No domestic operators use this product. Therefore, we find that notice and opportunity for prior public comment are unnecessary and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2012–1293 and Directorate Identifier 2012–NE–45–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Costs of Compliance

We estimate that this AD will affect no engines installed on airplanes of U.S. registry. We also estimate that it will take about two hours per engine to perform a BSI of the HPT stage 2 nozzle. The average labor rate is $85 per hour. Required parts cost about $504,486 per engine. Based on these figures, we estimate the cost of this AD to U.S. operators to be $0.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2013–02–06, Amendment 39–17327 (78 FR 5710, January 28, 2013) and adding the following new AD:

2016–22–11 Engine Alliance: Amendment 39–18700; Docket No. FAA–2012–1293; Directorate Identifier 2012–NE–45–AD.

(a) Effective Date

This AD is effective November 16, 2016.

(b) Affected ADs

This AD replaces AD 2013–02–06, Amendment 39–17327 (78 FR 5710, January 28, 2013).

(c) Applicability

This AD applies to all Engine Alliance GP7270 and GP7277 turbofan engines with a high-pressure turbine (HPT) stage 2 nozzle segment, part number (P/N) 2101M24G01, 2101M24G02, 2101M24G03, 2101M24G04, 2101M24G05, or 2101M24G06, installed.

(d) Unsafe Condition

This AD was prompted by a report of inadequate cooling of the HPT stage 1 shroud and stage 2 nozzle, leading to damage to the HPT stage 2 nozzle, burn-through of the turbine case, and in-flight shutdown. We are issuing this AD to prevent HPT stage 2 nozzle failure, uncontrolled fire, in-flight shutdown, and damage to the airplane.

(e) Compliance

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

(1) Perform a 360 degree borescope inspection of the HPT stage 1 shroud and stage 2 nozzle as follows:

(i) For engines with nozzles installed at a shop visit that did not include full engine overhaul, borescope inspect the HPT stage 1 shroud and stage 2 nozzle as follows:

(A) If the nozzle has fewer than 1,050 cycles-since-new (CSN) or cycles-since-repair (CSR) on the effective date of this AD, before the nozzle has accumulated 1,100 CSN or CSR.

(B) If the nozzle has 1,050 or more CSN or CSR on the effective date of this AD, within the next 50 cycles.

(ii) For all other engines, borescope inspect the HPT stage 1 shroud and HPT stage 2 nozzle as follows:

(A) If the nozzle has fewer than 1,450 CSN or CSR on the effective date of this AD, before the nozzle has accumulated 1,500 CSN or CSR.

(B) If the nozzle has 1,450 or more CSN or CSR on the effective date of this AD, within the next 50 cycles.

(iii) Thereafter, repetitively borescope inspect the HPT stage 1 shroud and stage 2 nozzle as follows:

(A) For engines with HPT stage 2 nozzle segments, P/N 2101M24G01, 2101M24G02, or 2101M24G03, within every 150 additional cycles-in-service (CIS).

(B) For engines with HPT stage 2 nozzle segments, P/N 2101M24G04, 2101M24G05, or 2101M24G06, within every 300 additional CIS.

(2) If any burn holes are detected through the surface of the nozzle or if the shroud is distorted radially inward with evidence of blade tip rubs, remove the HPT stage 1 shroud and HPT stage 2 nozzle from service before further flight.

(f) Mandatory Terminating Action

Replace HPT stage 2 nozzle segments, P/N 2101M24G01, 2101M24G02, 2101M24G03, 2101M24G04, 2101M24G05, and 2101M24G06, at the next piece-part exposure, with parts eligible for installation.

(g) Definition

For the purpose of this AD, piece-part exposure is when the HPT stage 2 nozzle is removed from the engine and completely disassembled.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request. You may email your request to: *ANE-AD-AMOC@faa.gov.*

(i) Related Information

For more information about this AD, contact Martin Adler, Aerospace Engineer, Engine & Propeller Directorate, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7157; fax: 781–238–7199; email: *martin.adler@faa.gov.*

(j) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on October 25, 2016.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2016–26280 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–5423; Directorate Identifier 2016–NE–09–AD; Amendment 39–18694; AD 2016–22–05]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney Division Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Pratt & Whitney (PW) PW4164, PW4164–1D, PW4168, PW4168–1D, PW4168A, PW4168A–1D, and PW4170 turbofan engines. This AD was prompted by several instances of fuel leaks on PW engines installed with the Talon IIB combustion chamber configuration. This AD requires initial and repetitive inspections of the affected fuel nozzles and their replacement with parts eligible for installation. We are issuing this AD to prevent failure of the fuel nozzles, which could lead to engine fire and damage to the airplane.

DATES: This AD is effective December 6, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 6, 2016.

ADDRESSES: For service information identified in this final rule, contact Pratt & Whitney Division, 400 Main St., East Hartford, CT 06108; phone: 860–565–8770; fax: 860–565–4503. 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–2016–5423.

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–2016–5423; 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: Besian Luga, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7750; fax: 781–238–7199; email: *besian.luga@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain PW PW4164, PW4164–1D, PW4168, PW4168–1D, PW4168A, PW4168A–1D, and PW4170 turbofan engines. The NPRM published in the **Federal Register** on April 20, 2016 (81 FR 23217) (''the NPRM''). The NPRM was prompted by several instances of fuel leaks on PW engines installed with the Talon IIB combustion chamber configuration. The NPRM proposed to require initial and repetitive inspections of the affected fuel nozzles and their replacement with parts eligible for installation. We are issuing this AD to prevent failure of the fuel nozzles, which could lead to engine fire and damage to the airplane.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Change Definition of Engine Shop Visit

Delta Air Lines (Delta) requested that the definition of an ''engine shop visit'' be defined as the induction of an engine into the shop for maintenance involving the separation of pairs of major mating engine flanges. Delta requested this change so that the definition of an engine shop visit in this AD would be consistent with prior ADs.

We disagree. The redefined shop visit interval as requested would result in less frequent replacements of fuel nozzles and an unacceptable fleet risk. We did not change this AD.

Conclusion

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

Related Service Information Under 1 CFR Part 51

We reviewed PW Alert Service Bulletin (ASB) PW4G–100–A73–45, dated February 16, 2016. The ASB describes procedures for inspecting and replacing the fuel nozzles. 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.

Costs of Compliance

We estimate that this AD will affect 72 engines installed on airplanes of U.S. registry. We also estimate that it will take about 2.2 hours per engine to perform each inspection and 48 hours per engine to replace the fuel nozzle. The average labor rate is $85 per hour. We also estimate that parts cost would be $15,780 per engine. Based on these figures, we estimate the cost of this AD on U.S. operators to be $1,443,384.

Authority for This Rulemaking

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

Aviation Programs, describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

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

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

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

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

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2016–22–05 Pratt & Whitney Division: Amendment 39–18694; Docket No. FAA–2016–5423; Directorate Identifier 2016–NE–09–AD.

(a) Effective Date

This AD is effective December 6, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Pratt & Whitney (PW):

(1) PW4164, PW4168, and PW4168A model engines that have incorporated PW Service Bulletin (SB) PW4G–100–72–214, dated December 15, 2011, or PW SB PW4G–100–72–219, Revision No. 1, dated October 5, 2011, or original issue, and have fuel nozzles, part number (P/N) 51J345, installed;

(2) PW4168A model engines with Talon IIA outer combustion chamber assembly, P/N 51J100, and fuel nozzles, P/N 51J345, with serial numbers CGGUA19703 through CGGUA19718 inclusive or CGGUA22996 and higher, installed;

(3) PW4168A–1D and PW4170 model engines with engine serial numbers P735001 thru P735190 inclusive and fuel nozzles, P/N 51J345, installed; and

(4) PW4164–1D, PW4168–1D, PW4168A–1D, and PW4170 model engines that have incorporated PW SB PW4G–100–72–220, Revision No. 4, dated September 30, 2011, or earlier revision, and have fuel nozzles, P/N 51J345, installed.

(d) Unsafe Condition

This AD was prompted by nine instances of fuel leaks on PW engines with the Talon IIB combustion chamber configuration installed. We are issuing this AD to prevent failure of the fuel nozzles, which could lead to engine fire and damage to the airplane.

(e) Compliance

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

(1) Within 800 flight hours after the effective date of this AD, and thereafter within every 800 flight hours accumulated on the fuel nozzles, do the following:

(i) Inspect all fuel nozzles, P/N 51J345. Use Part A of PW Alert Service Bulletin (ASB) PW4G–100–A73–45, dated February 16, 2016, to do the inspection.

(ii) For any fuel nozzle that fails the inspection, before further flight, remove and replace it with a part that is eligible for installation.

(2) At the next shop visit after the effective date of this AD, and thereafter at each engine shop visit, remove all fuel nozzles, P/N 51J345, unless fuel nozzles were replaced within the last 100 flight hours. Use Part B of PW ASB PW4G–100–A73–45, dated February 16, 2016, to replace the fuel nozzles with parts eligible for installation.

(f) Definitions

(1) For the purpose of this AD, an ''engine shop visit'' means the induction of an engine into the shop for any maintenance.

(2) For the purpose of this AD, a part that is ''eligible for installation'' is a fuel nozzle, with a P/N other than 51J345, that is FAA-approved for installation or a fuel nozzle, P/N 51J345, that meets the requirements of Part A, paragraph 4.B., or Part B, paragraph 1.B. of PW ASB PW4G–100–A73–45, dated February 16, 2016.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request. You may email your request to: *ANE-AD-AMOC@faa.gov.*

(h) Related Information

For more information about this AD, contact Besian Luga, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7750; fax: 781–238–7199; email: *besian.luga@faa.gov.*

(i) Material Incorporated by Reference

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

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

(i) Pratt & Whitney (PW) Alert Service Bulletin PW4G–100–A73–45, dated February 16, 2016.

(ii) Reserved.

(3) For PW service information identified in this AD, contact Pratt & Whitney Division, 400 Main St., East Hartford, CT 06108; phone: 860–565–8770; fax: 860–565–4503.

(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.

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

Issued in Burlington, Massachusetts, on October 25, 2016.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2016–26183 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6990; Directorate Identifier 2016–NE–14–AD; Amendment 39–186990; AD 2016–22–10]

RIN 2120–AA64

Airworthiness Directives; Turbomeca S.A. Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Turbomeca S.A. Arriel 1, 1A, 1A1, 1A2, 1B, 1B2, 1C, 1C1, 1C2, 1D, 1D1, 1E, 1E2, 1K1, 1S, and 1S1 turboshaft engines. This AD requires removing the centrifugal impeller and replacing with a part eligible for installation. This AD was prompted by an anomaly that occurred during the grinding operation required by modification TU376, which increases the clearance between the rear curvic coupling of the centrifugal impeller and the fuel injection manifold. We are issuing this AD to prevent failure of the centrifugal impeller, uncontained centrifugal impeller release, damage to the engine, and damage to the helicopter.

DATES: This AD becomes effective December 6, 2016.

ADDRESSES: See the **FOR FURTHER INFORMATION CONTACT** section.

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–2016–6990; 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 mandatory continuing airworthiness information (MCAI), 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: Philip Haberlen, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7770; fax: 781–238–7199; email: *philip.haberlen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to the specified products. The NPRM was published in the **Federal Register** on July 28, 2016 (81 FR 49575). The NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> Turbomeca reported an anomaly that was generated during the grinding operation associated to the application of modification TU376, which increases the clearance between the rear curvic coupling of the centrifugal impeller and the fuel injection manifold.
>
> This condition, if not corrected, could lead to crack initiation and propagation in the centrifugal impeller bore area, possibly resulting in centrifugal impeller failure, with consequent damage to, and reduced control of, the helicopter. To address this potential unsafe condition, the life of the affected centrifugal impellers was reduced and Turbomeca published Mandatory Service Bulletin (MSB) 292 72 0848 to inform operators about the life reduction and to provide instructions for the replacement of the affected centrifugal impellers.
>
> For the reasons described above, this AD requires replacement of each affected centrifugal impeller before it exceeds the applicable reduced life limit.

You may obtain further information by examining the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6990.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (81 FR 49575, July 28, 2016) or on the determination of the cost to the public.

Conclusion

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

Related Service Information

Turbomeca S.A. has issued Mandatory Service Bulletin (MSB) 292 72 0848, Version B, dated April 13, 2016. The MSB describes procedures for reducing the life limit of the centrifugal impellers affected by an anomaly that occurred during the grinding operation required by modification TU376. 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.

Costs of Compliance

We estimate that this AD affects 3 engines installed on helicopters of U.S. registry. We also estimate that it would take about 22 hours per engine to comply with this AD. The average labor rate is $85 per hour. Required parts cost about $96,518 per engine. Based on these figures, we estimate the cost of this AD on U.S. operators to be $295,164.

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 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 this AD:

(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 to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2016–22–10 Turbomeca S.A.: Amendment 39–186990; Docket No. FAA–2016–6990; Directorate Identifier 2016–NE–14–AD.

(a) Effective Date

This AD becomes effective December 6, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to certain Arriel 1, 1A, 1A1, 1A2, 1B, 1B2, 1C, 1C1, 1C2, 1D, 1D1, 1E, 1E2, 1K1, 1S, and 1S1 turboshaft engines, with modification TU376 installed.

(d) Reason

This AD was prompted by an anomaly that occurred during the grinding operation required by modification TU376, which increases the clearance between the rear curvic coupling of the centrifugal impeller and the fuel injection manifold. We are issuing this AD to prevent failure of the centrifugal impeller, uncontained centrifugal impeller release, damage to the engine, and damage to the helicopter.

(e) Actions and Compliance

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

(1) Remove from service, any centrifugal impeller listed in Table 1 to paragraph (e) of this AD, before exceeding the applicable cycles since new (CSN) and replace with a centrifugal impeller not listed in Table 1 to paragraph (e) of this AD.

TABLE 1 TO PARAGRAPH (e)—CENTRIFUGAL IMPELLER CSNs

Part No.	Serial No.	CSN
0292254040	44	5,129
0292254040	1762FT	11,476
0292254050	1676CAR	6,281
0292254050	5333OTT	5,495
0292254050	5017OTT	5,491
0292254050	1136CAR	8,734
0292254050	3655OTT	4,600
0292254050	1757CAR	7,913
0292254050	1738CAR	10,640
0292254050	1149CAR	12,273
0292254050	2677OTT	11,145
0292254050	3109OTT	10,662
0292254050	3496OTT	5,562
0292254050	2074CAR	7,423
729225293A	290CAR	6,326
729225293A	1227FT	8,139
729225293A	504FB	4,600
729225293A	2517OTT	9,732
729225293A	2165OTT	6,163
729225293A	2194FT	11,461
729225293A	1331OTT	12,513
729225293A	1301FT	7,262
729225293A	1567FT	6,305
729225293A	783FB	8,307
729225293A	98OTT	9,492

(2) Reserved.

(f) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request. You may email your request to: *ANE-AD-AMOC@faa.gov.*

(g) Related Information

(1) For more information about this AD, contact Philip Haberlen, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7770; fax: 781–238–7199; email: *philip.haberlen@faa.gov.*

(2) Refer to MCAI, European Aviation Safety Agency AD 2016–0090, dated May 10, 2016, for more information. You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2016–6990.

(h) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on October 24, 2016.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2016–26184 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 73 and 74

[Docket No. FDA–2016–F–0821]

Listing of Color Additives Exempt From Certification; Titanium Dioxide and Listing of Color Additives Subject to Certification; [Phthalocyaninato (2-)] Copper

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or we) is amending the color additive regulations to provide for the safe use of titanium dioxide and [phthalocyaninato (2-)] copper to color orientation marks for intraocular lenses. This action is in response to a petition filed by Milton W. Chu, M.D.

DATES: This rule is effective December 2, 2016. See section IX for further information on the filing of objections. Submit either electronic or written objections and requests for a hearing by December 1, 2016.

ADDRESSES: You may submit objections and requests for a hearing as follows:

Electronic Submissions

Submit electronic objections in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Objections submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your objection will be made public, you are solely responsible for ensuring that your objection does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your objection, that information will be posted on *http://www.regulations.gov.*

• If you want to submit an objection with confidential information that you do not wish to be made available to the public, submit the objection as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper objections submitted to the Division of Dockets Management, FDA will post your objection, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–F–0821 for ''Listing of Color Additives Exempt From Certification; Titanium Dioxide and Listing of Color Additives Subject to Certification; [Phthalocyaninato (2-)] Copper.'' Received objections will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit an objection with confidential information that you do not wish to be made publicly available, submit your objections only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov*. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm*.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

Laura A. Dye, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740–3835, 240–402–1275.

SUPPLEMENTARY INFORMATION:

I. Introduction

In a document published in the **Federal Register** of March 22, 2016 (81 FR 15173), we announced that we had filed a color additive petition (CAP 6C0305), submitted by Milton W. Chu, M.D. (petitioner), 5800 Santa Rosa Rd., Suite 111, Camarillo, CA 93012. The petition proposed to amend the color additive regulations in § 73.3126 (21 CFR 73.3126) and § 74.3045 (21 CFR 74.3045) to provide for the safe use of titanium dioxide and [phthalocyaninato (2-)] copper to color orientation marks for intraocular lenses (IOLs). IOLs are devices made of materials such as glass or plastic and are intended to be implanted to replace the natural lens of an eye (21 CFR 886.3600). The orientation marks are intended to aid the surgeon in visualization and placement of IOLs during lens implantation surgery. Because IOLs are permanently implanted, titanium dioxide and [phthalocyaninato (2-)] copper, in the colored orientation marks, will come into direct contact with a patient's eye for a significant amount of time. These color additives are, therefore, subject to section 721 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 379e).

II. Background

Titanium dioxide is already approved as a color additive for foods (§ 73.575), drugs (§ 73.1575), cosmetics (§ 73.2575), and medical devices (§ 73.3126). Regarding its use in medical devices, titanium dioxide (CAS Reg. No. 13463–67–7, Color Index No. 77891) is currently approved under § 73.3126(b)(1) for use as a color additive in contact lenses in amounts not to exceed the minimum reasonably required to accomplish the intended coloring effect and must meet the identity and specification requirements in § 73.575(a)(1) and (b). Titanium dioxide is exempt from certification under section 721(c) of the FD&C Act because we previously determined that certification was not necessary for the protection of public health (51 FR 24815, July 9, 1986).

[Phthalocyaninato (2-)] copper (CAS Reg. No. 147–14–8, Color Index No. 74160) is currently approved as a color additive under § 74.3045(c)(1) for use in coloring certain non-absorbable sutures for general and ophthalmic surgery, and for use in coloring specific monofilaments used as supporting side struts (haptics) that hold the IOLs in place in the eye, at a level up to 0.5 percent by weight of the suture or haptic material. In addition, it is currently approved as a color additive under § 74.3045(c)(2) for use in coloring contact lenses in amounts not to exceed the minimum amount reasonably required to accomplish the intended coloring effect. We previously determined that batch certification was necessary to ensure the safety of [phthalocyaninato (2-)] copper (34 FR 6777, April 23, 1969).

III. Safety Evaluation

A. Determination of Safety

Under section 721(b)(4) of the FD&C Act, a color additive may not be listed for a particular use unless the data and information available to FDA establish that the color additive is safe for that use. Our color additive regulations at 21 CFR 70.3(i) define ''safe'' to mean that there is convincing evidence that establishes with reasonable certainty that no harm will result from the intended use of the color additive. To establish with reasonable certainty that these color additives intended to color IOL orientation marks are not harmful under their intended conditions of use, we considered exposure to the additives and their impurities, each additive's toxicological data, and other relevant information (such as published literature) available to us.

B. Safety of Petitioned Use of the Color Additives

Regarding the petitioned use, titanium dioxide and [phthalocyaninato (2-)] copper are intended to color orientation marks for IOL materials (polymers) to create white and translucent or opaque blue marks that are typically 100–250 microns (μm) in diameter and 80–150 μm in depth. Titanium dioxide will be used in amounts not to exceed the minimum reasonably required to accomplish the intended coloring effect of the orientation marks. [Phthalocyaninato (2-)] copper will be used at levels not to exceed 0.5 percent by weight of the orientation marks.

To assess safety, we compared an individual's estimated exposure to these two color additives for the petitioned use to color IOL orientation marks to the approved uses of these color additives, including in IOL haptics and opaque contact lenses, because these uses are similar. As part of our previous approval for titanium dioxide used to color contact lenses, we estimated exposure to titanium dioxide from this use to be 270 nanograms per person per day (ng/p/d) over the lens lifetime (51 FR 24815), which does not significantly contribute to the cumulative exposure when compared to the exposure to titanium dioxide from the approved uses of mica-based pearlescent pigments (of which titanium dioxide is a component) in food and pharmaceuticals (Ref. 1). Similarly, we previously estimated exposure to [phthalocyaninato (2-)] copper from the use of surgical sutures, contact lenses, and specific monofilaments used as supporting haptics for IOLs to be 310 ng/p/d, 280 ng/p/d, and 0.3 ng/p/d, respectively (64 FR 23185, April 30, 1999; 51 FR 39370, October 28, 1986; and 52 FR 15944, May 1, 1987). With respect to the petitioned use, we estimated that the worst-case lifetime exposure to titanium dioxide and [phthalocyaninato (2-)] copper used to color orientation marks would be no greater than 0.06 ng/p/d and 0.004 ng/

p/d, respectively, over a 70-year lifetime (Ref. 2). This exposure estimate is conservative as it assumes 100 percent migration of the color additives from the IOLs into the ocular fluid of the eye over a lifespan of 70 years following lens implantation. However, we expect that the color additives in the orientation marks will most likely be either chemically bound or otherwise integrated into the lens material, which would limit migration of the color additives into the ocular fluid of the eye. This means that the actual exposures to titanium dioxide and [phthalocyaninato (2-)] copper to color IOL orientation marks are expected to be far less than the worst-case exposure estimates for these color additives and insignificant in comparison to the cumulative exposures from the other approved uses of these color additives that we have already established to be safe (Ref. 2).

In assessing biocompatibility and toxicity of IOLs, we consider the International Standard for intraocular lens testing for biocompatibility (ISO 11979–5) as an appropriate standard. In general, ISO 11979–5 recommends investigations on the following biological endpoints: Cytotoxicity, genotoxicity, local effects after implantation, and sensitization potential, in the context of physicochemical properties.

The petitioner conducted a cytotoxicity study in which cultured cells were exposed to a mixture of titanium dioxide and [phthalocyaninato (2-)] copper in direct contact for at least 24 hours. Both color additives were found to be noncytotoxic in this study. Cytotoxicity studies of [phthalocyaninato (2-)] copper in previous petitions also indicated no cytotoxicity (Ref. 3). Additionally, the toxicology data for [phthalocyaninato (2-)] copper from previous petitions, as well as relevant data found in the Organization for Economic Cooperation and Development's Screening Information Dataset (OECD's SIDS) database, all indicated negative results for genotoxicity, carcinogenicity, implantation safety, and sensitization potential (Ref. 3). Similarly, data on titanium dioxide in OECD's SIDS database reported negative results for genotoxicity and sensitization potential. We conclude that the available toxicology data are sufficient to support the safety of the proposed expanded uses of titanium dioxide and [phthalocyaninato (2-)] copper.

IV. Conclusion

Based on the data and information in the petition and other relevant material, we conclude that the petitioned use of titanium dioxide and [phthalocyaninato (2-)] copper to color orientation marks for IOLs is safe. We further conclude that these additives will achieve their intended technical effect and are suitable for the petitioned use. Consequently, we are amending the color additive regulations in parts 73 and 74 as set forth in this document. In addition, based upon the factors listed in 21 CFR 71.20(b), we conclude that certification of titanium dioxide remains unnecessary for the protection of the public health. We also conclude that batch certification of [phthalocyaninato (2-)] copper continues to be necessary to protect the public health.

V. Public Disclosure and Confidentiality of Data and Information in a Color Additive Rule

In accordance with § 71.15 (21 CFR 71.15), the petition and the documents that we considered and relied upon in reaching our decision to approve the petition will be made available for public disclosure (see **FOR FURTHER INFORMATION CONTACT**). As provided in § 71.15, we will delete from the documents any materials that are not available for public disclosure.

VI. Analysis of Environmental Impact

We previously considered the environmental effects of this rule, as stated in the March 22, 2016, notice of petition for CAP 6C0305 (81 FR 15173). We stated that we had determined, under 21 CFR 25.32(*l*), that this action ''is of a type that does not individually or cumulatively have a significant effect on the human environment'' such that neither an environmental assessment nor an environmental impact statement is required. We have not received any new information or comments that would affect our previous determination.

VII. Paperwork Reduction Act of 1995

This final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VIII. Objections

This rule is effective as shown in the **DATES** section except as to any provisions that may be stayed by the filing of proper objections. If you will be adversely affected by one or more provisions of this regulation, you may file with the Division of Dockets Management (see **ADDRESSES**) either electronic or written objections. You must separately number each objection, and within each numbered objection you must specify with particularity the provision(s) of the regulation to which you object and the grounds for your objection. Within each numbered objection, you must specifically state whether you are requesting a hearing on the particular provision that you specify in that numbered objection. If you do not request a hearing for any particular objection, you waive the right to a hearing on that objection. If you request a hearing, your objection must include a detailed description and analysis of the specific factual information you intend to present in support of the objection in the event that a hearing is held. If you do not include such a description and analysis for any particular objection, you waive the right to a hearing on the objection.

Any objections received in response to the regulation may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov*. We will publish notice of the objections that we have received or lack thereof in the **Federal Register**.

IX. References

The following references are on display in the Division of Dockets Management (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they also are available electronically at *http://www.regulations.gov*.

1. Memorandum from H. Lee, Division of Petition Review, Chemistry Review Team, to P. DeLeo, Division of Petition Review, Regulatory Group I, FDA, March 1, 2005.
2. Memorandum from H. Lee, Division of Petition Review, Chemistry Review Team, to L. Dye, Division of Petition Review, Regulatory Group I, FDA, April 20, 2016.
3. Memorandum from Y. Zang, Division of Petition Review, Toxicology Review Team, to L. Dye, Division of Petition Review, Regulatory Group I, FDA, June 30, 2016.

List of Subjects

21 CFR Part 73

Color additives, Cosmetics, Drugs, Medical devices.

21 CFR Part 74

Color additives, Cosmetics, Drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and re-delegated to the Director, Center for Food Safety and

Applied Nutrition, 21 CFR parts 73 and 74 are amended as follows:

PART 73—LISTING OF COLOR ADDITIVES EXEMPT FROM CERTIFICATION

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

Authority: 21 U.S.C. 321, 341, 342, 343, 348, 351, 352, 355, 361, 362, 371, 379e.

■ 2. In § 73.3126, revise paragraph (b)(1) to read as follows:

§ 73.3126 Titanium dioxide.

* * * * *

(b) * * * (1) The substance listed in paragraph (a) of this section may be used as a color additive in contact lenses and intraocular lens orientation marks in amounts not to exceed the minimum reasonably required to accomplish the intended coloring effect.

* * * * *

PART 74—LISTING OF COLOR ADDITIVES SUBJECT TO CERTIFICATION

■ 3. The authority citation for part 74 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 342, 343, 348, 351, 352, 355, 361, 362, 371, 379e.

■ 4. In § 74.3045, revise paragraphs (c)(1) introductory text and (c)(1)(i) to read as follows:

§ 74.3045 [Phthalocyaninato (2-)] copper.

* * * * *

(c) * * * (1) The color additive [phthalocyaninato(2-)] copper may be safely used to color polypropylene sutures, polybutester (the generic designation for the suture fabricated from 1,4-benzenedicarboxylic acid, polymer with 1,4-butanediol and *alpha*-hydro-*omega*-hydroxypoly(oxy-1,4-butanediyl), CAS Reg. No. 37282–12–5) nonabsorbable sutures for use in general and ophthalmic surgery, polybutylene terephthalate nonabsorbable monofilament sutures for general and ophthalmic surgery, nonabsorbable sutures made from poly(vinylidene fluoride) and poly(vinylidene fluoride-co-hexafluoropropylene) for general and ophthalmic surgery, polymethylmethacrylate monofilament used as supporting haptics for intraocular lenses, and polymers used in orientation marks for intraocular lenses, subject to the following restrictions:

(i) The quantity of the color additive does not exceed 0.5 percent by weight of the suture, haptic material, or orientation mark.

* * * * *

Dated: October 25, 2016.

Susan Bernard,

Director, Office of Regulations, Policy and Social Science, Center for Food Safety and Applied Nutrition.

[FR Doc. 2016–26310 Filed 10–31–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 117

[Docket No. FDA–2011–N–0920]

What You Need To Know About the Food and Drug Administration Regulation: Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Human Food; Small Entity Compliance Guide; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of availability.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing the availability of a guidance for industry entitled ''What You Need To Know About the FDA Regulation: Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Human Food''—Small Entity Compliance Guide. The small entity compliance guide (SECG) is intended to help small entities comply with the final rule titled ''Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Human Food.''

DATES: Submit either electronic or written comments on FDA guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2011–N–0920 for ''What You Need To Know About the FDA Regulation: Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Human Food (21 CFR part 117).'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the SECG to the Office of Food Safety, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740. Send two self-addressed adhesive labels to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the SECG.

FOR FURTHER INFORMATION CONTACT: Jenny Scott, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–1700.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 17, 2015 (80 FR 55908), we issued a final rule titled ''Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Human Food'' (the final rule) in which we modernized the longstanding current good manufacturing practice requirements in 21 CFR part 110 and added the requirements for facilities subject to registration to establish and implement hazard analysis and risk-based preventive controls for human food. The final rule, which is codified at part 117 (21 CFR part 117), became effective November 16, 2015 (except for the amendment to part 110 in instruction 13, which is effective September 17, 2018, and paragraph (2) of the definition of ''qualified auditor'' in § 117.3, and §§ 117.5(k)(2), 117.8, 117.405(a)(2), 117.405(c), 117.410(d)(2)(ii), 117.430(d), 117.435(d), 117.475(c)(2), and 117.475(c)(13)) but has compliance dates staggered over several years after publication of the final rule.

We examined the economic implications of the final rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612) and determined that the final rule will have a significant economic impact on a substantial number of small entities. In compliance with section 212 of the Small Business Regulatory Enforcement Fairness Act (Pub. L. 104–121, as amended by Pub. L. 110–28), we are making available the SECG to explain the actions that a small entity must take to comply with the rule.

We are issuing the SECG consistent with our good guidance practices regulation (21 CFR 10.115(c)(2)). The SECG represents the current thinking of FDA on this topic. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 117 have been approved under OMB control number 0910–0751.

III. Electronic Access

Persons with access to the Internet may obtain the SECG at either *http://www.fda.gov/FoodGuidances,* or *http://www.regulations.gov.* Use the FDA Web site listed in the previous sentence to find the most current version of the guidance.

Dated: October 26, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–26315 Filed 10–31–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 507

[Docket No. FDA–2011–N–0922]

What You Need To Know About the Food and Drug Administration Regulation: Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Food for Animals; Small Entity Compliance Guide; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of availability.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing the availability of a guidance for industry #241 entitled ''What You Need To Know About the FDA Regulation: Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Food for Animals''—Small Entity Compliance Guide. The small entity compliance guide (SECG) is intended to help small entities comply with the final rule titled ''Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Food for Animals.''

DATES: Submit either electronic or written comments on FDA guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the

public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2011–N–0922 for ''What You Need to Know About the FDA Regulation: Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Food for Animals.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION''. The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the SECG to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send two self-addressed adhesive labels to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the SECG.

FOR FURTHER INFORMATION CONTACT: Jeanette Murphy, Center for Veterinary Medicine (HFV–200), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20800, 240–402–6246.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 17, 2015 (80 FR 56170), we issued a final rule entitled ''Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Food for Animals'' (the final rule) in which we established requirements for facilities subject to food registration to implement current good manufacturing practices and establish and implement hazard analysis and risk-based preventive controls for food for animals. The final rule, which is codified at part 507 (21 CFR part 507), became effective November 16, 2015 (except for paragraph (2) of the definition of ''qualified auditor'' in § 507.3, and §§ 507.12(a)(1)(ii), 507.105(a)(2), 507.105(c), 507.110(d)(2)(ii), 507.130(d), 507.135(d), 507.175(c)(2), and 507.175(c)(13)) but has compliance dates staggered over several years after publication of the final rule.

We examined the economic implications of the final rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612) and determined that the final rule will have a significant economic impact on a substantial number of small entities. In compliance with section 212 of the Small Business Regulatory Enforcement Fairness Act (Pub. L. 104–121, as amended by Pub. L. 110–28), we are making available the SECG to explain the actions that a small entity must take to comply with the rule.

We are issuing the SECG consistent with our good guidance practices regulation (21 CFR 10.115(c)(2)). The SECG represents the current thinking of FDA on this topic. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in part 507 have been approved under 0910–0789.

III. Electronic Access

Persons with access to the Internet may obtain the SECG at *http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm, http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm253380.htm,* or *http://www.regulations.gov.* Use the FDA Web site listed in the previous sentence to find the most current version of the guidance.

Dated: October 26, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–26314 Filed 10–31–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2016–0936]

Safety Zone; Delaware River, Philadelphia, PA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce regulations for a safety zone for an annual fireworks event in the Captain of the Port Delaware Bay zone from 6 p.m. to 8 p.m. on November 19, 2016. Enforcement of this zone is necessary and intended to ensure safety of life on

the navigable waters immediately prior to, during, and immediately after this fireworks event. During the enforcement period, no vessel may transit this regulated area without approval from the Captain of the Port or a designated representative.

DATES: The regulations in 33 CFR 165.506 will be enforced from 6 p.m. to 8 p.m. on November 19, 2016, for the safety zone identified in row (a)(16) of Table to § 165.506.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email MST1 Thomas Simkins, Sector Delaware Bay Waterways Management Division, U.S. Coast Guard; telephone 215–271–4889, email *Tom.J.Simkins@uscg.mil.*

SUPPLEMENTARY INFORMATION:

From 6 p.m. to 8 p.m. on November 19, 2016, the Coast Guard will enforce regulations in 33 CFR 165.506 for the safety zone in the Delaware River in Philadelphia, PA listed in row (a)(16) in the table in that section. This action is being taken to provide for the safety of life on navigable waterways during the fireworks display.

Our regulations for recurring firework events in Captain of the Port Delaware Bay Zone, appear in § 165.506, Safety Zones; Fireworks Displays in the Fifth Coast Guard District, which specifies the location of the regulated area for this safety zone as all waters of Delaware River, adjacent to Penn's Landing, Philadelphia, PA, bounded from shoreline to shoreline, bounded on the south by a line running east to west from points along the shoreline at latitude 39°56′31.2″ N., longitude 075°08′28.1″ W.; thence to latitude 39°56′29″ .1 N., longitude 075°07′56.5″ W., and bounded on the north by the Benjamin Franklin Bridge.

As specified in § 165.506, during the enforcement period no vessel may transit this safety zone without approval from the Captain of the Port Delaware Bay. If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative.

This notice of enforcement is issued under authority of 33 CFR 165.506 and 5 U.S.C. 552(a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide the maritime community with advanced notification of this enforcement period via Broadcast Notice to Mariners (BNM).

If the Captain of the Port Delaware Bay determines that the regulated area need not be enforced for the full duration, a BNM to grant general permission to enter the safety zone may be used.

Dated: October 27, 2016.

Benjamin A. Cooper,

Captain, U.S. Coast Guard, Captain of the Port Delaware Bay.

[FR Doc. 2016–26342 Filed 10–31–16; 8:45 am]

BILLING CODE 9110–04–P

LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. RM 2011–6]

Designation of Agent To Receive Notification of Claimed Infringement

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: Under the Digital Millennium Copyright Act (''DMCA''), the U.S. Copyright Office is required to maintain a ''current directory'' of agents that have been designated by online service providers to receive notifications of claimed infringement. Since the DMCA's enactment in 1998, online service providers have designated agents with the Copyright Office using the Office's or their own paper form, and the Office has made scanned copies these filings available to the public by posting them on the Office's Web site. Although the DMCA requires service providers to update their designations with the Office as information changes, an examination of the Office's current directory reveals that many have failed to do so, and that much of the information currently contained in the directory has become inaccurate and out of date. On September 28, 2011, the Office issued a notice of proposed rulemaking to update relevant regulations in anticipation of creating a new electronic system through which service providers would be able to more efficiently submit, and the public would be better able to search for, designated agent information. On May 25, 2016, with the electronic system in its final stages of development, the Office issued a notice of proposed rulemaking proposing significantly lower fees for designating agents through the forthcoming online system. As the next step in implementation, the Office today announces the adoption of a final rule to govern the designation and maintenance of DMCA agent information under the new electronic system and to establish the applicable fees.

DATES: Effective December 1, 2016.

FOR FURTHER INFORMATION CONTACT: Sarang V. Damle, General Counsel and Associate Register of Copyrights, by email at *sdam@loc.gov,* or Jason E. Sloan, Attorney-Advisor, by email at *jslo@loc.gov.* Each can be contacted by telephone by calling (202) 707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

In 1998, Congress enacted section 512 of title 17, United States Code, as part of the Digital Millennium Copyright Act (''DMCA'').[1] Among other things, section 512 provides safe harbors from copyright infringement liability for online service providers that are engaged in specified activities and that meet certain eligibility requirements.[2] A service provider seeking to avail itself of the safe harbor in section 512(c) (for storage of material at the direction of a user) is required to designate an agent to receive notifications of claimed copyright infringement by making contact information for the agent available to the public on its Web site, and by providing such information to the Copyright Office.[3] The safe harbors in subsections 512(b) (for system caching) and (d) (for information location tools) incorporate the notice provisions of section 512(c) and thus also require that notices of infringement be sent to ''the designated agent of a service provider'' [4]—that is, an agent that has been designated by the service provider as described above.[5]

The language of section 512(c)(2) makes clear that a service provider must maintain the same contact information required under section 512(c)(2)(A) and (B) both on its Web site and at the Copyright Office.[6] A service provider that fails to maintain current and accurate information, both on its Web site and with the Office, may not satisfy the statutory requirements necessary for

[1] Public Law 105–304, 112 Stat. 2860 (1998).

[2] 17 U.S.C. 512.

[3] *Id.* at 512(c)(2).

[4] *Id.* at 512(c)(3)(A).

[5] *See id.* at 512(b)(2)(E), (d)(3).

[6] 63 FR 59233, 59234 (Nov. 3, 1998) (''[A] service provider designates an agent by providing information required by Copyright Office regulations both on its publicly available Web site and in a filing with the Copyright Office.''); *see also BWP Media USA Inc.* v. *Hollywood Fan Sites LLC,* 115 F. Supp. 3d 397, 403 (S.D.N.Y. 2015) (''[T]he statutory scheme expressly requires two publicly available, parallel sources of a service provider's DMCA agent information (the service provider's Web site and the [Copyright Office] directory) in order for that provider to be shielded by the § 512(c) safe harbor.''); 4 Melville Nimmer & David Nimmer, Nimmer on Copyright 12B.04[B][3] (2015) (''Nimmer on Copyright'') (''In addition to providing the foregoing information to the Copyright Office, the service provider must provide the same information to the public.'').

invoking the limitations on liability in section 512.

As Congress made clear in enacting section 512(c)(2), its expectation was that ''the parties will comply with the functional requirements of the notification provisions—such as providing sufficient information so that a designated agent or the complaining party submitting a notification may be contacted efficiently—in order to ensure that the notification and take down procedures set forth in this subsection operate smoothly.'' [7] A service provider's failure to maintain up-to-date information would be contrary to that congressional intent, and would substantially undermine the statutory regime, as inaccurate or outdated information could significantly affect the ability of a copyright owner to contact a service provider's designated agent. The end result in such a case would be the same as if the service provider had not designated an agent at all—notifications of claimed infringement cannot effectively be submitted. Because providing inaccurate or outdated information can be functionally equivalent to not designating an agent, it follows that just as designating an agent is a prerequisite for obtaining safe harbor protection,[8] keeping that designation current and accurate must be an ongoing prerequisite as well.[9]

Moreover, the statute specifically directs the Copyright Office to ''maintain a current directory of agents,'' and authorizes a fee to cover the ''costs of maintaining the directory.'' [10] The purpose of this central repository of designated agent information—separate and apart from the information required to be maintained on each service provider's Web site—is ''[t]o facilitate easy access to the identity of all designated agents'' for public use.[11] If designated agent contact information contained in the Office's directory is inaccurate or out of date, it would significantly hinder the ability of copyright owners to efficiently contact the service provider's agent. This is especially so because it may be difficult to locate contact information for a designated agent on a service provider's own Web site.[12] Thus, in adopting regulations to implement the statute, the Office's ultimate task is to ensure that the directory fulfills its essential purpose as a convenient repository for ''current'' designated agent information.[13]

Because the DMCA was effective on its date of enactment, and a procedure to enable the designation of agents needed to be in place immediately, the Copyright Office issued interim regulations governing the designation of agents to receive notifications of claimed infringement without the opportunity for a public comment period.[14] While the information required to be provided by the interim regulations was originally submitted to the Office in paper hardcopy, the Office later began accepting scanned submissions of paper designations via email. Once received, the Office then scanned the filings, if necessary, and posted them to the directory on its Web site.[15] This system has continued to this day.

Over time it has become clear to the Office that the designation process established under the interim regulations needs to be updated to better fulfill the objectives of section 512(c)(2). The paper designation system is inefficient and expensive for service providers, and represents a significant drain on Office resources due to the largely manual process of scanning paper designations and posting them online. Furthermore, the search capabilities of the paper-generated directory, even in its online format, are limited. To effectuate an update of the interim regulations, the Office issued a notice of proposed rulemaking on September 28, 2011 (''NPRM'') proposing a new fully-electronic system through which service providers could more efficiently designate agents and maintain service provider and agent information with the Copyright Office, and the public could more easily search for agents in an online directory.[16]At the time of the NPRM, the Office also expressed concern that a sizable portion of the designations in the paper-generated directory appeared to be outdated or for defunct service providers. The Office had examined a small random sampling of designations from the directory, which revealed that a number of existing designations were associated with businesses that had ceased operations.[17] Thus, although the interim regulations required a service provider that ceased operations to notify the Copyright Office of such,[18] it seemed that few actually did so.[19] The Office also noted that although it was unable to ''discern the precise percentage of designations that contain outdated information, the number of amended designations that the Office does receive suggests that many designations are probably outdated.'' [20]

In 2013, the Department of Commerce's Internet Policy Task Force [21] reiterated concerns regarding the accuracy of the Office's existing directory in a paper addressing various issues involving copyright and new technologies. Relying on an industry study, the Task Force found that ''the database is not current and reliable.'' [22]

More recently, to confirm the NPRM's initial assessment of the quality of the information in the current designated agent directory, the Office examined a larger sampling of 500 existing paper designations and found that approximately 70% either had inaccurate information or were for defunct service providers. Specifically, 110 (22%) appeared to be for defunct service providers.[23] For the remaining,

[7] Staff of H. Comm. on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, at 32 (Comm. Print 1998).

[8] *See* 17 U.S.C. 512(c)(2) (''The limitations on liability established in this subsection apply to a service provider *only if* the service provider has designated an agent to receive notifications of claimed infringement. . . .'') (emphasis added); *see also* 4 Nimmer on Copyright 12B.04[B][3] (''Section 512 provides that a service provider may take advantage of the instant limitation only if it has designated an agent to receive the notifications of claimed infringement.'').

[9] Several commenters in this proceeding agree that failing to keep designations current and accurate could result in the loss of safe harbor protection. *See infra* note 89 and accompanying text.

[10] 17 U.S.C. 512(c)(2).

[11] *See* 4 Nimmer on Copyright 12B.04[B][3]; *see also BWP Media USA Inc.,* 115 F. Supp. 3d at 402 (citing Nimmer on Copyright).

[12] As discussed below, in an effort to assess the accuracy of designations in the existing Copyright Office directory, the Office undertook a comparison of the information contained in designations in the directory against the information on service provider Web sites. In doing so, the Office also learned that it often takes a significant effort to even locate designated agent information on a service provider's Web site, and in many cases the Office was unable to locate the information at all.

[13] *See* 17 U.S.C. 512(c)(2).

[14] *See* 63 FR at 59233–34.

[15] *See http://www.copyright.gov/onlinesp/.*

[16] *See* 76 FR 59953 (Sept. 28, 2011).

[17] 76 FR at 59954.

[18] 37 CFR 201.38(g) (''If a service provider terminates its operations, the entity shall notify the Copyright Office by certified or registered mail.'').

[19] 76 FR at 59954.

[20] *Id.*

[21] The Internet Policy Task Force is a group comprised of various Commerce Department bureaus, including the United States Patent and Trademark Office, the National Telecommunications and Information Administration, the International Trade Administration, the National Institute of Standards and Technology, and the Economic and Statistics Administration. Department of Commerce Internet Policy Task Force, Copyright Policy, Creativity, and Innovation in the Digital Economy, at i (2013).

[22] *Id.* at 59 & n.317 (citing a study by the Software & Information Industry Association finding that ''nearly half'' of emails sent to a sample of designated agents listed in the Office's directory ''were returned as undeliverable'' and that ''[o]f those that were deliverable, many went without a response'').

[23] This figure aligns with the estimate made by the Office in calculating the appropriate fee for the

non-defunct service providers, to determine whether a service provider's designation contained inaccurate or outdated information, the Office compared the information provided in the paper designation to the information the service provider currently provides on its own Web site. As noted above, the DMCA requires a service provider to maintain the same information both on its Web site and at the Copyright Office. Where there is a discrepancy between these sources, it is fair to assume that the information in the Copyright Office's directory, rather than the information on the service provider's own Web site, is out of date, as service providers are more likely to update their own Web sites on a regular basis.

Accordingly, for each of the 390 non-defunct service providers in the sample, the Office assessed whether the telephone number, physical mail address, and email address listed for the designated agent in the Office's directory matched the contact information on the service provider's Web site. The Office found that the Web sites for 20 service providers did not appear to contain any contact information whatsoever. Although these service providers' failure to provide designated agent information on their Web sites renders them ineligible for the section 512 safe harbors, that failure also meant that the Office could not ascertain the accuracy of the designations in the Office's directory one way or the other, because there was no information against which to compare. This left the Office with a sample of 370 service providers that had at least some of the required contact information on their Web sites that the Office could use to compare against the paper designations filed with the Office.[24] Out of these 370 designations, 241 (approximately 65%) were out of date, as evidenced by the fact that one or more of the telephone number, physical mail address, or email address listed for a designated agent did not match the contact information on the corresponding service provider's Web site.[25]

As this analysis shows, the apparent volume of designations in the Office's directory belonging to defunct service providers or containing inaccurate information is extremely high. These findings are particularly concerning because they show that service providers might unwittingly be losing the protection of the safe harbors in section 512 by forgetting to maintain complete, accurate, and up-to-date information with the Copyright Office. These findings are also concerning because the directory in many cases would seem to be an unreliable resource, at best, to identify or obtain contact information for a particular service provider's designated agent.

Though the Office did not yet know the full extent of the inaccuracy of the current directory, the Office issued the NPRM with these general concerns of accuracy, cost, and efficiency in mind. In addition to describing the proposed electronic system, the NPRM sought public comment on modified regulations that would govern the submission and updating of information relating to designated agents through such proposed system.[26] In response to the NPRM, the Office received comments from trade organizations and others representing the interests of internet service providers and copyright owners.[27]

To effectuate the system described in the NPRM, the Library of Congress authorized the necessary software development effort through its Information and Technology Services unit (now called the Office of the Chief Information Officer). Over the past year, the Library has committed development resources to this effort and it is now anticipated that the new electronic system to register designated agents with the Office will be launched on December 1, 2016.

As the software development effort was reaching its final stages, the Office on May 25, 2016 issued a notice of proposed rulemaking to lower the fee for designating an agent through the new system (''Fee NPRM'').[28] The Fee NPRM proposed reducing the current fee of $105, plus an additional fee of $35 for each group of one to ten alternate names used by the service provider, to a flat fee of $6 per designation—whether registering a new designation, or amending or resubmitting a previously registered designation.[29] The Office solicited comments on the proposed change in fees and received a number of comments in response.[30]

new system. In the Office's May 25, 2016 notice proposing the specific fee for designating agents through the new electronic system, the Office estimated that defunct service providers constituted 15–25% of all current designations. *See* 81 FR 33153, 33154 (May 25, 2016). The category of defunct service providers includes service providers that have merged with another service provider. In such cases, the Web properties previously owned by the first service provider may still exist, but that service provider itself no longer exists as a going concern.

[24] The Office notes that a number of even these service providers did not provide all three pieces of information contemplated by the statute—the telephone number, physical mail address, and email address for the designated agent—on their Web sites, instead providing only one or two. In those cases, the Office used whichever piece(s) of contact information that the service provider supplied on the Web site to compare against the information in the Office's directory. If that information matched, the Office counted the service's provider's designation as accurate and current.

[25] This figure includes Web sites that provided contact information explicitly for a DMCA designated agent as well as Web sites that only provided general contact information for the site. To break this number down further: The Office found that for approximately 56% of the designations corresponding to Web sites with contact information specifically for a designated agent, one or more of the telephone number, physical mail address, or email address listed for a designated agent did not match the contact information on the corresponding service provider's Web site. For service providers with Web sites that only provided general contact information that did not specifically reference a designated agent, this figure was approximately 84%.

[26] *See* 76 FR at 59953.

[27] Computer & Commc'ns Indus. Ass'n, Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (''CCIA Initial''); Elec. Frontier Found., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) (''EFF Initial''); Google Inc., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) (''Google Initial''); Google Inc., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Dec. 27, 2011) (''Google Reply''); Internet Commerce Coal., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) (''ICC Initial''); Matthew Neco, Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (''Neco Initial''); Microsoft Corp., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) (''Microsoft Initial''); MiMTiD Corp., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) (''MiMTiD Initial''); Motion Picture Ass'n of Am., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 23, 2011) (''MPAA Initial''); Org. for the Promotion and Advancement of Small Telecomms. Cos., Nat'l Telecomms. Coop. Ass'n, Am. Cable Ass'n, Indep. Tel. & Telecomms. Alliance, W. Telecomms. Alliance, Rural Indep. Competitive All., Joint Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) (''Telecomm Parties Initial''); Pub. Knowledge, Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) (''Public Knowledge Initial''); Recording Indus. Ass'n of Am., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (''RIAA Initial''); Verizon Commc'ns Inc., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) (''Verizon Initial'').

[28] Designation of Agent To Receive Notification of Claimed Infringement, 81 FR 33153 (May 25, 2016).

[29] *Id.* at 33154.

[30] Ass'n of Am. Publishers, Comments Submitted in Response to U.S. Copyright Office's May 25, 2016 Notice of Proposed Rulemaking (June 24, 2016) (''AAP Fee''); Computer & Commc'ns Indus. Ass'n, Comments Submitted in Response to U.S. Copyright Office's May 25, 2016 Notice of Proposed Rulemaking (June 23, 2016) (''CCIA Fee''); Elec. Frontier Found. et al., Comments Submitted in Response to U.S. Copyright Office's May 25, 2016

Continued

Having reviewed and carefully considered all of the public comments received in response to the NPRM and the Fee NPRM, the Copyright Office now issues a final rule, effective as of the implementation of the new electronic system on December 1, 2016, governing the designation of agents to receive notifications of claimed infringement with the Office pursuant to 17 U.S.C. 512(c)(2), including associated fees. The Register's authority to implement such system and promulgate these regulations governing the designation of agents and the use and operation of the electronic system derive directly from section 512(c)(2), which explicitly permits the Register to require service providers to supply ''contact information which [she] may deem appropriate'' and expressly requires the Register to ''maintain a current directory of agents available to the public.'' [31] In addition, the Copyright Act gives the Register general authority to ''establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title.'' [32] Sections 512 and 702 together necessarily authorize such regulations as the Register may deem appropriate to ensure both a ''current directory'' and that the registration system and directory are acceptably ''maintain[ed]'' for continued usability. As noted, the purpose of the directory is ''[t]o facilitate easy access to the identity of all designated agents'' for public use,[33] and the rule announced today serves this end by establishing an electronic system that makes it easier for the public to more effectively find current and accurate designated agent contact information.

II. Discussion

The new electronic system to designate agents with the Copyright Office pursuant to 17 U.S.C. 512(c)(2) will fully replace the paper-based system implemented through the interim regulations adopted in 1998. Beginning December 1, 2016, a service provider must use the online registration system to electronically submit service provider and designated agent information to the Copyright Office. Accordingly, as of December 1, 2016, the Office will no longer accept paper designations.

Notice of Proposed Rulemaking (June 24, 2016) (''EFF Fee''); Internet Ass'n, Comments Submitted in Response to U.S. Copyright Office's May 25, 2016 Notice of Proposed Rulemaking (''IA Fee'').

[31] 17 U.S.C. 512(c)(2).

[32] *Id.* at 702.

[33] *See* 4 Nimmer on Copyright 12B.04[B][3].

The comments received in response to the NPRM and Fee NPRM indicate widespread support for the creation of an electronic registration system,[34] with no commenter suggesting that the paper system should be retained. Indeed, given that online service providers, by definition, operate in an online environment, an electronic-only designation procedure is not only logical but should pose no special burden for service providers. In addition, the electronic system significantly increases the administrative efficiency of the designation process, resulting in a dramatic reduction of costs to the Office and, therefore, in the filing fees to be charged to the service provider community. Such a system also better ensures that service providers will be supplying and maintaining accurate information with the Office by making it easier and cheaper to update designations. The system includes automatic checks to confirm that the requisite information is being provided and will verify certain types of submitted data. Moreover, the electronic registration system seamlessly integrates with the online directory, making it quicker and easier for the public to find a service provider's current designation.

As detailed above, the Copyright Office has confirmed that a substantial amount of the designated agent information currently listed in the Office's directory is inaccurate or out of date. To ensure that the new electronic directory is accurate and up to date, all service providers seeking to comply with 17 U.S.C. 512(c)(2), including those that have previously designated an agent using the paper process under the Office's interim regulations, are required to submit new designations through the electronic system by December 31, 2017. Moreover, the Office made clear that ''[i]nterim designations filed pursuant to these interim regulations will be valid until the effective date of the final regulations. At that time, service providers wishing to invoke section 512(c)(2) will have to file new designations that satisfy the requirements of the final regulations, which will include the payment of the fee required under the final regulations.'' [35]

While service providers must file new designations in the electronic system, they will have over a year to do so. Previously filed paper designations will continue to satisfy the service provider's statutory obligations under section 512(c)(2) until the service provider registers electronically, or through December 31, 2017, whichever occurs earlier. For a further discussion of this aspect of the final rule, including responses to public comments, see ''Phaseout of Paper Directory and Requirement to Register in Electronic Directory'' below.

[34] *See, e.g.,* AAP Fee at 1–2; IA Fee at 2; ICC Initial at 1; Microsoft Initial at 2; MPAA Initial at 1; Public Knowledge Initial at 1.

[35] 63 FR at 59234.

As under the old system, service providers will be required to keep their designations current and accurate by timely updating information in the system when it has changed (*i.e.,* ''amending'' their designations). Additionally, to help ensure that designations in fact remain current and accurate, a service provider's designation will expire and become invalid three years after it is registered with the Office, unless the service provider renews such designation by either amending it to correct or update all relevant information or resubmitting it without amendment to confirm the designation's continued accuracy. This constitutes the requirement to periodically ''renew'' a designation. Either amending or resubmitting a designation, as appropriate, through the online system begins a new three-year period before such designation must be renewed. The new system, which will include automated reminders to service providers to review and renew their designations, is designed to encourage effective compliance with the requirements of section 512(c)(2). It will also better serve the public by helping to ensure that service providers maintain current information about their designated agents, including up-to-date contact information, on file with the Copyright Office, as Congress intended. For a further discussion of these aspects of the final rule, including responses to public comments, see ''Amending and Renewing a Designation'' below.

A. Registering a Service Provider and Designated Agent

Creating a Registration Account. In order to access the online registration system, a service provider must establish an account that will be used to log into the system and register itself and its designated agent. There is no charge to establish a registration account. Registration of any designation with the Office, including any subsequent amendment or resubmission (see ''Amending and Renewing a Designation'' below) must be made through such an account. To set up a registration account, the service provider must select a login ID and password, and provide the first name, last name, position or title, organization, physical mail address, telephone number, and email address of two representatives of the service provider who will serve as primary and secondary points of contact for purposes of communications with the Copyright Office. These representatives will receive automated confirmation emails generated by the system and correspondence from the Office, such as notices that a designation needs to be renewed and other communications about the system or account. The Office may also contact these individuals if there are any questions about the designation or registration account. These individuals' identities and contact information will not be made publicly available in the online directory and are not required to be listed on service provider Web sites, as the Office is requiring this information pursuant to the Register's statutory authority to ''maintain'' the directory, not under her authority to require additional contact information for inclusion in a service provider's designation.[36] The Office's ability to communicate with these individuals is essential to the functioning and continued usability of the registration system and directory.

The Office notes that one commenting party asked that an email address for the individual who actually registered the designation be made available in the public directory.[37] The Office declines to adopt this suggestion, as it is not apparent how this information would further the statutory purpose of the directory, which is to ensure that copyright owners can send notifications of claimed infringement to the *designated agent* of a service provider (rather than the individual who may have registered that agent).

In the NPRM, the Office mentioned its willingness to consider allowing a service provider to delegate responsibility for managing the registration process or otherwise administering its account to a third-party entity.[38] The Office noted a potential concern with the accuracy of the required information if the information is not supplied by the service provider itself.[39] Only one commenter echoed this concern, suggesting that a third party might also fail to follow the directions of the service provider.[40] Other commenters disagreed with that view, arguing that delegation to third parties is more efficient and would be particularly helpful to smaller service providers with minimal staffing.[41] They explained that third-party firms that provide assistance to service providers have developed the expertise to accurately and efficiently comply with regulatory requirements.[42] Furthermore, they contended that third parties have every incentive to be accurate so as to establish a positive reputation to retain and grow their client base.[43]

After considering these competing comments, the Office finds no compelling reason to deny a service provider the option of hiring a third party to manage its designation on its behalf, so long as the service provider is willing to accept the risk that it could lose the safe harbor protections of section 512 if such third party fails to provide accurate information and maintain an up-to-date designation at the Copyright Office. In light of this conclusion, the electronic system has been designed to facilitate third-party management of service provider designations. In particular, a single registrant is able to use a single account to designate agents (and amend and resubmit designations) for multiple service providers.

Registering a New Designation. Once a registration account has been created, an authorized user can log into the account to register a service provider's designation with the Office by providing the information requested by the system, which is described in detail in the section below, ''Information Required for Service Providers and Designated Agents.''

Related Service Providers. An issue that the Office considered in designing the new system was whether related or affiliated service providers that are separate legal entities (*e.g.,* parent and subsidiary companies) should be permitted to file a single, joint designation.[44] Under the interim regulations, related companies were deemed to be separate service providers and thus required to file separate designations. The Office has received occasional complaints from service providers about the inefficiency of this practice. The NPRM noted the Office's receptiveness to allowing joint designations, but also discussed some of the difficulties it could pose.[45] Many commenters favored allowing joint designation of related service providers, perceiving it as more efficient and less costly.[46] One commenter opposed it, stating that the directory's accuracy would be better preserved by continuing to require separate designations.[47]

After reviewing the comments and working with the Library's software development team, the Office has concluded that permitting joint designations as originally conceived in the NPRM would needlessly complicate the online registration system and would also require a significantly more complex and costly development effort. As explained above, the Office has designed the system so that a single account user can register and manage designations for multiple service providers. Thus, a parent company can manage the designations of all of its subsidiaries through one central account should it so choose. The ability of a single registrant to manage multiple designations, combined with the modest fee for registration, set at $6 (see ''Fees'' below), should largely address the concerns that would have been addressed by permitting joint designations. Accordingly, under the final rule, as under the interim rule, related or affiliated service providers that are separate legal entities are considered separate service providers, and each must have its own separate designation.

B. Information Required for Service Providers and Designated Agents

The Office has determined that the information required from service providers through the online registration system will remain, for the most part, the same as has been required under the interim regulations. A service provider is required to supply its full legal name, physical street address (not a post office box), telephone number, email address, any alternate names used by the service provider, and the name, organization, physical mail address, telephone number, and email address[48]

[36] *See* 17 U.S.C. 512(c)(2) (''The Register of Copyrights shall *maintain* a current directory of agents available to the public. . . .'') (emphasis added).

[37] RIAA Initial at 2.

[38] 76 FR at 59954.

[39] *Id.*

[40] RIAA Initial at 1.

[41] *See, e.g.,* Microsoft Initial at 1–2; MPAA Initial at 3–4; Telecomm Parties Initial at 3.

[42] Telecomm Parties Initial at 3.

[43] *Id.*

[44] 76 FR at 59958.

[45] *Id.*

[46] *See, e.g.,* CCIA Initial at 1; ICC Initial at 5–6; Microsoft Initial at 4; MPAA Initial at 11; Telecomm Parties Initial at 4–5; Verizon Initial at 1.

[47] RIAA Initial at 4.

[48] The NPRM noted concerns that had previously been expressed to the Office about displaying email addresses on the Office's Web site, and noted that some had suggested that the Office should display email addresses in a format that could not easily be harvested by automated software and used for spamming purposes (*e.g.,* ''userid at domain dot com''). 76 FR at 59956–57. However, no commenter recommended adoption of this suggestion, and instead the system will display traditionally

Continued

of its designated agent. These requirements are described in more detail below. Although the system requires contact information for the service provider, the designated agent, and the primary and secondary contacts for the registration account, the Office notes that the same person may serve in multiple roles so long as the primary and secondary contacts associated with the registration account are different people.

Service Provider's Identity and Alternate Names. The NPRM provided that in addition to the legal name of the service provider, the Office would require a service provider to list any alternate names under which it is doing business (as required under the interim regulations), including any names that the service provider would expect members of the public to be likely to use to search the directory for the service provider's designated agent.[49] The NPRM explained that such names should enable a copyright owner to identify the service provider and its designated agent.[50]

The Office has modified this provision to clarify that the requirement to provide alternate names is not limited solely to names under which a service provider is doing business, such as a ''d/b/a'' name. Rather, service providers must list all alternate names that the public would be likely to use to search for the service provider's designated agent in the directory, including all names under which the service provider is doing business, Web site names and addresses (*i.e.,* URLs, such as ''__.com'' or ''__.org''), software application names, and other commonly used names. The purpose of this requirement is to identify the service provider sufficiently so that the public can locate the service provider's designated agent information in the directory.[51]

Separate *legal* entities, however—such as corporate parents or subsidiaries—are *not* considered alternate names. As noted above, each separate legal entity must have its own separately registered designation (though such separate designations may be managed by a single user through a single registration account).

Some commenters noted that it could be burdensome to list all of a service provider's Web sites in the system.[52] The Office does not believe that such a requirement is unduly onerous, especially when weighed against the benefits of allowing the public to search the directory using Web site names or addresses rather than the corporate names of service providers, which may not be well known. But to facilitate compliance with the alternate names requirement, the system is designed to allow names to be uploaded in bulk using an Excel spreadsheet, in addition to being entered one at a time. Once entered or uploaded, the list can be modified as necessary to reflect new and/or discontinued names. These factors should significantly diminish any potential burden associated with providing alternate names.

Contact Information for the Service Provider. As under the interim regulations and proposed in the NPRM, the Office is continuing to require service providers to supply a physical mail address, pursuant to the Register's authority under section 512(c)(2) to require any additional contact information the Register deems appropriate. As under the interim regulations, a service provider's physical mail address will continue to be made public through the online directory and remains part of the information that a service provider is required to display on its Web site. Furthermore, as the NPRM proposed, the Office is requiring that the physical mail address be a street address, and not a post office box. The rationale for this requirement is that there are circumstances where it is important for a copyright owners to be able to physically locate the service provider (*e.g.,* for accurate identification of the service provider or to serve a legal notice).[53] Two commenters supported this aspect of the proposal,[54] and none objected.[55]

In addition, pursuant to the Register's separate authority to issue regulations necessary to ''maintain'' the public directory, the Office is now also requiring service providers to provide a telephone number and email address, solely for use by the Office for administrative purposes essential to the functioning and continued usability of the registration system and directory—for example, to send system confirmations, renewal reminders, or other notices about its designation or the system itself.[56] A service provider's telephone number and email address will not be shown in the public directory, and are not required to be displayed on the service provider's Web site.

Agent's Identity. Section 512(c)(2)(A) specifies that to invoke the limitation of liability provided under subsection (c), the service provider must provide ''the name, address, phone number, and electronic mail address of the agent.'' Under the interim regulations, the Office initially required the service provider to provide the name of a natural person to act as the service provider's designated agent. As a result of concerns that personnel changes could inadvertently render the designation of a natural person obsolete, however, the Office has subsequently allowed service providers to designate a specific position or a particular title (*e.g.,* ''Copyright Manager''), rather than

formatted email addresses (*e.g.,* ''userid@domain.com'').

[49] 76 FR at 59959.

[50] *Id.* at 59957.

[51] The Office declines to adopt the Recording Industry Association of America (''RIAA'')'s suggestion to require service providers to disclose any shareholders or related groups of shareholders with a majority ownership of the service provider and any persons or entities with a controlling interest in or decisionmaking power over the service provider. *See* RIAA Initial at 3; *see also* Google Reply at 2 (arguing that such a requirement has no basis in the statute). The Office does not at this time see sufficient justification to burden service providers with such an additional requirement.

[52] *See, e.g.,* Public Knowledge Initial at 12–13 (''[T]he Copyright Office can require service providers to list their domain names as separate fields in the agent designation form. . . . However, even this may result in too burdensome amendment requirements for providers that frequently obtain new domain names, even if those amendments do not make the service provider actually easier to find by a copyright owner.''); *see also* Microsoft Initial at 3–4; MPAA Initial at 11–12.

[53] Although the Office is requiring a street address for the service provider, the Office declines to adopt RIAA's suggestion to require proof of this address. *See* RIAA Initial at 4. RIAA asserted that a significant problem facing copyright owners is that information provided by service providers is not accurate and the information cannot be used to locate the service provider to serve a subpoena. *Id.* While the Office is sympathetic to this concern, the Office believes that the new renewal requirement should largely resolve this issue.

[54] *See* MPAA Initial at 10; Google Initial at 2 (explaining that ''all of'' the NPRM's proposed clarifications concerning contact information for service providers ''appear sound'').

[55] Although some commenters argued in favor of permitting *designated agents* to provide a post office box in lieu of a street address, none objected to requiring *service providers* to provide a street address. *See, e.g.,* CCIA Initial at 1–2; ICC Initial at 6; Google Reply at 2. The Office notes that, in rare situations, the requirement to provide a street address could raise safety or security concerns for an individual who is operating the service. The final rule thus provides a mechanism to submit a written request for a waiver of the prohibition on post office boxes in exceptional circumstances. If the request is approved, the service provider may display the post office box address on its Web site and will receive instructions from the Office on how to complete the Office's electronic registration process. Upon successful completion of the registration process in accordance with the Office's instructions, the registered designation will not be considered invalid due to any failure to comply with the service provider address requirement, and the Office will override the system to insert the post office box as the service provider's address.

[56] Though the NPRM only proposed requiring an email address, the Office is now requesting a telephone number as well as an alternative and more expedient method for the Office to communicate directly with service providers, if necessary.

an individually named person, as its agent.[57]

The NPRM proposed continuation of the practice of allowing service providers to designate an agent either by name or by position or title.[58] The NPRM also stated, however, that the Office was not inclined to permit a service provider to designate an entity generally (*e.g.,* a law firm or copyright management agency).[59] The Office expressed concern that notices of claimed infringement addressed to a general entity, rather than a natural person or specific title, might be overlooked or not attended to in a timely fashion, and that this concern is reduced when a service provider designates a specific position or title at an entity or a natural person as its agent, particularly when that role is associated with a specific email address.[60] The NPRM further proposed, however, that service providers be permitted to designate an agent either within the service provider's organization itself or at an unrelated third party.[61]

There was widespread support among commenters for maintaining the Office's current practice of allowing service providers to designate agents by position or title rather than an individual's proper name, both to address the problem of personnel changes and to avoid misuse of personal information.[62] Moreover, none of the commenters opposed the Office's position that an employee of either the service provider or a third party could serve as a designated agent.[63] There was debate, however, concerning whether it would be appropriate to name a third-party entity as a whole (*e.g.,* a law firm or copyright management agency) as an agent. One trade organization representing copyright owners was against it, arguing that it would increase the likelihood that notices are not handled expeditiously and further complicate the ability of rights holders to efficiently contact the individual responsible when there are failures to act on notices, to follow up on the handling of notices, or to take other action.[64] But Public Knowledge, a public advocacy organization, urged the Office to allow designation of third-party entities as a whole, noting that regardless of whether the designated agent is a person, title, or entity, it does not change the service provider's obligation to respond to notices expeditiously.[65] Public Knowledge further contended that section 512 does not limit designations to specifically identifiable persons, and that at least one federal court has suggested that designating an entire department as an agent satisfies the statute.[66]

After considering the comments and reevaluating its initial inclination with respect to the naming of an individual or position versus a department or entity as a whole to serve as a designated agent, the Office has concluded that any one of these appears to be a reasonable interpretation of the statute. The Office believes, contrary to its initial inclination, that the sounder policy is to allow a service provider to designate as its agent an individual (*e.g.,* ''Jane Doe''), a specific position or title held by an individual (*e.g.,* ''Copyright Manager''), a specific department within the service provider's organization or within a third-party entity (*e.g.,* ''Copyright Compliance Department''), or a third-party entity generally (*e.g.,* ''ACME Takedown Service''). The Office agrees with the point made by Public Knowledge that service providers are already obligated by statute to respond ''expeditiously'' to take down requests; this is true whether they rely on a particular individual, a corporate department, or a third-party entity to process their notices. The Office is also cognizant of the current realities of the notice-and-takedown system, where some large service providers now receive millions of takedown requests per day, making a requirement that a designated agent be a single person simply infeasible.[67] Indeed, the designation of a single person to receive all takedown requests for further processing by others would not allay the Office's original concerns of overlooked notices and untimely action, but might well work *against* the efficient processing of such requests.[68]

The Copyright Office emphasizes, however, that these changes to the rule are in no way intended to excuse the loss or mishandling of notices addressed to departments or entities rather than individuals, or to otherwise absolve service providers from their statutory responsibility to ''respond[ ] expeditiously'' to notices of claimed infringement.[69] Rather, it is the Office's hope that by making these practical accommodations—which may be especially useful for service providers that receive large volumes of notices—the rule will in fact enable greater attention to notices and faster response times.

Contact Information for the Designated Agent. In addition to the agent's identity, the amended regulations continue to require a designated agent's physical mail address, telephone number, and email address.[70] Section 512(c)(2)(A) requires this information to be supplied to the Copyright Office and also to appear on the service provider's Web site. The interim rule's requirement of a facsimile number, however, is being discontinued due to the fact that faxing has become a relatively obsolete technology.

Because an individual serving as a designated agent may be located outside of the service provider's organization, the Office is now also requiring that the designated agent's organization be identified, when applicable. If the designated agent is an individual, a position or title, or a department within

[57] This expansion was a matter of internal practice as the interim rule has always required the ''name of the agent.'' *See* 37 CFR 201.38(c)(3).

[58] 76 FR at 59957.

[59] *Id.*

[60] *Id.*

[61] *Id.* The NPRM also stated that the Office was not inclined to permit the designation of multiple agents, as doing so would unjustifiably complicate the statutory process. *Id.* All commenters seemed to agree with this. *See, e.g.,* MPAA Initial at 10; RIAA Initial at 3.

[62] *See, e.g.,* Google Initial at 2; Microsoft Initial at 3; MPAA Initial at 9–10; Telecomm Parties Initial at 4. Only RIAA seemed to oppose this, suggesting that the best way to ensure notices reach live persons is to require that they be sent to an email address for which a particular employee has responsibility. RIAA Initial at 3.

[63] *Cf.* MPAA Initial at 10 (supporting concept of allowing service provider employees or third parties to serve as designated agents).

[64] MPAA Initial at 9.

[65] Public Knowledge Initial at 9–11.

[66] *Id.* at 9–10 (citing *Hendrickson* v. *eBay, Inc.,* 165 F. Supp. 2d 1082, 1092 n.13 (C.D. Cal. 2001)).

[67] *See, e.g.,* Chris Welch, *Google received over 75 million copyright takedown requests in February, VERGE* (Mar. 7, 2016), *http://www.theverge.com/2016/3/7/11172516/google-takedown-requests-75-million* (stating that Google received over 75 million DMCA takedown requests in a single month and that ''Google is effectively processing over 100,000 URLs per hour'').

[68] RIAA also urged the Office to require a service provider's designated agent to accept service of process on behalf of the service provider. RIAA Initial at 3. Google opposed this, stating that RIAA's request has no basis in the statute and is contrary to its purpose of providing an expeditious, nonjudicial way of removing infringing material. Google Reply at 1–2. The Office declines to adopt RIAA's suggestion; requiring designated agents to accept service of process appears to go beyond the main purpose of the statute.

[69] *See* 17 U.S.C. 512(c)(1)(C).

[70] *See id.* at 512(c)(2)(A). Microsoft requested that in addition to this basic information, the Office include an optional field in the online system to permit service providers to designate a particular Web site location linking to the service provider's designated agent contact information or to additional information or online tools to use a service provider's specific process for receiving notices of claimed infringement. Microsoft Initial at 3–4. While service providers have the option of suggesting the use of specific procedures on their Web site (in addition to providing contact information for a designated agent as required under section 512(c)(2)), the Office declines to adopt Microsoft's suggestion at this time. The Office notes that no other commenter addressed this proposal, and the Office has insufficient information at this time to determine whether such a proposal should be adopted.

a service provider, the agent's organization would simply be the service provider. If the agent is an individual, position or title, or a department at a third-party entity, the agent's organization would be the legal name of that third-party entity. If the agent is a third-party entity as a whole, then the name of the agent and the organization fields should have the same information. If the agent is an individual acting outside of the context of any organization, the field can be marked ''None'' or ''N/A.''

The NPRM proposed permitting post office boxes to serve as a designated agent's address due to concerns about agents' privacy and safety, particularly where an agent's only address is a home address.[71] A number of commenters echoed these concerns.[72] Others argued that the agent is a public-facing position and rightsholders need to be able to contact the agent directly to report claims of infringement, including by street address if telephone and email efforts prove insufficient.[73] They further claimed that using a post office box provides a layer of anonymity that is not warranted, and that requiring a street address better ensures that the agent is a real person and the information provided in the designation is reliable.[74]

After weighing these conflicting viewpoints, the Office has determined that, consistent with the proposed rule, the final rule will allow a designated agent to specify a post office box and will not require a street address. Irrespective of the safety and privacy concerns of designated agents, requiring a physical street address is unnecessary to achieve the goals of the statute. To satisfy section 512(c)(2), service providers are required to supply accurate and reliable information for their designated agents, regardless of whether their agents are using a street address or post office box. While a post office box may not be as direct of a point of contact as a street address, copyright owners may still contact the designated agent by telephone or email. Moreover, allowing use of post office boxes may actually allow for faster and more efficient processing of mailed notices. For example, a large corporate mailroom receiving a broad mix of correspondence might be slower in identifying time-sensitive notices and delivering them to the responsible person within the organization. In contrast, a post office box could be dedicated solely to the receipt of DMCA takedown requests and could be checked directly by the agent.

Signature and Attestation. The Office has eliminated the signature requirement contained in the interim rule. Because all designations in the online registration system require the creation of a user account, as well as payment via Pay.gov (operated by the U.S. Department of the Treasury) with a credit or debit card or a bank account, the system reasonably verifies and authenticates the identity of the person designating the agent (or amending or resubmitting such designation). The registration system as designed by the Library requires each account to be protected by a twelve character password, and the Pay.gov system additionally requires a credit card or bank account holder name, if a credit or debit card, a billing address and card number, and if a bank account, the account and routing numbers.

Furthermore, in designating an agent, or amending or resubmitting such designation, the online registration system requires the account user to attest both to having the authority of the service provider to take that action and to the accuracy and completeness of the information being submitted to the Office by checking a box acknowledging the user's agreement to such an attestation. The transaction cannot be completed without such attestation.[75]

C. DMCA Designated Agent Directory

The new registration system described is directly tied to the public, searchable DMCA designated agent directory. Information submitted by service providers through the registration system will automatically populate in the directory, providing fast and efficient public access to designated agent information. Members of the public will be able to access the directory through the Office's Web site and can search the directory either by service provider name or alternate name to obtain contact information for a designated agent. The search results will show not only service provider names and alternate names matching the search query, but will also indicate whether the agent designation is still active.

Prior Versions of Electronic Designations. The NPRM asked for comment on whether earlier versions of electronic designations should be made available, free of charge, through the public online directory of designated agents, or whether those versions should instead be kept offline, and made available to the public only upon request to the Copyright Office.[76] Some commenters argued that listing prior versions of designations could create confusion for users as to which entry is current and might result in notifications being sent to the wrong person.[77] Others were concerned with the additional cost of developing this functionality.[78] On the other side, some commenters asserted that having immediate access to prior versions of designations would make it easier to determine whether a service provider qualified for safe harbor protection and might also assist scholars in certain research pursuits.[79] Some commenters also suggested that if prior versions are included, they be clearly marked as such or maintained in a separate part of the directory.[80]

Having weighed these comments, the Office has decided to make prior versions of electronic designations available in the online directory so that the public can access them immediately and free of charge. At present, the Office plans for the directory to contain prior versions going back for up to ten years. Each time a designation is amended or resubmitted, the system creates a new version of the designation. Additionally, new versions are created whenever a designation, after having expired or been terminated, is reactivated. Because the earlier records are automatically maintained by the system, there is little added cost to the Office to permit users to access this information. Such historical information may be useful, for example, in a litigation or research context.

In addition, the Office has designed the directory layout to clearly indicate whether a designation is currently active or historical, and any results from a search of the directory will initially only display the most recent version of a designation. From there, a user can then navigate to prior versions of that designation. Accordingly, there should

[71] 76 FR at 59958.

[72] *See, e.g.,* CCIA Initial at 1–2; ICC Initial at 6; Google Reply at 2.

[73] *See, e.g.,* MPAA Initial at 10; RIAA Initial at 4.

[74] *See, e.g.,* MPAA Initial at 10; RIAA Initial at 4. RIAA also asserted that where the agent is an individual with only a home address, the individual is either the sole owner of the service provider (in which case he or she must supply his or her physical address anyway as part of the service provider contact information) or an employee or consultant of a very small company with no central office. RIAA argued that in these situations, the need to supply a physical address will underscore the importance of responding to notices. RIAA Initial at 4.

[75] More generally, existing federal law prohibits the making of any ''knowingly and willfully'' ''materially false, fictitious, or fraudulent statement[s] or representation[s].'' 18 U.S.C. 1001(a).

[76] 76 FR at 59954–55.

[77] *See, e.g.,* ICC Initial at 4; MPAA Initial at 5–6.

[78] *See, e.g.,* ICC Initial at 4; RIAA Initial at 2.

[79] *See, e.g.,* Public Knowledge Initial at 8–9; RIAA Initial at 2; *see also* Microsoft Initial at 3.

[80] *See, e.g.,* MPAA Initial at 5–6; Public Knowledge Initial at 8–9.

be little confusion about the status of a particular designation. The anticipated ten-year time frame was selected due to concerns that displaying more than ten years of records could become voluminous and contain large amounts of outdated information that is simply irrelevant for the vast majority of users.[81] Electronic designations filed before that ten-year period will be maintained consistent with the Office's record retention policies, and would be made available via a request for copies of records pursuant to 37 CFR 201.2.

Prior Versions of Paper Designations. For the same reasons just discussed, following the transition from the current paper-generated directory to the new electronically-generated directory (see ''Phaseout of Paper Directory and Requirement to Register in Electronic Directory'' below), the Office plans to continue to make the paper-generated directory available on the Office's Web site for ten years following the conclusion of the transition period. After this time, paper designations filed pursuant to the interim regulations will be maintained consistent with the Office's record retention policies, and made available via a request for copies of records pursuant to 37 CFR 201.2.

D. Amending and Renewing a Designation

Amending a Designation. It is prudent for service providers to keep the information in their designations, both on their Web sites and with the Office, current and accurate, as courts may find that inaccurate or outdated information constitutes a failure to comply with the statutory requirements necessary for invoking the limitations on liability in section 512. The new online registration system permits a service provider to review the accuracy and currency of the information in its designation and to amend the designation at any time. The fee for amending a designation will initially be set at $6 (see ''Fees'' below). Upon successful receipt of payment, the system will confirm, both in the system and via email, that the designation has been updated in the public directory, and has therefore been renewed as of that date (see ''Periodic Renewal of Designations'' below).

Periodic Renewal of Designations. As discussed above (see ''Background''), the Office has found that an extremely high number of designations in the current directory appear to contain inaccurate or outdated information, or are for defunct service providers. In order to help maintain the accuracy and utility of the online directory of designated agents made available to the public, and to ensure that service providers do not inadvertently lose the protections of the section 512 safe harbors, the NPRM proposed requiring service providers to periodically review their designations and, as necessary, update them to correct inaccurate or outdated information, or confirm their continued accuracy by resubmitting them through the online system.[82] Under the proposed rule, the renewal period was two years.[83] The NPRM also proposed that the online registration system would send out reminder emails ahead of the renewal deadline and explained how that process might work.[84] Lastly, the NPRM proposed that a failure to renew would result in the expiration of the designation.[85]

A number of commenters opposed the requirement of periodic renewal.[86] Opponents offered several arguments for this positon. They argued that once a service provider initially makes a valid designation, that designation should remain effective unless and until it is amended by the service provider.[87] Opponents claimed that a renewal requirement is contrary to the statute because section 512 does not require service providers to take any further action so long as their designations remain accurate and up to date, and the Register is only authorized to specify additional contact information required for new designations—not to impose additional requirements on previously registered designations.[88] They argued that the statute already motivates service providers to keep their designations current and accurate because failing to do so can result in a loss of safe harbor eligibility independent of compliance or noncompliance with any Copyright Office-imposed renewal requirement.[89] They further stated that such situations should be adjudicated in court, and that the Office should not categorically strip service providers of safe harbor eligibility for failing to renew their designations.[90]

Opponents also complained that the proposed renewal requirement was an unreasonable burden, especially on smaller service providers.[91] Opponents further argued that the potential loss of safe harbor protection would be a disproportionally severe consequence for a failure to renew, especially when the failure was due to inattention or clerical error rather than purposeful conduct.[92] They opined that, even with an emailed reminder, a service provider might inadvertently fail to renew its designation and should not be punished for doing so.[93]

On the other side, trade associations representing both copyright owners and a coalition of large internet companies, including broadband providers and technology companies like Amazon, eBay and Google, agreed with the NPRM that renewal is important to address the issue of stale information and ensure the continued accuracy of the directory.[94] These associations also agreed that two years is an appropriate time frame for the requirement.[95] Furthermore, the Department of Commerce's Internet Policy Task Force examined this aspect of the Office's proposal and expressed no objection to it; indeed, it stated that it ''support[ed] the Copyright Office's efforts.''[96]

Having considered the competing views of stakeholders concerning the renewal requirement—as well as its own research into the accuracy of the listings under the existing paper system without a renewal requirement—the Office concludes that in order to ''maintain a current directory'' of designated agents, as the Register is obligated to do under section 512(c)(2), the Office should adopt a periodic renewal requirement. That said, in view of the concerns expressed by some regarding the burden of renewal—particularly with respect to smaller entities—the Office believes it is reasonable to extend the renewal period from two years to three.

A service provider may fulfill the periodic renewal requirement by reviewing its existing designation and either amending it to correct or update

---

[81] The design of the system is sufficiently flexible that the ten-year period can be increased in the future if there is sufficient demand for older records.

[82] 76 FR at 59954–55.

[83] *Id.* at 59959.

[84] *Id.* at 59955.

[85] *Id.* at 59955.

[86] *See, e.g.,* CCIA Initial at 2–6; CCIA Fee at 2–7; EFF Initial at 1–3; EFF Fee at 2–5; IA Fee at 2–4; Microsoft Initial at 2–3; MPAA Initial at 4–5; Neco Initial at 1; Public Knowledge Initial at 4–8.

[87] *See, e.g.,* EFF Initial at 1; EFF Fee at 2; Neco Initial at 1.

[88] *See, e.g.,* CCIA Initial at 3–5; CCIA Fee at 2–3; IA Fee at 3; Public Knowledge Initial at 4–8.

[89] *See, e.g.,* CCIA Initial at 3–5; CCIA Fee at 5; EFF Initial at 3; Microsoft Initial at 2–3; MPAA Initial at 4–5; Public Knowledge Initial at 4–8.

[90] *See, e.g.,* EFF Initial at 3; Public Knowledge Initial at 8.

[91] *See, e.g.,* CCIA Fee at 3–4; EFF Initial at 2–3; EFF Fee at 4; MPAA Initial at 4–5; Neco Initial at 1; Public Knowledge Initial at 5, 7–8; IA Fee at 3.

[92] *See, e.g.,* CCIA Initial at 5; EFF Initial at 2; EFF Fee at 3; IA Fee at 3.

[93] *See, e.g.,* Neco Initial at 1.

[94] ICC Initial at 3–4; RIAA Initial at 2; *see also* Verizon Initial at 1.

[95] ICC Initial at 3–4; RIAA Initial at 2.

[96] Department of Commerce Internet Policy Task Force, Copyright Policy, Creativity, and Innovation in the Digital Economy 59 (2013).

information or, if the information is still accurate and no changes are necessary, simply resubmitting it through the online system without amendment—a process that should take no more than a few minutes.[97] The fee to amend or resubmit a designation in connection with the renewal requirement will initially be set at $6 (see ''Fees'' below).

The final rule also makes clear that the three-year renewal period will be reset after a service provider either amends or resubmits its designation through the online system. To illustrate, if a service provider registers a new designation on January 1, 2017, and thereafter makes no amendment to that designation, it must renew the designation prior to January 1, 2020. But if that service provider instead amends its initial designation on March 1, 2019 to update it with new information, the three-year renewal clock is reset, and March 1, 2022 becomes the date prior to which the service provider must renew the designation.

To alleviate any concern that a service provider may accidentally forget to renew its designation during the three-year period, the online registration system will automatically generate a series of reminder emails well in advance of the renewal deadline to every email address associated with the service provider in the system (including the primary and secondary account contacts, the service provider, and the designated agent).

Should a service provider fail to renew within the allotted time, the designation will expire and become invalid, resulting in its being labeled as ''terminated'' in the directory. The primary and secondary account contacts, service provider, and designated agent will be notified of this. A service provider whose designation has expired, however, will be able to reactivate the expired designation by logging into the system and following the same process as a renewal (including payment of the applicable fee). Once the process is complete and payment has been successfully received, the designation will no longer be invalid and will be relabeled as ''active'' in the directory. Reactivation of a designation will create a new version of the designation in the historical record (see ''Prior Versions of Electronic Designations'' above). Thus, the directory will show a gap in time between expiration and reactivation, during which the service provider had no active designated agent listed in the Office's directory.

The Copyright Office finds the arguments made against the renewal requirement unpersuasive. First, imposition of a renewal requirement is within the authority delegated to the Office by the Copyright Act. Section 512(c)(2) not only requires service providers to maintain up-to-date information, but explicitly obligates the Register of Copyrights to ''maintain a *current* directory of agents available to the public.'' [98] The Register's obligation to maintain a ''current directory'' exists separate and apart from the obligations placed on service providers themselves.[99] Accordingly, the Register has the authority to issue rules designed to ensure that the directory remains ''current.'' [100]

Second, contrary to opponents' arguments, relying on service providers' general statutory obligation to maintain accurate designations is an inadequate means of ensuring the directory remains current. For instance, the Office's interim regulations have long obligated service providers to affirmatively notify the Office when they terminate operations.[101] But, as discussed above, this obligation is not often satisfied. Moreover, as also discussed above, even as to service providers that remain in business, a significant number of designations in the existing directory are out of date or inaccurate.[102]

One commenter stated that the presence of designations by defunct service providers is harmless because the public will not be searching for them.[103] But there are many cases where this would not be true. For instance, as discussed in the ''Conflicting Designations'' section below, where one service provider is purchased by or merges with another service provider and fails to terminate its designation in the Copyright Office's directory, there could be conflicting information in the directory (*e.g.,* duplicate entries referencing web properties that were transferred in the sale) absent some regular process to clear out inactive designations. Similar confusion could result if a defunct domain name is purchased by another entity, who then files a conflicting designation in the system. In any event, the commenter's critique ignores the high prevalence of noncompliant designations for service providers that continue to be in business.

Third, with respect to the burden imposed and severity of the consequences for the failure to renew, opponents' arguments are significantly overstated. Renewal—which will initially cost a mere $6, take minutes to complete, and need only be attended to when information has changed or once every three years—should be a manageable proposition for even the smallest of service providers. Nor does the rule create ''a trap for the unwary'' as some opponents allege; [104] as explained above, the system is designed to send a series of reminders to all email addresses associated with a service provider, including its designated agent. If, after those multiple reminders, a service provider fails to renew its designation, it can hardly be said to have let its designation lapse unwittingly. In addition, given that service providers already routinely manage an array of other recurring obligations that are integral to their businesses—including business

[97] The Office declines to adopt the suggestion of the Motion Picture Association of America (''MPAA'') that an account user managing multiple designations be allowed to renew all of them simultaneously without having to review each designation individually. *See* MPAA Initial at 5. The purpose of renewal is to require a service provider that has not reviewed or updated its designation during the previous three-year period to examine the designation to make sure it is still correct. MPAA's suggestion would be contrary to that goal.

[98] *See* 17 U.S.C. 512(c)(2) (emphasis added).

[99] Indeed, an opponent of the renewal requirement, the Computer and Communications Industry Association (''CCIA''), acknowledged that Congress assigned the burden of maintaining a ''current'' directory to the Register. *See* CCIA Initial at 4.

[100] *See* 17 U.S.C. 702 (authorizing the Register to ''establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title'').

[101] *See* 37 CFR 201.38(g).

[102] In the Fee NPRM, the Office estimated—for the purposes of the fee calculation—that 75% to 85% of designations in the current directory were for active service providers. 81 FR at 33154. In responding to that proposal, one commenter implied that this estimate militates against requiring periodic renewal of designations or mandatory electronic submission of previously filed paper designations, stating that ''the Office itself concedes in the NPRM that the current registrations are generally accurate.'' *See* CCIA Fee at 5. This logic is mistaken. First, it is sufficiently problematic if as many as 25% of the designations currently in the system (*i.e.,* approximately 5,825 designations) are for service providers that are no longer in business. Second, the estimate made in the Fee NPRM does not account for the high number of inaccurate or outdated designations filed by service providers that are still in business (as previously noted above). The periodic renewal and mandatory electronic submission requirements are aimed at mitigating that problem as well.

[103] *See* CCIA Initial at 2–3; CCIA Fee at 6.

[104] *See, e.g.,* CCIA Initial at 5; CCIA Fee at 3; MPAA Initial at 4–5.

licenses,[105] software licenses,[106] trademarks,[107] web hosting,[108] leases on web domain names,[109] real estate leases, and insurance policies—the Office cannot see how such a renewal requirement could be viewed as excessively burdensome. At the same time, such a requirement carries significant benefits both for the public and for the service providers themselves, by ensuring that up-to-date information is maintained in the system, and that information from defunct service providers is cleared out of the system.[110]

Indeed, while opponents highlight the consequences of failing to comply with the renewal requirement, the fact is that opponents' preferred solution—which would rely on service providers to remember to update their information with the Copyright Office—is *more* likely to lead to negative consequences. Under the current regime, a service provider (particularly a smaller or less sophisticated one) might file its designation with the Copyright Office once, and easily forget to amend the designation as its information changes, sometimes years later.[111] As a trade association opposing the renewal requirement correctly observed, a ''failure to comply with the existing requirements [of section 512] results in the loss of service providers' safe harbor.'' [112] That is not a better result for service providers.[113]

E. Phaseout of Paper Directory and Requirement To Register in Electronic Directory

As of the effective date of this rule, the Office will no longer accept paper designations and amendments; service providers must use the online system to submit designations. Furthermore, service providers that have previously designated agents with the Office under the interim regulations must submit new designations through the electronic system. The final rule gives service providers a generous period—until December 31, 2017—to register their designations in the online system. Previously filed paper designations will continue to be effective until the service provider has registered using the new online system or through December 31, 2017, whichever is earlier.

As discussed above (see ''Prior Versions of Paper Designations'' above), the Office will continue to maintain the old paper-generated directory on its Web site during the transition period and for ten years following it, in addition to the new electronically-generated directory. During the 13-month transition period—that is, through December 31, 2017—members of the public will need to search both directories for designated agent information, since a service provider may have a valid designation in either. To the extent there is a discrepancy between designations registered in the old and new systems, the information in the new directory will control. As of January 1, 2018, all paper designations will become invalid and only those designations made through the online registration system will satisfy the statutory requirement for designating an agent with the Copyright Office.

The Office is requiring service providers who have previously filed a paper designation to register in the electronic system for two principal reasons. First, as discussed above, the old paper-generated directory contains a significant amount of outdated information, including information about service providers that no longer exist. The electronic submission requirement will encourage service providers that have neglected to update their designations to provide updated information as necessary. Second, for the Office to migrate information from the old directory into the new directory would require extensive manual review and data entry, an effort that would be extraordinarily burdensome and expensive for the Office to undertake. The old directory consists of approximately 23,300 designations, all in PDF format. It would be a significant drain on the Copyright Office's limited resources to have Office personnel manually transfer information from the PDFs into the new database.[114] And, after all of this effort, the end result would be a new electronic database full of obsolete and erroneous records.

The arguments made by commenters opposed to the requirement to re-register in the electronic system were essentially the same as those made by commenters opposed to renewals: It is burdensome, it is a trap for the unwary, it imposes potentially harsh consequences for noncompliance, and the Office lacks authority to implement it.[115] But, as the, the Office made clear in its interim regulations in 1998 that ''[i]nterim designations filed pursuant to these interim regulations will be valid until the effective date of the final regulations. At that time, service providers wishing to invoke section 512(c)(2) will have to file new designations that satisfy the requirements of the final regulations, which will include the payment of the fee required under the final regulations.'' [116] Therefore, it was always understood that there would be a requirement to re-register upon the adoption of a final rule. Moreover, as noted, requiring electronic registration is an effective means of ensuring that the Copyright Office can fulfill its statutory duty of maintaining a ''current'' directory of designated agents. It is not a trap for the unwary; service providers will have over a year to submit their designations through the

[105] *See, e.g., New Business Registration,* S.F. Treasurer & Tax Collector, *http://sftreasurer.org/registration* (last visited Oct. 12, 2016) (San Francisco requires renewal every year); *Business License Frequently Asked Questions,* L.A. County Treasurer & Tax Collector, *https://ttc.lacounty.gov/proptax/Business_License_FAQ.htm* (last visited Oct. 12, 2016) (Los Angeles requires renewal every year); *Frequently Asked Questions: Business Licensing,* Dep't of Consumer & Reg. Aff., *http://dcra.dc.gov/node/545242* (last visited Oct. 12, 2016) (District of Columbia requires renewal every two years).

[106] *See, e.g., Comparison of Creative Cloud Plans,* ADOBE, *https://creative.adobe.com/plans* (last visited Oct. 12, 2016) (requiring monthly or annual renewal).

[107] *See* 15 U.S.C. 1059(a) (requiring renewal every ten years).

[108] *See, e.g., List of Web Hosting Plans,* GoDaddy, *https://www.godaddy.com/hosting/web-hosting-config-new.aspx?src=gs&plan=plesk_tier1_036mo* (last visited Oct. 12, 2016) (requiring renewal between every three and thirty-six months depending on plan).

[109] *See, e.g., FAQs,* ICANN, *https://www.icann.org/resources/pages/faqs-2014-01-21-en* (last visited Oct. 12, 2016) (leases on web domain names may need to be renewed as often as every year, and at minimum must be renewed every ten years).

[110] The renewal requirement is nothing like the copyright formalities referenced by commenters. *See, e.g.,* CCIA Initial at 5; CCIA Fee at 6–7. Renewal is necessary to maintain a current and accurate directory and should in many cases actually assist service providers in retaining their safe harbor, rather than serving to deprive them of it.

[111] As to any argument that the system should only generate reminder notices, the Office believes that requiring service providers to actively review and either amend or resubmit their information is much more likely to lead to current and accurate information in the directory. In addition, simply sending out reminders would not help clear out defunct service providers from the system.

[112] CCIA Fee at 5.

[113] At the same time, the Office emphasizes that if a service provider's designated agent information changes within the three-year period before renewal is required, a service provider that wishes to remain compliant should promptly submit amended information to the Office (in addition to updating its Web site).

[114] Some commenters asked the Office to explore technological means of transferring data from the old directory automatically into the new one. *See, e.g.,* MPAA Initial at 3; Public Knowledge Initial at 6. The paper designations, however, are not all in the same format, and some have been filled out by hand. In any event, as explained, even assuming that information could be easily transferred into the new directory, there remains the underlying problem concerning the significant amount of outdated information in the old directory.

[115] *See, e.g.,* CCIA Initial at 2–5; EFF Initial at 2–3; MPAA Initial at 3; Public Knowledge Initial at 3–7.

[116] 63 FR at 59234.

online process. In addition, the Office plans to engage in public outreach activities to ensure that service providers are aware of the new system and the electronic submission requirement.[117]

F. Fees

In keeping with the specific fee-setting authority in section 512(c)(2), the NPRM proposed establishing fees to designate agents.[118] It also proposed continuing to charge additional fees for alternate names.[119] Following the NPRM, the Office issued the Fee NPRM, which proposed reducing the current registration fee from $105 (plus an additional fee of $35 for each group of one to ten alternate names used by the service provider), to a flat fee of $6 per designation—whether registering a new designation, or amending or resubmitting a previously registered designation.[120] The Fee NPRM explained that the old fee reflected the cost to the Office of receiving, reviewing, scanning, and posting the paper designations submitted by service providers, which has been a largely manual process.[121] The Office believed that based on an analysis of the cost of operating and maintaining the new electronic system, the fee to designate an agent to receive a notification of claimed infringement could be much lower, and should be established at $6 per designation.[122] The Office believed that an additional fee to include alternate names with a designation was not warranted because the Office did not foresee appreciable additional costs due to service provider submission of alternate names through the online process.[123] The Office explained that the significantly lower proposed fee reflected the far greater efficiency of the electronic system for the Copyright Office.[124]

Although some comments filed in response to the NPRM argued against imposition of any fee, or for the imposition of a reduced fee, in certain cases,[125] those particular points were not renewed in response to the Fee NPRM, likely due to the modesty of the fee adopted.[126] Significantly, no commenter specifically argued against setting the fee at $6.[127] In any event, the Office sees no reason to provide reduced fees or no fees for renewals, amendments, or resubmissions, which would result in needing to charge higher fees for initial designations in the new system. The Office declines to structure the fee this way, as it is fairer to impose the ongoing costs of the system on those service providers that continue to use the system, rather than requiring a higher upfront fee regardless of how long a service provider maintains a designation. Therefore, pursuant to the Register's authority under sections 512(c)(2) and 708(a) of title 17,[128] and for the reasons described in the Fee NPRM, the Office adopts the $6 fee as originally proposed.

G. Miscellaneous Issues

Conflicting Designations. As discussed in the NPRM, there is a potential concern with duplicative entries in the directory that can arise when a service provider transfers one of the Web sites it controls to another company, but fails to update its designation to remove that Web site from the list of alternate names.[129] As a result, when the purchasing company registers or updates its designation with the Office and lists the purchased Web site as an alternate name, there may be conflicting entries in the public directory associated with that alternate name—one pointing to the seller's designation and the other pointing to the purchaser's designation. A similar problem can occur when a service provider itself is acquired, and the acquired service provider's designation is not terminated, either because the acquired service provider has no incentive to do so itself, or because the purchasing entity does not have access to the acquired service provider's designated agent registration account. These scenarios can create confusion if copyright owners find two different agents identified in the directory for the same Web site or same service provider.

The NPRM proposed two potential solutions to this problem.[130] The first option was to simply allow both designations to exist in the online directory until expiration of the renewal period of the old designation; at that time, the old designation would either expire or be updated with accurate information. In the meantime, people seeking the identity of and contact information for a service provider's agent could find two inconsistent listings for the service provider's designated agent. The NPRM suggested that users could cover themselves by serving a notice of claimed infringement on both the old and the new designated agent. The second option was to include, as part of the final rule, a requirement that the seller, who has control of the existing entry in the online registration system, amend the designation or terminate it as appropriate. Commenters offered competing ideas for how best to resolve the issue of conflicting designations.[131] Having weighed these comments, the Office concludes that it should not impose any requirements on a buyer or seller to update or terminate the prior designation. The Office sees no good way to enforce such a requirement, and remains disinclined to involve itself in policing the system for conflicting entries. As noted above, the Office also believes that the concern about

[117] Again, the Department of Commerce's Internet Policy Task Force expressed no objection to this aspect of the Office's proposal, and instead stated that it "support[ed] the Copyright Office's efforts." Department of Commerce Internet Policy Task Force, Copyright Policy, Creativity, and Innovation in the Digital Economy 59 (2013).

[118] *See* 76 FR at 59956.

[119] *Id.*

[120] 81 FR at 33154.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] Some commenters argued that charging *any* fee for amendments would discourage timely updates to designations. *See, e.g.,* MPAA Initial at 6–7; RIAA Initial at 2; Telecomm Parties Initial at 5. Others argued that no fee should be assessed for renewals or that fees for renewals should be less than for an initial designation. *See, e.g.,* ICC Initial at 3–4; Verizon Initial at 1. Still others asserted that no fee should be assessed for electronic submission of designations contained in the old paper-generated directory. *See, e.g.,* Public Knowledge Initial at 6–7.

[126] Many of the arguments regarding the fee made in response to the Fee NPRM were simply vehicles to contest the requirement that service providers must re-register electronically and periodically renew their designations. *See* CCIA Fee at 2–7; EFF Fee at 2–5; IA Fee at 2–4. These arguments have been addressed. See "Periodic Renewal of Designations" and "Phaseout of Paper Directory and Requirement to Register in Electronic Directory" above.

[127] The Office declines to adopt EFF's proposals to offer an option for service providers to make single one-time registration to remain permanently effective and to restructure the fee so that the same revenue can be collected without the renewal requirement. *See* EFF Fee at 2, 5. Permitting either of these would defeat the purpose of the renewal requirement, which is to ensure a current and accurate directory—not to generate funds for the Office beyond its costs. If the Office had determined that renewal was unnecessary, the fee would have been adjusted accordingly.

[128] *See* 17 U.S.C. 512(c)(2) (authorizing the Register of Copyrights to "require payment of a fee by service providers to cover the costs" of maintaining a directory of agents designated to receive notifications of claimed infringement); *id.* 708(a) (more generally authorizing the Register to fix fees for Office services based on the cost of providing the service).

[129] 76 FR at 59955–56.

[130] *Id.*

[131] *See, e.g.,* Microsoft Initial at 3 (supporting requiring either the seller or buyer to amend the existing designation or replace it with a new designation); MPAA Initial at 7 (opposing imposing a requirement on sellers or buyers, noting the lack of an enforcement mechanism); ICC Initial at 5 (urging that any concern is mitigated by the renewal requirement, and that sending notices to two agents in the meantime is not a significant inconvenience for copyright owners); RIAA Initial at 2 (suggesting that the system be designed to inform service providers of conflicting designations).

conflicting entries is mitigated by the periodic renewal requirement, as the outdated designations will be updated or expire after three years. But to help minimize conflicting entries, the Office has designed the system to warn a registration account user if he or she attempts to register a designation for a service provider with the same name as a service provider that has already been registered in the system. The system will not, however, bar the creation of the new designation, as it is possible for two service providers to legitimately have the same name.

Purported Abuse of the DMCA Notice-and-Takedown System. Some commenters requested that the Office use this opportunity to take specific steps to address various alleged ''ongoing abuses'' of the DMCA notice-and-takedown system by copyright owners, such as where it is used (1) in connection with peer-to-peer file sharing activities where the material alleged to be infringed does not reside on a service provider's system or network, (2) in connection with trademark infringement, where the process does not apply, (3) in situations where material is protected by fair use, and (4) as an abusive litigation tactic in ''copyright troll'' lawsuits.[132] They noted that such misuse significantly burdens service providers, making it more difficult to respond to legitimate notices and slowing down that process.[133] They specifically asked that the Office present users of the online directory with a prominent warning and informational notice describing proper use of the notice-and-takedown process, warning against improper use, and alerting users to the potential penalties under section 512(f) for making material misrepresentations.[134]

The Office believes that this rulemaking and the online directory are not the proper forums to attempt to police rights holders who send improper notices or otherwise misuse the process. The Office notes that in fact, such issues are among those currently being reviewed in the Office's pending study of section 512.[135] The Office has, however, included information on the front page of the system describing the statutorily required elements for notices.

Clarity and Readability Edits. In addition to adjustments to the NPRM's proposed regulatory language reflecting the foregoing conclusions, the Copyright Office has made additional non-substantive modifications for purposes of clarity and readability.

List of Subjects in 37 CFR Part 201

Copyright.

Final Regulations

For the reasons set forth above, the Copyright Office amends 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

■ 2. Amend § 201.3 by revising paragraph (c)(17) to read as follows:

§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.

* * * * *

(c) * * *

Registration, recordation, and related services	Fees ($)
* * * * * *	*
(17) Designation of agent under 17 U.S.C. 512(c)(2) to receive notification of claimed infringement, or amendment or resubmission of designation	6
* * * * * *	*

* * * * *

■ 3. Revise § 201.38 to read as follows:

§ 201.38 Designation of agent to receive notification of claimed infringement.

(a) *General.* This section prescribes the rules pursuant to which service providers may designate agents to receive notifications of claimed infringement pursuant to section 512 of title 17 of the United States Code. Any service provider seeking to comply with section 512(c)(2) of the statute must:

(1) Designate an agent by making available through its service, including on its Web site in a location accessible to the public, and by providing to the Copyright Office, the service provider and designated agent information required by paragraph (b) of this section;

(2) Maintain the currency and accuracy of the information required by paragraph (b) both on its Web site and with the Office by timely updating such information when it has changed; and

(3) Comply with the electronic registration requirements in paragraph (c) to designate an agent with the Office.

(b) *Information required to designate an agent.* To designate an agent, a service provider must make available through its service, including on its Web site in a location accessible to the public, and provide to the Copyright Office in accordance with paragraph (c) of this section, the following information:

(1)(i) The full legal name and physical street address of the service provider. Related or affiliated service providers that are separate legal entities (*e.g.,* corporate parents and subsidiaries) are considered separate service providers, and each must have its own separate designation.

(ii) A post office box may not be substituted for the street address for the service provider, except in exceptional circumstances (*e.g.,* where there is a demonstrable threat to an individual's personal safety or security, such that it may be dangerous to publicly publish a street address where such individual can be located) and, upon written request by the service provider, the Register of Copyrights determines that the circumstances warrant a waiver of this requirement. To obtain a waiver, the service provider must send a signed letter, addressed to the ''U.S. Copyright Office, Office of the General Counsel'' and sent to the address for time-sensitive requests set forth in section 201.1(c)(1), containing the following information: The name of the service provider; the post office box address that the service provider wishes to use; a detailed statement providing the

[132] *See, e.g.,* ICC Initial at 7–8; Verizon Initial at 2.

[133] *See, e.g.,* ICC Initial at 7–8; Verizon Initial at 2.

[134] *See, e.g.,* ICC Initial at 7–8; Verizon Initial at 2.

[135] *See* Section 512 Study: Notice and Request for Public Comment, 80 FR 81862 (Dec. 31, 2015).

reasons supporting the request, with explanation of the specific threat(s) to an individual's personal safety or security; and an email address and/or physical mail address for any responsive correspondence from the Office. There is no fee associated with making this request. If the request is approved, the service provider may display the post office box address on its Web site and will receive instructions from the Office as to how to complete the Office's electronic registration process.

(2) All alternate names that the public would be likely to use to search for the service provider's designated agent in the Copyright Office's online directory of designated agents, including all names under which the service provider is doing business, Web site names and addresses (*i.e.,* URLs), software application names, and other commonly used names. Separate legal entities are not considered alternate names.

(3) The name of the agent designated to receive notifications of claimed infringement and, if applicable, the name of the agent's organization. The designated agent may be an individual (*e.g.,* ''Jane Doe''), a specific position or title held by an individual (*e.g.,* ''Copyright Manager''), a specific department within the service provider's organization or within a third-party entity (*e.g.,* ''Copyright Compliance Department''), or a third-party entity generally (*e.g.,* ''ACME Takedown Service''). Only a single agent may be designated for each service provider.

(4) The physical mail address (street address or post office box), telephone number, and email address of the agent designated to receive notifications of claimed infringement.

(c) *Electronic registration with the Copyright Office.* Service providers designating an agent with the Copyright Office must do so electronically by establishing an account with and then utilizing the applicable online registration system made available through the Copyright Office's Web site. Designations, amendments, and resubmissions submitted to the Office in paper or any other form will not be accepted. All electronic registrations must adhere to the following requirements:

(1) *Registration information.* All required fields in the online registration system must be completed in order for the designation to be registered with the Copyright Office. In addition to the information required by paragraph (b) of this section, the person designating the agent with the Office must provide the following for administrative purposes, and which will not be displayed in the Office's public directory and need not be displayed by the service provider on its Web site:

(i) The first name, last name, position or title, organization, physical mail address (street address or post office box), telephone number, and email address of two representatives of the service provider who will serve as primary and secondary points of contact for communications with the Office.

(ii) A telephone number and email address for the service provider for communications with the Office.

(2) *Attestation.* For each designation and any subsequent amendment or resubmission of such designation, the person designating the agent, or amending or resubmitting such designation, must attest that:

(i) The information provided to the Office is true, accurate, and complete to the best of his or her knowledge; and

(ii) He or she has been given authority to make the designation, amendment, or resubmission on behalf of the service provider.

(3) *Amendment.* All service providers must ensure the currency and accuracy of the information contained in designations submitted to the Office by timely updating information when it has changed. A service provider may amend a designation previously registered with the Office at any time to correct or update information.

(4) *Periodic renewal.* A service provider's designation will expire and become invalid three years after it is registered with the Office, unless the service provider renews such designation by either amending it to correct or update information or resubmitting it without amendment. Either amending or resubmitting a designation, as appropriate, begins a new three-year period before such designation must be renewed.

(d) *Fees.* The Copyright Office's general fee schedule, located at section 201.3 of title 37 of the Code of Federal Regulations, sets forth the applicable fee for a service provider to designate an agent with the Copyright Office to receive notifications of claimed infringement and to amend or resubmit such a designation.

(e) *Transitional provisions.* (1) As of December 1, 2016, any designation of an agent pursuant to 17 U.S.C. 512(c)(2) must be made electronically through the Copyright Office's online registration system.

(2) A service provider that has designated an agent with the Office under the previous version of this section, which was effective between November 3, 1998 and November 30, 2016, and desires to remain in compliance with section 512(c)(2) of title 17, United States Code, must submit a new designation electronically using the online registration system by December 31, 2017. Any designation not made through the online registration system will expire and become invalid after December 31, 2017.

(3) During the period beginning with the effective date of this section, December 1, 2016, through December 31, 2017 (the ''transition period''), the Copyright Office will maintain two directories of designated agents: the directory consisting of paper designations made pursuant to the prior interim regulations (the ''old directory''), and the directory consisting of designations made electronically through the online registration system (the ''new directory''). During the transition period, a compliant designation in either the old directory or the new directory will satisfy the service provider's obligation under section 512(c)(2) of title 17, United States Code to designate an agent with the Copyright Office.

Dated: October 26, 2016.

Karyn Temple Claggett,

Acting Register of Copyrights and Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,

Librarian of Congress.

[FR Doc. 2016–26257 Filed 10–31–16; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R02–OAR–2016–0161; FRL–9954–60–Region 2]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; State of New York, State of New Jersey and Commonwealth of Puerto Rico; Other Solid Waste Incineration Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve the Clean Air Act (CAA) section 111(d)/129 negative declarations for the States of New York and New Jersey and the Commonwealth of Puerto Rico, for other solid waste incineration (OSWI) units. Other solid waste incineration (OSWI) unit means either a very small municipal waste

combustion unit or an institutional waste incineration unit within our regulations. This negative declaration certifies that OSWI units subject to sections 111(d) and 129 of the CAA do not exist within the jurisdiction of the States of New York and New Jersey and the Commonwealth of Puerto Rico.

The EPA is accepting the negative declaration in accordance with the requirements of the CAA.

DATES: This direct final rule will be effective January 3, 2017, without further notice, unless the EPA receives adverse comment by December 1, 2016. If EPA receives adverse comment, we will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R02–OAR–2016–0161, to *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make.

The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system).

For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Edward J. Linky, Environmental Protection Agency, Air Programs Branch, 290 Broadway, New York, New York 10007–1866 at 212–637–3764 or by email at *linky.edward@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document "we," "us," or "our" refer to the EPA. This section provides additional information by addressing the following:

I. Background

The Clean Air Act (CAA) requires that state [1] regulatory agencies implement the emission guidelines and compliance times using a state plan developed under sections 111(d) and 129 of the CAA.

The general provisions for the submittal and approval of state plans are codified in 40 CFR part 60, subpart B and 40 CFR part 62, subpart A. section 111(d) establishes general requirements and procedures on state plan submittals for the control of designated pollutants.

Section 129 requires emission guidelines to be promulgated for all categories of solid waste incineration units, including OSWI units. Section 129 mandates that all plan requirements be at least as protective and restrictive as the promulgated emission guidelines. This includes fixed final compliance dates, fixed compliance schedules, and Title V permitting requirements for all affected sources. Section 129 also requires that state plans be submitted to EPA within one year after EPA's promulgation of the emission guidelines and compliance times.

States have options other than submitting a state plan in order to fulfill their obligations under CAA sections 111(d) and 129. If a State does not have any existing OSWI units for the relevant emission guidelines, a letter can be submitted certifying that no such units exist within the State (*i.e.,* negative declaration) in lieu of a state plan.

The negative declaration exempts the State from the requirements of subpart B that would otherwise require the submittal of a CAA section 111(d)/129 plan.

On March 21, 2011 (76 FR 15372), the EPA established emission guidelines and compliance times for existing OSWI units. The emission guidelines and compliance times are codified at 40 CFR 60, subpart FFFF.

In order to fulfill obligations under CAA sections 111(d) and 129, the State of New York submitted a negative declaration letter to the EPA on November 13, 2006, the State of New Jersey submitted a negative declaration letter to the EPA on April 5, 2006 and the Commonwealth of Puerto Rico submitted a negative declaration letter to the EPA on September 25, 2006.

The submittal of these declarations exempts the State of New York, State of New Jersey and Commonwealth of Puerto Rico from the requirement to submit a state plan for existing OSWI units.

[1] Section 302(d) of the CAA includes the Commonwealth of Puerto Rico in the definition of the term "State."

II. Analysis of State Submittal

In this Direct Final action, the EPA is amending part 62 to reflect receipt of the negative declaration letters from the State of New York, State of New Jersey and Commonwealth of Puerto Rico, certifying that there are no existing OSWI units subject to 40 CFR part 60, subpart FFFF, in accordance with section 111(d) of the CAA.

The EPA is publishing this direct final rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment.

However, in the "Proposed Rules" section of this **Federal Register**, we are publishing a separate document that will serve as the proposed rule to approve the negative declaration if adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document. If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We will address all public comments in any subsequent final rule based on the proposed rule.

III. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a section 111(d)/129 plan submission that complies with the provisions of the Act and applicable Federal regulations. 40 CFR 62.04.

Thus, in reviewing section 111(d)/129 plan submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA.

Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law.

For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely

affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) note, because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition this action does not have tribal implications as specified by Executive Order 13175 because the section 111(d)/129 plan is not approved to apply in Indian country located in the state, and EPA notes will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this section.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 3, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

List of Subjects in 40 CFR Part 62

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

Dated: October 3, 2016.

Judith A. Enck,

Regional Administrator, Region 2.

For the reasons stated in the preamble, EPA amends 40 CFR part 62 as set forth below:

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

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

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

Subpart FF—New Jersey

■ 2. Subpart FF is amended by adding an undesignated center heading and § 62.7606 to read as follows:

Air Emissions From Other Solid Waste Incineration (OSWI) Units Constructed on or Before December 16, 2005

§ 62.7606 Identification of plan-negative declaration.

Letter from New Jersey Department of Environmental Protection submitted April 5, 2006 to Alan J. Steinberg Regional Administrator EPA Region 2 certifying there are no existing OSWI units in the State of New Jersey subject to 40 CFR part 60, subpart FFFF.

Subpart HH—New York

■ 3. Subpart HH is amended by adding an undesignated center heading and § 62.8109 to read as follows:

Air Emissions From Other Solid Waste Incineration (OSWI) Units Constructed on or Before December 16, 2005

§ 62.8109 Identification of plan-negative declaration.

Letter from New York State Department of Environmental Conservation submitted November 13, 2006 to Alan J. Steinberg Regional Administrator EPA Region 2 certifying that there are no existing OSWI units in the State of New York subject to 40 CFR part 60, subpart FFFF.

Subpart BBB—Puerto Rico

■ 4. Subpart BBB is amended by adding an undesignated center heading and § 62.13110 to read as follows:

Air Emissions From Other Solid Waste Incineration (OSWI) Units Constructed on or Before December 16, 2005

§ 62.13110 Identifcation of plan-negative declaration.

Letter from Commonwealth of Puerto Rico, Office of Environmental Quality Board, September 25, 2006 to Alan Steinberg Regional Administrator EPA Region 2 certifying that there are no existing OSWI units in the Commonwealth of Puerto Rico subject to 40 CFR part 60, subpart FFFF.

[FR Doc. 2016–26171 Filed 10–31–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 10 and 11

[PS Docket No. 15–91; PS Docket No. 15–94; FCC 16–127]

Wireless Emergency Alerts; Amendments to Rules Regarding the Emergency Alert System

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts revisions to Wireless Emergency Alert (WEA) rules to take advantage of the significant technological changes and improvements experienced by the mobile wireless industry since the passage of the Warning, Alert and Response Network (WARN) Act, and deployment of Wireless Emergency Alerts (WEA) to improve utility of WEA as a life-saving tool. By this action, the Commission adopts rules that will improve Alert Message content in order to help communities communicate clearly and effectively about imminent threats and local crises. It also adopts rules to meet alert originators' needs for the delivery of the Alert Messages they transmit and creates a framework that will allow emergency managers to test, exercise, and raise public awareness about WEA. Through this action, the Commission hopes to empower state and local alert originators to participate more fully in WEA, and to enhance the utility of WEA as an alerting tool.

DATES: Amendments and revisions to §§ 10.280, 10.400, 10.410, 10.430, 10.510, and the addition of § 10.350(c) are effective May 1, 2019. The addition of § 10.480 is effective November 1, 2018. The addition of § 10.441 is effective November 1, 2017. Amendments to § 10.450 are effective January 3, 2017. Removal of § 10.440, and amendments to § 10.350 (section heading and introductory text), § 10.350(b), § 10.520(d), and § 11.45 are effective December 1, 2016. Section 10.320(g) contains information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing an effective date.

FOR FURTHER INFORMATION CONTACT: James Wiley, Attorney Advisor, Public Safety and Homeland Security Bureau, at (202) 418–1678, or by email at *James.Wiley@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order in PS Docket No. 15–91, No. 15–94, FCC 16–127, released on September 29, 2016. The document is available for download at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0929/FCC-16-127A1.pdf.* The complete text of this document is also available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Final Paperwork Reduction Act of 1995 Analysis

This Report and Order adopts new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13 (44 U.S.C. 3501–3520). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA. The Commission will publish a separate notice in the Federal Register inviting comment on the new or revised information collection requirements adopted in this document. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA) the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *WEA NPRM* (80 FR 77289, Dec. 14, 2015). No comments were filed addressing the IRFA regarding the issues raised in the *WEA NPRM.* Because the Commission amends the rules in this *WEA Report and Order,* the Commission has included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA

A. Need for, and Objectives of, the Rules

2. Today's *WEA Report and Order* adopts rules to empower alert originators to participate more fully in WEA and to enhance the utility of WEA as an alerting tool. In this *WEA Report and Order,* we adopt rules that fall into three categories, message content, message delivery, and testing and outreach.

3. Specifically, with respect to message content, we increase the maximum Alert Message length from 90 to 360 characters for 4G–LTE and future networks only. We classify Public Safety Messages as an Alert Message eligible to be issued in connection with any other class of Alert Message. We require Participating Commercial Mobile Service (CMS) Providers to support embedded references, and allow Participating CMS providers to include embedded references in all Alert Message types for the purpose of an industry-led pilot of this functionality. We also require Participating CMS Providers to support transmission of Spanish-language Alert Messages.

4. With respect to message delivery, we require Participating CMS Providers to narrow their geo-targeting of Alert Messages to an area that best approximates the alert area specified by the alert originator. We require that mobile devices process and display Alert Messages concurrent with other device activity. We also require Participating CMS Providers to log Alert Messages, to maintain those logs for at least 12 months, and to make those logs available upon request.

5. With respect to testing and outreach, we require support for State/Local WEA Tests and encourage emergency managers to engage in proficiency training exercises using alert origination software. We require periodic testing of the broadcast-based backup to the C-interface. Finally, we allow federal, state, local, tribal and territorial entities, as well as non-governmental organizations (NGOs) in coordination with such entities to issue Public Service Announcements (PSAs) aimed at raising public awareness about WEA.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. No commenter raised issues in response to the IRFA included in the *WEA NPRM.* We conclude that these mandates provide Participating CMS Providers with a sufficient measure of flexibility to account for technical and cost-related concerns. In the event that small entities face unique circumstances that restrict their ability to comply with the Commission's rules, we can address them through the waiver process. We have determined that implementing these improvements to WEA is technically feasible and the cost of implementation is small.

C. Description and Estimate of the Number of Small Entities To Which the Rules Will Apply

7. 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 rules. 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.

8. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards. First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA. In addition, a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of 2007, there were approximately 1,621,315 small organizations. Finally, the term ''small governmental jurisdiction'' is defined generally as ''governments of cities,

towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States. We estimate that, of this total, as many as 88, 506 entities may qualify as ''small governmental jurisdictions.'' Thus, we estimate that most governmental jurisdictions are small.

9. *Wireless Telecommunications Carriers (except satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services. The appropriate size standard under SBA rules for the category Wireless Telecommunications Carriers (except satellite) is that a business is small if it has 1,500 or fewer employees. Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of fewer than 1000 employees. Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small.

10. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a ''small business'' for C- and F-Block licenses as an entity that has average gross revenues of $40 million or less in the three previous calendar years. For F-Block licenses, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks. On April 15, 1999, the Commission completed the reauction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22. Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

11. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses. On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71. Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses. On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78. Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.

12. *Narrowband Personal Communications Service.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order. A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards.

13. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions.

14. *700 MHz Guard Band Licensees.* In 2000, in the 700 MHz Guard Band Order, the Commission adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

15. *Lower 700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. The Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—''entrepreneur''—which is defined as an entity that, together with its affiliates and controlling principals,

has average gross revenues that are not more than $3 million for the preceding three years. The SBA approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses. On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

16. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order.* An auction of 700 MHz licenses commenced January 24, 2008 and closed on March 18, 2008, which included, 176 Economic Area licenses in the A Block, 734 Cellular Market Area licenses in the B Block, and 176 EA licenses in the E Block. Twenty winning bidders, claiming small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years) won 49 licenses. Thirty three winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) won 325 licenses.

17. *Upper 700 MHz Band Licenses.* In the *700 MHz Second Report and Order,* the Commission revised its rules regarding Upper 700 MHz licenses. On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block. The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) and winning five licenses.

18. *Advanced Wireless Services. AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS–1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS–2); 2155–2175 MHz band (AWS–3)).* For the AWS–1 bands, the Commission has defined a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a ''very small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. For AWS–2 and AWS–3, although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS–1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS–2 or AWS–3 bands but proposes to treat both AWS–2 and AWS–3 similarly to broadband PCS service and AWS–1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.

19. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and ''wireless cable,'' transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

20. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

21. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,436 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we estimate that at least 2,336 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use the most current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that

size standard was: All such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2007, there were a total of 996 firms in this category that operated for the entire year. Of this total, 948 firms had annual receipts of under $10 million, and 48 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small. In the Paging *Third Report and Order,* we developed a small business size standard for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small business size standards. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 365 carriers reported that they were engaged in the provision of paging and messaging services. Of those, we estimate that 360 are small, under the SBA-approved small business size standard.

22. *Wireless Communications Service.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A ''small business'' is an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as ''very small business'' entities, and one that qualified as a ''small business'' entity.

23. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. The Small Business Administration has established a size standard for this industry of 750 employees or less. Census data for 2012 show that 841 establishments operated in this industry in that year. Of that number, 819 establishments operated with less than 500 employees. Based on this data, we conclude that a majority of manufacturers in this industry is small.

24. *Software Publishers.* Since 2007 these services have been defined within the broad economic census category of Custom Computer Programming Services; that category is defined as establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer. The SBA has developed a small business size standard for this category, which is annual gross receipts of $25 million or less. According to data from the 2007 U.S. Census, there were 41,571 establishments engaged in this business in 2007. Of these, 40,149 had annual gross receipts of less than $10,000,000. Another 1,422 establishments had gross receipts of $10,000,000 or more. Based on this data, the Commission concludes that the majority of the businesses engaged in this industry are small.

25. *NCE and Public Broadcast Stations.* The Census Bureau defines this category as follows: ''This industry comprises 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.'' The SBA has created a small business size standard for Television Broadcasting entities, which is: Such firms having $13 million or less in annual receipts. According to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database as of May 16, 2003, about 814 of the 1,220 commercial television stations in the United States had revenues of $12 (twelve) million or less. 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.

26. 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 do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent. There are also 2,117 low power television stations (LPTV). Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

27. The Commission has, under SBA regulations, estimated the number of licensed NCE television stations to be 380. 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. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

28. In the *WEA Report and Order,* we amend our Part 10 rules for Participating CMS Providers, as defined in the WEA rules, to require them to create and maintain logs of Alert Messages received at their Alert Gateway from FEMA IPAWS, and to make available to emergency management agencies information about the measures they take to geo-target Alert Messages transmitted by that agency.

29. We consider compliance costs associated with the alert logging and geo-targeting disclosure rules that we adopt today to be reporting and recordkeeping costs. These costs

include a one-time expense to establish the Alert Gateway logging capability for the few Participating CMS Providers that may not already have this capability, and the small, annual expense of automatically generating and maintaining alert logs, and the potentially larger expense of the employment of a clerical worker to respond to emergency management agencies' requests for alert log data or requests for information about geo-targeting. These alert logging and reporting requirements represent a somewhat more lenient version of the alert logging requirements we proposed in the *WEA NPRM.* To the extent these costs may still present a burden to non-nationwide Participating CMS Providers, we offer such entities an extended timeframe for compliance with our alert logging requirement in order to allow them to standardize appropriate gateway behavior and integrate any updates into their regular technology refresh cycle.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

30. The RFA requires an agency to describe any significant, specifically small business alternatives that it has considered in reaching its conclusions, 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, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.''

31. The compliance requirements in this *WEA Report and Order* have been adjusted to accommodate the special circumstances of non-nationwide Participating CMS Providers with respect to our WEA geo-targeting requirements and our alert logging requirements. According to the *Annual Competition Report,* ''there are four nationwide providers in the U.S. with networks that cover a majority of the population and land area of the country—Verizon Wireless, AT&T, Sprint, and T-Mobile.'' Consistent with the *Annual Competition Report,* we refer to other providers with ''networks that are limited to regional and local areas'' as non-nationwide Participating CMS Providers. We allow non-nationwide Participating CMS Providers one year within which to comply with our WEA geo-targeting rules and two years to comply with our alert logging rules, instead of sixty days from the rules' publication in the **Federal Register**, in light of a non-nationwide Participating CMS Provider's inability to meet that standard immediately, and our concern that other non-nationwide Participating CMS Providers may be similarly situated. We believe that applying the same rules equally to all entities in this context is not necessary to alleviate potential confusion from adopting different rules for Participating CMS Providers because most consumers do not have insight into the relative accuracy of various Participating CMS Providers geo-targeting capabilities, and because alert logging is not a consumer facing service. We believe, and the record in this proceeding confirms, that the costs and/or administrative burdens associated with the rules will not unduly burden small entities, particularly in light of the special consideration we provide to them. These requirements will implicate no additional legal concerns, and will require no additional professional assistance for non-nationwide Participating CMS Providers.

32. Based on our review of the record, we find that it is practicable for all Participating CMS Providers, including non-nationwide Participating CMS Providers, to implement WEA improvements without incurring unduly burdensome costs, especially considering the special treatment that we afford non-nationwide Participating CMS Providers. The *WEA Report and Order* recognizes that technical and operational issues must be addressed before compliance can be required, and allows sufficient time for nationwide and non-nationwide Participating CMS Providers to achieve compliance with today's rules.

33. In considering the record received in response to the *WEA NPRM,* we examined additional alternatives to ease the burden on non-nationwide EAS Participants. These alternatives included adopting longer compliance timeframes than those initially proposed; requiring Participating CMS Providers to support WEA Alert Messages that contain only 360 characters, as opposed to 1,380, as considered by the *Updated START Report;* requiring support for only additional languages that are currently supported by standards, as opposed to others as initially proposed; and allowing Participating CMS Providers geo-target an Alert Message to an area that ''best approximates'' the target area, as opposed to one that is ''no larger than'' the target area using device-based geo-fencing techniques, as proposed. Additionally, the rules adopted in this *WEA Report and Order* are technologically neutral in order to enable small entities flexibility to comply with our rules using technologies offered by a variety of vendors. Finally, we sought further comment on some issues where the record demonstrated that it would be premature to adopt rules at this time, particularly for non-nationwide CMS Providers.

34. Finally, in the event that small entities face unique circumstances with respect to these rules, such entities may request waiver relief from the Commission. Accordingly, we find that we have discharged our duty to consider the burdens imposed on small entities.

F. Legal Basis

35. The legal basis for the actions taken pursuant to this *WEA Report and Order* is contained in 47 U.S.C. 151, 152, 154(i) and (o), 301, 301(r), 303(v), 307, 309, 335, 403, 544(g), 606 and 615 of the Communications Act of 1934, as amended, as well as by sections 602(a), (b), (c), (f), 603, 604 and 606 of the WARN Act.

G. Federal Rules That May Duplicate, Overlap, or Conflict With the Rules

36. None

H. Congressional Review Act

37. The Commission will send a copy of this Report & Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Synopsis

I. Report and Order

A. Alert Message Content

1. Increasing Maximum Alert Message Length From 90 to 360 Characters

38. We amend Section 10.430 to expand the character limit for Alert Messages from 90 to 360 characters for 4G–LTE and future networks. A 360-character maximum Alert Message length balances emergency managers' needs to communicate more clearly with their communities with the technical limitations of CMS networks. While Hyper-Reach states that support for ''1,000+'' characters would be preferable because it would be consistent with the *START Report's* findings that messages longer than 1,380 characters produce ''better outcomes for interpretation, personalization and milling, than did the standard 90-character WEA message,'' this approach is not supported by the weight of the record. Beaufort County cautions, for

example, that ''people will stop reading'' Alert Messages once they get past the second screen of text, diminishing the value of any additional characters that extend beyond that, and moreover, longer Alert Messages may contribute to distracted driving. On balance, we find that a 360-character maximum for Alert Message text ''is appropriate for disseminating official, targeted, immediate, and actionable information.'' We note that establishing 360 characters as the maximum character length leaves emergency managers free to issue Alert Messages that are shorter than 360 characters in appropriate situations. We defer to emergency managers' experience and best practices to determine the appropriate message length for their particular needs.

39. We also find that expanding the maximum character length to 360 for 4G–LTE networks is technically feasible. As we observed in the *WEA NPRM,* CSRIC IV recommended that the Commission expand the character limit for WEA Alert Messages on 4G LTE networks to a maximum of 280 characters, pending confirmation by the Alliance for Telecommunications Industry Solutions (ATIS) that such an increase would be feasible. Not only did ATIS' feasibility study conclude that it was feasible for 4G–LTE networks to transmit 280-character WEA Alert Messages, but it found that Participating CMS Providers could transmit 360-character Alert Messages just as easily. ATIS found that transmission of WEA Alert Messages longer than 360 characters, on the other hand, would cause additional delays in the delivery of the Alert Message and could drain battery life. Commenting Participating CMS Providers and device manufacturers agree. In addition to the feasible steps that compliance with this rule will require Participating CMS Providers to take, FEMA states that the increased message length will require ''software modifications to CAP message authoring tools, IPAWS OPEN, [and] the 'C' Interface.'' We find that we can achieve our goal of expanding the maximum character limit for WEA Alert Messages on 4G–LTE networks without presenting WEA stakeholders with undue technical burdens.

40. We also find, however, that we should continue to allow Participating CMS Providers to transmit 90-character Alert Messages on legacy networks until those networks are retired. While many public safety commenters, including APCO and Harris County OSHEM, state that it would be feasible and desirable to support 360-character Alert Messages on legacy networks by linking together (concatenating) multiple 90-character messages, we are convinced by AT&T that message concatenation would be problematic because ''[m]essages are not guaranteed to be received by the device in the correct order,'' which would likely cause confusion that would be exacerbated during the pendency of multiple alerts. Further, according to AT&T, concatenating 90-character Alert Messages on legacy networks would have an adverse effect on mobile device battery life. T-Mobile, Sprint and Microsoft agree that, unlike 4G–LTE networks, it would be infeasible to expand the character limit for legacy networks due to the technical limitations of those networks, and because of financial disincentives to continue to update networks that will soon be retired. The risks that public confusion and other complications would result from Alert Message concatenation are too great for public safety messaging where the potential for panic is heightened, and the consequences of misinterpretation could be deadly.

41. Emergency managers will be free to transmit an Alert Message containing as many as 360 characters as of the rules' implementation date. FEMA IPAWS will make this possible, while also ensuring that all community members in the target area, including those on legacy networks, can receive an Alert Message, by automatically generating a 90-character Alert Message from the CAP fields of a 360-character message for distribution on legacy networks whenever an emergency manager transmits only a 360-character Alert Message. Once a CMS network is able to support 360-character messages, it will cease to receive the 90-character version, and begin to receive the full 360-character version instead. CSRIC IV and FEMA attest that this co-existence of 90- and 360-character Alert Messages is technically feasible. Indeed, FEMA IPAWS already treats Alert Messages that do not contain free-form text in this manner, and their approach is consistent with the methodology that the Participating CMS Provider Alert Gateway will use to process Alert Messages in multiple languages. For example, if FEMA IPAWS receives an Alert Message today without free-form text, it will use the CAP parameters [hazard][location][time][guidance][source] to generate Alert Message text along the lines of ''Tornado Warning in this area until 6:30 p.m. Take Shelter. Check Local Media.—NWS.'' The CMS Provider Alert Gateway will send the longer free-form message to devices on 4G–LTE networks, and the automatically generated 90-character Alert Message to mobile devices on legacy networks. Pursuant to the approach we adopt today, no matter how an alert originator transmits a WEA Alert Message, members of their community in the target area will receive a version of it.

42. Increasing the maximum character length for WEA Alert Messages will produce valuable public safety benefits. Emergency managers state that the current 90-character limit is insufficient to communicate clearly with the public because 90-character Alert Messages rely on difficult-to-understand jargon and abbreviations. Expanding the character limit will reduce reliance on these potentially confusing terms and will allow emergency managers to provide their communities with information that is clear and effective at encouraging swift protective action. The value of this benefit will be increased when taken together with several of the improvements that we adopt in this *Report and Order.* For example, according to Jefferson Parish Emergency Management, the additional characters are necessary to adequately communicate critical information, such as shelter locations, that could prevent unnecessary loss of life and property damage. The additional characters will also support the inclusion of embedded references in Alert Messages, help facilitate message comprehension for individuals with disabilities, and will facilitate the translation of English-language Alert Messages into the Spanish language. Further, our approach to the co-existence of 90- and 360-character Alert Messages has the additional benefit of ensuring that emergency managers will be able to simply initiate one 360-character Alert Message in instances where every second counts. In sum, this action will improve the likelihood that the public will understand and properly respond to WEA Alert Messages, increasing the likelihood that WEA will save lives.

2. Establishment of a New Alert Message Classification (Public Safety Messages)

43. We amend Section 10.400 to create a fourth classification of Alert Message, ''Public Safety Message.'' The current rules only provides for three classes of WEA: (1) Presidential Alert; (2) Imminent Threat Alert; and (3) AMBER Alert. For an alert originator to issue an Alert Message using WEA, it must fall within one of these three classifications. Whereas we proposed to name this new Alert Message classification ''Emergency Government Information'' in the *WEA NPRM,* we agree with FEMA that it should be

named ‘‘Public Safety Message’’ because the title ‘‘Emergency Government Information’’ is ‘‘vague and could be confusing,’’ and because FEMA's recommended title more accurately describes the intended message content. We define a Public Safety Message as ‘‘an essential public safety advisory that prescribes one or more actions likely to save lives and/or safeguard property,’’ as we proposed. By defining Public Safety Messages in this way and by tailoring their use as we describe below, we strike an appropriate balance between some commenters' requests for discretion in the use of this new Alert Message classification, and others' warnings that Public Safety Messages may be overused and contribute to alert fatigue if they are defined in an over-inclusive manner.

44. Public Safety Messages will only be eligible for issuance in connection with an Imminent Threat Alert, an AMBER Alert, or a Presidential Alert, as recommended by AT&T, CTIA and several emergency management agencies. We do not expand the definition of an ‘‘emergency’’ situation in which it is appropriate to issue an Alert Message so as to avoid alert fatigue. Instead, we add a tool for emergency managers to better communicate with the public during and after emergencies, in a manner that naturally complements existing Alert Message classifications. We note that several commenters state that our new Alert Message classification should be eligible for issuance even in the absence of another Alert Message type. If we were to allow Public Safety Messages to stand alone, however, it would expand the definition of an ‘‘emergency’’ during which the issuance of a WEA Alert Message is appropriate, contrary to our reasoning in the *WEA First Report and Order* that the existing Alert Message classifications are sufficient to communicate information about ‘‘*bona fide* emergencies.’’ Further, we believe that a broader definition of an ‘‘emergency’’ would risk increasing alert fatigue and consumer opt out.

45. Any entity authorized to use WEA may initiate Public Safety Messages. Some commenters state that we should limit eligibility to issue Public Safety Messages to government entities. This may be because it would not make sense for non-governmental entities to issue Alert Messages under our proposed title, ‘‘Emergency Government Information.’’ Moreover, we agree with the majority of emergency managers treating the issue that all entities that have completed FEMA IPAWS alert originator authorization process may send Public Safety Messages. We thus defer to FEMA, as we have done since WEA's deployment, to determine the suitability of agencies as WEA alert originators.

46. Within this framework, we agree with commenters that the development of best practices around the use of Public Safety Messages will help ensure that this new Alert Message classification is used appropriately. NYCEM offers a number of best practices that would help inform emergency managers' determination of whether it is appropriate to send a Public Safety Message. These best practices include answering the following questions prior to initiating a Public Safety Message: ‘‘ ‘Is your emergency operations center activated?’ ‘Has a competent, authorized party declared a state of emergency and/or are emergency orders being issued?’ ‘Is there a need for broad public action or awareness of a condition that is occurring or likely to occur?’ ‘Will the message prevent public fear or serve to preserve critical public safety functions that are (or could be) overwhelmed (*e.g.,* inappropriate use of 911)?’ ’’ We encourage emergency management agencies to build upon these best practices and incorporate them into any alert origination training modules that they may develop for their staff. We expect that emergency managers will be best positioned to determine the specific situations in which it is appropriate to issue Public Safety Messages. We will monitor the use of this new Alert Message classification, and will take further action in the event it becomes evident that our adopted definition is either too narrow or too broad.

47. We do not agree with commenters that, rather than create a new Alert Message classification, we should clarify that the types of Alert Messages that would be issued as Public Safety Messages can be issued as Imminent Threat Alerts. The term ‘‘Imminent Threat Alert’’ is defined in our rules as ‘‘an alert that meets a minimum value for each of three CAP elements: Urgency, Severity, and Certainty.’’ Public Safety Messages would not fit within this definition because the ‘‘severity’’ and ‘‘urgency’’ elements of an Imminent Threat Alert describe the underlying imminently threatening emergency condition, whereas Public Safety Messages are intended to provide supplemental instructions about how to protect life or property during an AMBER Alert, Presidential Alert, or Imminent Threat Alert. We anticipate that this separate and broader applicability for Public Safety Messages will make them more versatile emergency management tools than if we were to limit such Alert Messages to the preexisting definition of an Imminent Threat Alert.

48. In addition to tailoring the scope of emergency managers' use of Public Safety Messages, we also take steps to ensure that the public receives Public Safety Messages in an appropriate manner. Specifically, we amend Section 10.280 to specify that Participating CMS Providers shall provide for their subscribers to receive Public Safety Messages by default, and may provide their subscribers with the option to opt out of receiving Public Safety Messages if they decide that they no longer wish to receive them. We agree with the majority of commenters that the public should be opted in to receiving Public Safety Messages by default because the information that they provide is essential by definition. We agree with Hyper-Reach that treating Public Safety Messages in this manner ensures that a greater percentage of the public will receive the information that Public Safety Messages are intended to provide than would be possible if the public were opted out of receiving Public Safety Messages by default.

49. Further, we allow, but do not require Participating CMS Providers to associate a unique attention signal or vibration cadence with Public Safety Messages. We agree with ATIS that requiring a new, unique attention signal and vibration cadence could create ‘‘significant technical impacts’’ for currently deployed WEA-capable mobile devices. We also agree with FEMA, however, that ‘‘the option to silence alerts that do not present an immediate threat’’ may have value in reducing consumer opt out. By allowing Participating CMS Providers to offer this functionality, we allow the market to determine whether or not any costs that may be implicated by these personalization options are outweighed by the benefits. Similarly, we will allow, but do not require Participating CMS Providers to provide their customers with the ability to turn off Public Safety Messages during certain hours. For example, if customers want to receive Public Safety Messages, but only during the daytime, they may be given the option to suppress the presentation of Public Safety Messages during nighttime hours.

50. APCO and many emergency management agencies support our creation of a new Alert Message classification because it ‘‘will enable public safety alert originators to take advantage of WEA when helpful, as compared to less secure and less immediate methods they may be employing presently.’’ We agree with commenters that adding a new Alert

Message classification will allow emergency managers to expand their ''capabilities of informing the public . . . to keep the residents and community safe and aware of potential situations'' during and after emergencies in a manner that complements existing Alert Message classifications. We also agree with Peoria County EMA that a new classification of Alert Messages would allow emergency managers to include specific secondary information, like shelter locations and other helpful disaster recovery instructions in WEA for the first time. Finally, we agree with commenters and CSRIC IV that it is technically feasible to support the transmission of this new Alert Message classification provided the sufficient time that we allow industry to update relevant standards.

3. Supporting Embedded References and Multimedia

51. We require Participating CMS Providers to support embedded references, as proposed. Accordingly, Participating CMS Providers must support the transmission of embedded URLs and phone numbers in WEA Alert Messages. This rule will become effective one year from the rules' publication in the **Federal Register**. Further, thirty days from the date the rules are published in the **Federal Register**, we allow voluntary, early adoption of embedded references through an industry-established and industry-led pilot program. With respect to multimedia, we find that the inclusion of multimedia capability in WEA Alert Messages can result in tremendous public safety benefits. At the same time, however, we recognize that additional standards development remains necessary. Accordingly, we seek comment in the *Further Notice* regarding the establishment of an appropriate regulatory framework and timeframe for incorporating multimedia capability into WEA Alert Messages. In order to facilitate the development of standards for multimedia in the swiftest timeframe possible, we allow voluntary, early prototyping of certain multimedia capabilities in Public Safety Messages 30 months from the effective date of the rules, as described in greater detail below.

52. Participating CMS Providers express concern that allowing embedded references in Alert Messages would risk network congestion, but the weight of the record supports our conclusion that this action will be more likely to reduce network loading than to increase it. The public already accesses public safety and other resources using the data network upon receipt of WEA messages that do not include embedded references. This behavior, known as ''milling,'' is a predictable public response to receiving an Alert Message, as members of the public will seek to confirm that the indicated emergency condition is indeed occurring, and to gather additional information not provided by the Alert Message to inform their response. Milling is considered undesirable from a public safety perspective because it increases the delay between receiving an Alert Message and taking an appropriate protective action, and from a network management perspective because it increases use of the data network. We agree with FEMA, the National Weather Service (NWS), NYCEM, Dennis Mileti, Professor Emeritus of Sociology at The University of Colorado, and the many emergency managers treating this issue that providing access to additional text and resources through URLs embedded in WEA Alert Messages could actually reduce network congestion by channeling the public's milling behavior through a single authoritative and comprehensive resource. This finding is also supported by the 2014 and 2015 *START Reports,* which state that providing the public with access to enhanced information in WEA Alert Messages can help to convince people to take protective action more quickly. Upon review of these studies and expert analyses, we are persuaded that embedded references are likely to reduce network load when included in Alert Messages.

53. Finally, Participating CMS Providers who claim that embedded references will result in harmful network congestion have offered no network models, or any other form of rigorous network analysis, to support their proposition that allowing embedded references in WEA would cause or contribute to network congestion. While all network activity contributes to network congestion to some degree, the unsupported assertion of a risk of network congestion cannot be the sole basis for declining to adopt any measure that utilizes the data network, particularly a measure that has been demonstrated to have a statistically significant impact on WEA's ability to save lives. In the absence of data to the contrary, and in light of the significant record outlined above, we conclude that even if support for embedded references were to result in an incremental increase in data network usage in some cases, this increase would be insufficient to affect network performance during emergencies. Further, we observe that many WEA-capable mobile devices are set to offload network usage to Wi-Fi where available by default, and nearly all smartphones make this option available through the settings menu. Thus, many individuals who choose to click on an embedded reference will not use the mobile data network to access them at all.

54. At the same time, however, we seek to ensure that Participating CMS Providers are able to assess the performance of their networks in real-world conditions and have an opportunity to make any necessary adjustments to accommodate embedded references. AT&T and CCA support ''moving ahead with a time-limited trial on their wireless network for purposes of determining whether embedded URLs result in unmanageable congestion when included in Amber Alerts.'' We therefore allow voluntary, early adoption of embedded references through an industry-established and industry-led pilot. In this regard, we allow Participating CMS Providers, if they choose, to ''pressure test'' the use of embedded references in Alert Messages in a sample of their network area or subscriber base, prior to full implementation. To this end, Participating CMS Providers may voluntarily coordinate with NCMEC, NWS, FEMA, and other stakeholders to accomplish a targeted, pilot deployment of embedded references in WEA in a particular geographic location, Alert Message classification, or to a particular subset of subscribers thirty days from the rule's publication in the **Federal Register**, and prior to the effective date of our rule requiring support for embedded references. We encourage all WEA alert initiators to work with Participating CMS Providers as this functionality is piloted and deployed in order to establish best practices for the inclusion of embedded references in Alert Messages, including the development of any network congestion mitigation strategies as appropriate. For example, stakeholders could voluntarily agree to constrain the amount of data that is made available through an embedded reference. We note that NCMEC already states that it intends to use a low-bandwidth (15kB or less), mobile-friendly version of their Web site (missingkids.com) in connection with their issuance of WEA AMBER Alerts. C Spire, FEMA and NWS have suggested that limiting the bandwidth requirements of embedded references will likely mitigate the risk of network congestion by limiting the amount of data that will need to be transferred. We defer to Participating CMS Providers to identify the specific terms and

timeframe of any such pilot deployment on their own initiative, as well as to undertake any necessary coordination, whether they do so individually or through a third-party coordinator of their choosing.

55. CSRIC IV and FEMA agree that support for embedded references in alert origination software, IPAWS, the C-interface, and on mobile devices can be enabled through a straightforward process of updating standards and software. The successful use of embedded references will also require the development of appropriate best practices. Specifically, CSRIC IV observes that some individuals, particularly those with feature phones, may not have access to the data connection necessary to access content made available by URLs. We share this concern, and urge emergency managers to continue to convey the most important actionable information through the Alert Message text to ensure that all members of the public are able to receive that information, even if they are unable to access the URL. Commenters also express concern that inadequately prepared web servers or call centers may become overloaded as a result of mass access. NCMEC assures us that the AMBER Alerts Web site is capable of handling the expected increase in traffic, and we urge all alert originators to take appropriate steps to ensure the preparedness of their web hosting service before initiating an Alert Message that contains a URL. Further, we urge emergency managers to consider the capacity of their call centers or hotlines before embedding a phone number in an Alert Message.

56. Finally, commenters express concern that allowing embedded references in Alert Messages may provide an opportunity for a malicious actor to compromise WEA. To the extent that Participating CMS Providers take part in this opportunity to pilot the use of embedded references in WEA Alert Messages, they should take appropriate steps, in concert with their pilot program partners, to ensure the integrity of the embedded references they transmit. We also encourage emergency management agencies to continue to work with FEMA and Participating CMS Providers to ensure the authenticity and integrity of every Alert Message they initiate. For example, NCMEC confirms that it already authenticates the content on every AMBER Alert on its Web site and that it will take measures to ensure the security of any URL that it might embed in a WEA AMBER Alert. We note that all WEA Alert Messages are protected with a CAP digital signature that effectively prevents malicious intrusion into Alert Message content in transit. We also note that industry has already begun to take steps to address any particular cybersecurity issues that may be implicated by allowing URLs to be included in WEA. Pursuant to the recommendation of CSRIC V, ATIS is completing a best practice standard to address potential threat vectors for WEA, including embedded references. We also encourage Participating CMS Providers and alert originators to work with FEMA to develop protocols that may help to mitigate potential risks.

57. Commenters identify the inclusion of embedded references in Alert Messages as the most critical among all of our proposed improvements to WEA. NCMEC, in particular, has found this capability to be paramount to the success of AMBER Alerts. We agree that allowing emergency managers to embed URLs in Alert Messages empowers them to offer the public multimedia-capable, comprehensive emergency response resources. Including an authoritative URL will also likely lead to swifter community response by reducing the likelihood that consumers will seek to verify information through additional sources before taking action. We also agree with commenters that allowing URLs to be included in Alert Messages will improve WEA accessibility, could streamline the public's use of 911 services, and would provide alert originators with a method to ensure the public has access to up-to-date information.

58. In addition to embedded URLs, allowing embedded phone numbers to be included in Alert Messages will offer the public significant public safety benefits. We agree with emergency managers, disability rights advocates and individuals that support including phone numbers in Alert Messages because integrating clickable phone numbers into WEA will provide an accessible method to quickly contact public safety officials. This capability may be particularly relevant to WEA AMBER Alerts where emergency management organizations will often establish special hotlines or call centers to receive reports about missing children that may be reached at a phone number other than 911 that may not be as commonly known. According to FEMA, providing the public with a direct emergency telephone number could hasten emergency response, and help to ensure that calls to 911 will not have to be rerouted. In sum, allowing embedded references to be included in WEA Alert Messages will dramatically improve WEA's effectiveness at moving the public to take protective action.

59. With respect to multimedia, our decision to require support for embedded references in WEA Alert Messages is an important first step towards ensuring that WEA can be used to provide the public with actionable multimedia content during emergencies. The record shows that WEA's effectiveness depends on its ability to help the all members of the public to close the thought-action gap, and that including multimedia content in Alert Messages themselves would hasten protective action taking, reduce milling, and improve Alert Message accessibility. We therefore believe that support for multimedia content has the potential to provide tremendous public safety benefits and should be implemented as soon as technically feasible. Recognizing that further standards development remains necessary to integrate multimedia technology into WEA, we seek comment in the *Further Notice* on how best to implement the support of multimedia content in WEA Alert Messages in a reasonable timeframe. In particular, as described in greater detail in the *Further Notice,* we seek comment on the inclusion of thumbnail-sized images, including hazard symbols, in Public Safety Messages on 4G LTE and future networks. In the interim, in order to facilitate the swift development of standards for supporting multimedia content in WEA, we allow the industry to participate in voluntary prototyping of this functionality in Public Safety Messages, in coordination with FEMA, emergency management agencies, and other relevant WEA stakeholders, as of the effective date of our rule requiring support for Public Safety Messages.

4. Supporting Spanish-Language Alert Messages

60. We adopt a new Section 10.480 requiring Participating CMS Providers to support the transmission of Spanish-language Alert Messages. This, along with Section 10.500(e) of the Commission's WEA rules, which requires ''extraction of alert content in English or the subscriber's preferred language,'' will provide a framework to ensure that Spanish-language Alert Messages will be processed and displayed properly. Pursuant to this framework, we would expect that Spanish-language WEA Alert Messages would be displayed on and only on WEA-capable mobile devices where the subscriber has specified Spanish as their preferred language.

61. The record demonstrates that it is technically feasible for Participating CMS Providers to support Spanish-language Alert Messages. ATIS has

developed standards that support the Alert Gateway, the CMS Provider network and mobile devices in receiving, transmitting and displaying Alert Messages in Spanish as well as English. We applaud ATIS for completing these standards, and encourage their continued efforts to standardize network functionality for Alert Messages in additional languages. According to Microsoft, multilingual alerting is already taking place in other countries.

62. We agree with Participating CMS Providers that they should not be responsible for Alert Message translation. Rather, emergency managers are the entities best equipped to determine message content, including content in other languages. We recognize that some emergency management agencies report that they do not currently have the capability to initiate Alert Messages in languages other than English. Other emergency management agencies, such as Harris County OHSEM, state that they do have this capability, and ''NYCEM is in the final stages of preparing to offer . . . [its] 80 most common messages in the 13 most commonly spoken languages in New York City, including American Sign Language,'' but those messages would have to be transmitted using alternative alerting platforms until WEA's multilingual alerting capabilities improve.

63. We anticipate that requiring Participating CMS Providers to support Spanish-language Alert Messages where available will encourage other emergency management agencies to continue to develop their multilingual alerting capabilities. Indeed, many emergency managers state that they can use State/Local WEA Tests as a tool to exercise and improve their multilingual alerting capability over time with the help of voluntary community feedback. We do not agree with NYCEM and Clark County OEM, however, that we should facilitate Alert Message translation by requiring Participating CMS Providers to ''place a 'translate' button/link'' in WEA Alert Messages. Rather, we agree with FEMA and the majority of emergency management agencies that automatic translation technologies that may reside on some mobile devices are currently too inaccurate to support emergency messaging.

64. The overwhelming majority of emergency management agencies support expanding WEA's language capabilities because it will help them to reach members of their communities that are currently inaccessible to them. Emergency managers in areas with large Spanish-speaking populations, as well as those in areas popular among tourists, state that requiring support for Spanish-language WEA Alert Messages will be particularly beneficial. We also anticipate that this action will allow emergency managers to better facilitate the inclusion of Spanish-speaking individuals, and particularly those with limited English proficiency, into their emergency response plans.

B. Alert Message Delivery

1. Logging Alert Messages at the Participating CMS Provider Alert Gateway

65. We require Participating CMS Providers to log their receipt of Alert Messages at their Alert Gateway and to appropriately maintain those records for review. Specifically, we adopt a new Section 10.320(g) that will require Participating CMS Providers' Alert Gateways to log Alert Messages as described below. Based on the record, we have modified the rules we proposed in the *WEA NPRM* in order to accommodate the varied approaches Participating CMS Providers take to alert logging.

- *Logging Requirements.* Participating CMS Providers are required to provide a mechanism to log the CMAC attributes of all Alert Messages received at the CMS Provider Alert Gateway, along with time stamps that verify when the message is received, and when it is retransmitted or rejected by the Participating CMS Provider Alert Gateway. If an alert is rejected, a Participating CMS Provider is required to log the specific error code generated by the rejection.
- *Maintenance of Logs.* Participating CMS providers are required to maintain a log of all active and cancelled Alert Messages for at least 12 months after receipt of such alert or cancellation.
- *Availability of Logs.* Participating CMS Providers are required to make their alert logs available to the Commission and FEMA upon request. Participating CMS Providers are also required to make alert logs available to emergency management agencies that offer confidentiality protection at least equal to that provided by the federal Freedom of Information Act (FOIA) upon request, but only insofar as those logs pertain to alerts initiated by that emergency management agency. We encourage, but do not require, Participating CMS Providers to work with alert origination software vendors to automate transmission of alert log data to emergency managers' alert origination software.

66. We find that compliance with these minimal alert logging requirements will be technically feasible. Indeed, the approach we adopt today is a more flexible and less burdensome alternative to that which we proposed in the *WEA NPRM,* and allows Participating CMS Providers to take a variety of approaches to achieve compliance. T-Mobile, Verizon, AT&T, Bluegrass Cellular and C Spire already log Alert Messages, and we anticipate that many other Participating CMS Providers may already be doing so as well, as part of their own system maintenance best practices. While Participating CMS Providers have taken different approaches to logging Alert Messages relative to the Trust Model recommended by CMSAAC, we anticipate that those Participating CMS Providers that already do log Alert Messages would log at least the CMAC attributes of all Alert Messages received, and be capable of sending error reports to the FEMA Alert Gateway consistent with those stipulated in the *CMSAAC Report.* We recognize Verizon's concern that requiring logging of information more granular than CMAC attributes and time stamps, or requiring alert logging at junctures in the WEA system other than the Alert Gateway would ''impose burdensome paperwork and IT-related requirements,'' but the requirements that we adopt today require only basic logging functionality at the Alert Gateway. We also recognize T-Mobile's concern that a uniform system of alert logging would be required in order to aptly compare Participating CMS Provider alert logs. We do not require Participating CMS Providers to take a uniform approach to alert logging today, only that they log the relevant information, maintain that information and make it available to appropriate parties. Further, the *CMSAAC Report* already stipulates a standard set of error code messages for communication between Participating CMS Provider and FEMA Alert Gateways. Finally, we recognize CTIA's concern about requiring alert logs to be maintained longer than necessary. By requiring alert logs to be maintained for 12 months, rather than 36, as proposed, we reduce the burden that alert log maintenance may pose for Participating CMS Providers. CTIA observes that a shorter alert log maintenance timeframe would incentivize emergency management agencies to request alert log data after every test or alert out of concern that alert log data may be deleted if they delay. At the same time, however, necessitating emergency management agencies to request logging information after every test is burdensome for both CMS Providers

(who must produce this data) and the emergency managers (who must request the data). We believe that requiring that alert logs be retained for one year strikes an appropriate balance that will allow emergency management agencies to request reports less frequently, posing lesser burdens on Participating CMS Providers and emergency management agencies, without requiring providers to retain logs for an extended period of time. Further, circumstances may arise that warrant a retrospective examination of prior log data that represents a sufficient period of time to accurately identify and represent trends or anomalies.

67. Alert logging has been a fundamental aspect of the WEA Trust Model. As we adopt changes to our rules that reflect our four years of experience with WEA and the underlying advancements of technology, it is time to ensure this fundamental component of system integrity is implemented. Authorized WEA alert originators agree that alert logs maintained at the Participating CMS Provider Alert Gateway have potential to increase their confidence that WEA will work as intended when needed. According to emergency managers, this increased confidence in system availability will encourage emergency managers that do not currently use WEA to become authorized. Alert logs are also necessary to establish a baseline for system integrity against which future iterations of WEA can be evaluated. Without records that can be used to describe the quality of system integrity, and the most common causes of message transmission failure, it will be difficult to evaluate how any changes to WEA that we may adopt subsequent to this *Report and Order* affect system integrity. We disagree with AT&T, Sprint and ATIS that the responsibility for alert logging properly belongs with FEMA IPAWS because FEMA has access to sufficient information to generate these reports. We find that alert logging is particularly important at Participating CMS Providers' Alert Gateway because even though FEMA IPAWS maintains an alert log at their Alert Gateway as well, that alert log alone could not capture and describe alert delivery across the C-interface, which is arguably the most critical interface in the WEA architecture because it describes the connection between the public aspect of WEA (FEMA IPAWS) and the private aspect (CMS Providers). Additionally, the time stamps that we require Participating CMS Providers to log for Alert Message receipt and retransmission may represent a useful model for collecting latency data throughout the WEA system, as proposed in the *Further Notice.* As discussed in further detail below, developing a stronger understanding of the extent of alert delivery latency is also crucial to building emergency managers' confidence that the system will work as intended when needed. We anticipate that the alert log maintenance requirements that we adopt today will serve to ensure that alert logs are available when needed, both to the Commission and to emergency management agencies. Indeed, any alert logging requirement would be seriously undermined if those logs could be overwritten as soon as they were recorded, or if they could not be reviewed in appropriate circumstances. Further, we observe that the alert log maintenance requirements that we adopt today are consistent with CMSAAC's initial recommendations for the WEA system. Finally, we observe that implementing these CMSAAC-recommended procedures would be beneficial in harmonizing our WEA logging requirements with those already in place for EAS Participants.

2. Narrowing Geo-Targeting Requirements

68. We narrow our WEA geo-targeting requirement from the current county-level standard to a polygon-level standard. Specifically, we amend Section 10.450 to state that a Participating CMS Provider must transmit any Alert Message that is specified by a geocode, circle, or polygon to an area that best approximates the specified geocode, circle, or polygon. While we initially proposed that Participating CMS Providers should transmit the Alert Message to an area ''no larger than'' the specified area, the record shows that implementation of such a standard, in the absence of geo-fencing, would routinely and predictably lead to under alerting. We acknowledge, as do many emergency managers, that cell broadcast technology has a limited capacity for accurate geo-targeting. The ''best approximates'' standard we adopt today, recommended by CSRIC IV and supported by Participating CMS Providers, requires Participating CMS Providers to leverage that technology to its fullest extent, given its limitations. At the same time, as we discuss below, we acknowledge that emergency managers need even more granular geo-targeting than the ''best approximates'' standard requires. We commend Participating CMS Providers for voluntarily geo-targeting Alert Messages more accurately than our rules require, where possible, in the years since WEA's deployment. We expect that Participating CMS Providers will continue to innovate in order to provide their subscribers with the best emergency alerting service it is feasible for them to offer. In this regard, we clarify that the geo-targeting requirement we adopt today does not preclude Participating CMS Providers from leveraging the location-sensing capability of WEA-capable mobile devices on their networks to geo-target Alert Message more accurately. As discussed below, the Commission will be adopting even more granular, handset-based, geo-targeting requirements. Our ultimate objective is for all Participating CMS Providers to match the target area provided by an alert originator.

69. Some alert originators remain concerned that a ''best approximates'' standard will continue to result in over-alerting and subsequent consumer opt-out. NYCEM, for example, warns that the ''best approximates'' approach is vague and risks weakening our current geo-targeting requirement. While we do not adopt specific parameters for what constitutes ''best approximates,'' we expect Participating CMS Providers to take reasonable efforts to leverage existing technology to its fullest extent, as noted above. We observe that in a recently adopted report, CSRIC V articulates expectations for cell broadcast-based geo-targeting in rural, suburban and urban areas pursuant to a ''best approximates'' approach. Specifically, in rural areas, CSRIC V expects that Participating CMS Providers would be able to approximate the target area with 30,000 meters of ''overshoot.'' In suburban areas, where cell broadcast facilities are likely to be more densely deployed, CSRIC V expects that geo-targeting would become more accurate, achieving an average overshoot of five miles. In urban areas, CSRIC V expects that geo-targeting would be more accurate still, averaging two miles of overshoot. We find that these values would satisfy reasonable efforts to ''best approximate'' the alert area, consistent with our requirement. In this regard, we believe we strike an appropriate balance between the limitations of Participating CMS Providers' current geo-targeting capabilities using cell broadcast, and WEA stakeholders' goal of sending WEA Alert Messages only to those members of the public who are at risk.

70. We find that compliance with this geo-targeting requirement is technically feasible, and, in fact, every commenting CMS Provider except one states that they already use network-based cell

broadcast techniques, such as algorithm-based facility selection and cell sectorization, to geo-target Alert Messages to polygonal areas more granular than required by our current ''county-level'' requirement. In this sense, the rule we adopt today will require most Participating CMS Providers only to continue to employ the techniques that they have been deploying as a matter of best practice. Emergency managers such as the NWS have also already transitioned from county- to polygon-level geo-targeting, and express a need for WEA to keep pace with their ability to forecast with granularity the areas that will be impacted by weather events. We observe that in the event Participating CMS Providers are unable to practice polygon-level geo-targeting, we continue to allow Participating CMS Providers to transmit Alert Messages to an area not exceeding the propagation area of a single transmission site, as described in Section 10.450. We make conforming amendments to Section 10.450, however, to reflect the new geo-targeting standard that we adopt today and specify that ''[i]f, however, the Participating CMS Provider cannot broadcast the Alert Message to an area that best approximates the target area, a Participating CMS Provider may transmit the Alert Message to an area not larger than the propagation area of a single transmission site.''

71. Participating CMS Providers' support for polygon-level geo-targeting will produce significant public safety benefits. Relative to county-level geo-targeting, we expect that polygon-level geo-targeting will reduce over-alerting. When the public regularly receives alerts that do not apply to them, it creates alert fatigue, a driving factor behind consumers' decisions to opt out of receiving WEA Alert Messages. Further, the Houston Office of Public Safety and Homeland Security comments that ''[c]ounty-level WEA warning is not only inconvenient, but can be dangerous, as protective actions may vary depending on the proximity to the hazard.'' Under-alerting also poses severe public safety risks. According to Austin Homeland Security and Emergency Management, under a county-level geo-targeting standard, ''if there are no cell towers physically located in the warning area, the alert may not be transmitted at all by some carriers.'' This would be impermissible under the ''best approximates'' standard we adopt today. We also agree with Dennis Mileti, Professor Emeritus of Sociology at The University of Colorado, that with improved geo-targeting, ''it is quite likely that milling after a received WEA message would decrease since people would not need to determine if they are in the intended audience for the WEA.'' A reduction in milling is desirable because it reduces the delay between the time an Alert Message is received, and the time that the public will begin to take protective action. This reduction in milling behavior is also likely to benefit Participating CMS Providers by reducing network usage at times when their network is otherwise vulnerable to congestion due to the pending emergency event. Finally, we agree with BRETSA and Douglas County Emergency Management that more granular alerting will encourage emergency managers to become authorized as WEA alert originators. Simply put, Participating CMS Providers' support for polygon-level geo-targeting is an important step towards ensuring that everyone affected by an emergency has access to the emergency information provided by WEA, and contributes to the public perception that ''if you receive a WEA, take action, because it applies to you.''

72. Our decision to require support for Participating CMS Providers' best approximation of the target area is an important step towards ensuring that WEA Alert Messages can be sent to only those individuals for whom they are relevant. The record shows that over-alerting leads to alert fatigue, residents that ignore the Alert Messages, and public safety officials who refrain from using WEA in emergencies. The record also demonstrates consensus among emergency managers and Participating CMS Providers that we should clear a path forward for even more accurate geo-targeting, and that we should make progress towards the achievement of this goal by adopting an appropriate regulatory framework, and by continuing to collaborate with WEA stakeholders to establish standards and best practices, and to better understand technical issues. Recognizing that standards development and network modifications may be necessary to further improve geo-targeting, in the *Further Notice* we seek comment on any issues that remain to be addressed and on an appropriate timeframe for compliance.

73. Finally, we take action to ensure that emergency alert originators better understand the manner in which their messages will be geo-targeted. In the *WEA NPRM* we sought comment on whether to require Participating CMS Providers to report data to alert originators about their provision of WEA along key performance metrics, including the accuracy of geo-targeting. In response, emergency managers observe that information about geo-targeting, in particular, would be helpful to inform their emergency response planning efforts by improving transparency and understanding of IPAWS/WEA among emergency managers authorized to use WEA. Commenters also indicate that this transparency, in turn, could increase WEA adoption by non-participating emergency managers. In light of the demonstrated benefits of improving emergency managers' understanding of the geographic area to which their WEA Alert Messages will be targeted, we require that, upon request from an emergency management agency, a Participating CMS Provider will disclose information regarding their capabilities for geo-targeting Alert Messages (*e.g.,* whether they are using network-based technology to ''best approximate'' the target area, or whether they are using device-based geo-fencing). A Participating CMS Provider is only required to disclose this information to an emergency management agency insofar as it would pertain to Alert Messages initiated by that emergency management agency, and only so long as the emergency management agency offers confidentiality protection at least equal to that provided by the federal FOIA.

3. Presenting Alert Messages Concurrent With Other Device Activity

74. We amend Section 10.510 to require WEA-capable mobile devices to present WEA Alert Messages as soon as they are received. We expect that devices engaged in active voice or data sessions on 4G–LTE networks will receive and prominently present WEA Alert Messages as soon as they are available, whereas WEA-capable mobile devices engaged in active voice or data sessions on legacy networks will not be able to receive available Alert Messages until the active voice or data session concludes. This approach is consistent with the *ATIS/TIA Mobile Device Behavior Specification'*s treatment of Alert Message prioritization.

75. We also allow Participating CMS Providers to provide their subscribers with the option to specify how the vibration cadence and attention signal should be presented when a WEA Alert Message is received during an active voice or data session in a manner that does not ''preempt'' it. Pursuant to the *ATIS/TIA Mobile Device Behavior Specification,* a ''momentary interruption of a voice call or active data session, such as a brief visual, audible and/or vibration indication that a CMAS message has been received, is not

considered preemption so long as the voice call/data session is not terminated and facilities to support that voice call or data session are not seized or released.'' We note that, according to ATIS, WEA-capable mobile devices currently take a variety of approaches to the use of the vibration cadence and audio attention signal to make the user aware of the receipt of an Alert Message while he/she is engaged in other device activity, but, according to AT&T, it ''is possible to display the WEA alert in LTE VoLTE with the alert tone suppressed'' during active voice sessions. We encourage Participating CMS Providers to leverage this capability by providing their customers with the option to change the manner in which the common attention signal and vibration cadence are used during active voice and data sessions.

76. This approach reflects the critical importance of a WEA Alert Message to its recipient, while also respecting that the Alert Message recipient may be using their mobile device to engage in a protective action that should not be interrupted, such as placing a call to 911, at the time the Alert Message is received. This approach is consistent with mobile device manufacturers' perspective that giving full priority to WEA Alert Messages during active voice calls ''would be distracting to the user,'' and that the WEA Alert Message should not disrupt the voice telephony capability of the device. It is also consistent with emergency managers' perspective that the readily recognizable common attention signal and vibration cadence should be presented to the public as quickly as technically possible, particularly during emergency situations where every second is critical. Conversely, we agree with commenters that a ''priority access'' requirement that would require ongoing voice and data sessions to be terminated by the receipt of a WEA Alert Message would not be in the public interest because it could result in the termination of other critical emergency communications.

C. Testing and Outreach

1. Supporting State/Local WEA Testing and Proficiency Training Exercises

77. We require Participating CMS Providers to support State/Local WEA Tests, as proposed in the *WEA NPRM.* Specifically, we adopt a new Section 10.350(c) to require Participating CMS Providers to support the receipt of State/Local WEA Tests from the Federal Alert Gateway Administrator, and to distribute such tests to the desired test area in a manner consistent with the Commission's Alert Message requirements. We reason that requiring State/Local WEA Tests to be received and delivered in accordance with our Alert Message requirements will ensure that emergency managers have the opportunity to test in an environment that mirrors actual alert conditions and evaluate, for example, the accuracy with which various Participating CMS Providers geo-target Alert Messages in their community. Unlike other Alert Messages, however, consumers will not receive State/Local WEA Tests by default. Participating CMS Providers should provide their subscribers with the option to receive State/Local WEA Tests, and subscribers would have to affirmatively select this option in order to receive these test messages. According to CTIA, ''[t]his way, unwanted test messages will not disturb wireless consumers who could become confused or annoyed by test messages and opt out of WEA entirely.'' We also agree with Sprint that making State/Local WEA Tests available on an opt-in basis minimizes any risk of call center congestion. Another respect in which a State/Local WEA Test will differ from an actual Alert Message is that we require State/Local WEA Tests to include conspicuous language sufficient to make clear to the public that the message is, in fact, only a test. This will minimize any chance that such test messages might be misconstrued as actual Alert Messages.

78. The 24-hour delivery window that currently applies to RMTs under Section 10.350(a)(2) will not apply to State/Local WEA Tests. Rather, we require that Participating CMS Providers transmit State/Local WEA Tests immediately upon receipt. We agree with commenters that allowing Participating CMS Providers to delay delivery of State/Local WEA Tests would make it impossible for emergency managers to evaluate message delivery latency, and might result in individuals who do opt in to receive State/Local WEA Tests receiving them in the middle of the night, which is unlikely to promote participation. A Participating CMS Provider may not forgo or delay delivery of a State/Local WEA Test, except when the test is preempted by actual Alert Message traffic, or if an unforeseen condition in the Participating CMS Provider infrastructure precludes distribution of the State/Local WEA Test. If a Participating CMS Provider Gateway forgoes or delays a State/Local WEA Test for one of these reasons, it shall send a response code to the Federal Alert Gateway indicating the reason consistent with how we currently require Participating CMS Providers to handle forgone RMTs. We anticipate that allowing Participating CMS Providers to forgo transmittal of a State/Local WEA Test if it is preempted by actual alert traffic or if unforeseen conditions arise will ensure that State/Local WEA Tests do not ''overwhelm wireless provides' limited resources, '' as stated by CTIA. We defer to emergency managers to determine how frequently testing is appropriate, given this constraint.

79. We encourage emergency management agencies to engage in proficiency training exercises using this State/Local WEA Testing framework where appropriate. We agree with commenters that proficiency training exercises are a helpful and meaningful way for emergency managers to engage with alert and warning issues. Moreover, we agree with San Joaquin County OES that ''proficiency training is an essential element of verifying competency'' in the alert origination skill set necessary to issue effective WEA Alert Messages. We observe that our rules allow such proficiency training exercises now. We agree with APCO that alert origination software can be used to support internal proficiency training exercises where emergency managers wish to iterate alert origination best practices in a closed environment, and that the State/Local WEA Testing framework described above is sufficient to support cases where emergency management agencies find it appropriate to involve the public in their WEA exercises. We hope that proficiency training exercises will provide emergency management agencies with a method of generating their own WEA alert origination best practices, particularly with respect to the kinds of enhanced Alert Messages enabled by this proceeding (*i.e.,* Alert Messages up to 360 characters in length that may include embedded references, may be issued in Spanish, and may be intended to supplement an already-issued Alert Message).

80. We find that requiring Participating CMS Providers to support this State/Local WEA Testing framework is technically feasible, requiring only updates to software and standards in order to allow users the option to opt in to receive such tests, and that it will result in significant public safety benefits. Specifically, we agree with Clarion County OES and the Lexington Division of Emergency Management that while occasional system failures are probable, a solid testing and training platform such as this can ensure that failures can be

corrected during a period where no real emergency exists. We also agree with Calcasieu Parish Police Jury Office of Homeland Security and Emergency Preparedness that regular readiness testing and proficiency training are critical to maintaining WEA alert origination competency because ''[i]f you don't use it you lose it.'' According to FEMA, requiring Participating CMS Providers to support State/Local WEA Testing will improve WEA by providing confidence to the public that their handsets are capable of receiving an Alert Message from local emergency management agencies, and by rendering WEA suitable for use in coordinated public warning exercises, such as those required by the Nuclear Regulatory Commission for local emergency preparedness programs. Further, we agree with Harris County Office of Homeland Security and Emergency Management that State/Local WEA Tests, in conjunction with targeted outreach efforts, may be useful to emergency managers as a tool to improve their competency at initiating Alert Messages in languages other than English. Importantly, emergency managers may also use State/Local WEA Tests to voluntarily collect and share information about geo-targeting, alert delivery latency, and other vital performance metrics. We encourage emergency managers and related entities to engage in extensive outreach to their respective communities in order to socialize the benefits of public participation in State/Local WEA Tests, and otherwise to raise public awareness about the benefits of receiving WEA messages, including through the use of PSAs.

2. Testing the NCE Public Television C-Interface Back-up

81. We agree with the public broadcasting and NCE commenters that in order to be fully effective and reflective of WEA system needs, a test of the public television broadcast-based backup to the C-interface should be implemented as an end-to-end test from the IPAWS to the CMS Provider Gateways. Accordingly, we amend our rules to make it clear that periodic C interface testing must include the testing of its public television broadcast-based backup. Pursuant to this framework, FEMA would initiate a test of the broadcast-based C-interface backup by sending a test message through that infrastructure to the CMS Provider Alert Gateway, which would respond by returning an acknowledgement of receipt of the test message to the FEMA Gateway. This approach ensures reliable continuity between FEMA and Participating CMS Providers, even during a disaster in which internet connectivity may be lost. We defer to FEMA as the IPAWS and Federal Alert Gateway administrator to determine the periodicity of these tests in conversation with Participating CMS Providers.

82. By requiring CMS Providers to participate in periodic testing of the broadcast-based backup to the C-interface, ''we develop and implement the appropriate safeguards to ensure delivery of critical infrastructure services,'' as recommended by the *CSRIC* v. *WEA Security Report.* PBS, APTS, and CPB agree that this approach to testing the C-interface backup presents NCE public broadcasting entities with no additional cost burdens. We agree with PBS, APTS, and CPB that this rule will require no ''material intervention'' by such stations because their receipt and retransmission of test messages will be entirely automated, and will use equipment already installed at their facilities. Accordingly, we anticipate that stations in compliance with our rules today will have to take no additional steps in order to comply with this new testing requirement.

3. Facilitating WEA PSAs

83. We amend Sections 11.45 and 10.520 to allow federal, state and local, tribal and territorial entities, as well as non-governmental organizations (NGOs) in coordination with such entities, to use the attention signal common to EAS and WEA to raise public awareness about WEA. WEA PSAs that use the WEA attention signal must make clear that it is being used in the context of the PSA, ''and for the purpose of educating the viewing or listening public about the functions of their WEA-capable mobile devices and the WEA program,'' including by explicitly stating that the WEA attention signal is being used in the context of a PSA for the purpose of educating the public about WEA.

84. We agree with commenters that facilitating federal, state, local, tribal and territorial governments' issuance of WEA PSAs, as proposed, is in the public interest, and that the utility of WEA PSAs will only be augmented by allowing NGOs to produce them in coordination with governmental entities by promoting effective community partnership. Specifically, WEA PSAs can be effective tools to raise public awareness about, and promote positive perceptions of WEA, which may reduce consumer opt-out and reduce milling. We note the PSA campaign of Minnesota Emergency, Community Health and Outreach (ECHO), a program and service of Twin Cities Public Television, as an example of how governmental entities can partner with NGOs to raise community awareness about the significance of the common alerting attention signal for EAS and WEA. We also note that WEA PSAs have become a critical part of FEMA's *Ready* campaign that has ''shown that it can enhance the public's understanding of how the WEA functions and increase the public's benefits from the WEA and thereby benefit public safety generally.'' We agree with commenters that the issuance of WEA PSAs is particularly appropriate in the context of the rules we adopt today. For example, with respect to increasing the maximum WEA character limit, FEMA notes that it will ''need to . . . conduct additional public information efforts to inform people of the new format of Alert Messages they may receive on their cellular phones.'' Additionally, we anticipate that PSAs will be an effective method to acclimate the public to the fact that they may receive supplemental instructions about how to respond to an emergency through the newly adopted WEA Public Safety Message classification. Indeed, we commit to work with WEA stakeholders to develop community outreach plans and raise public awareness about each of the WEA enhancements made possible by this *Report and Order.* Moreover, we agree with Professor Denis Mileti, Professor Emeritus, University of Colorado, that WEA PSAs can reduce milling by ''build[ing] the reputation of the WEA system with the American public,'' making it a more credible and authoritative single resource for emergency information.

D. Compliance Timeframes

Rule amendment	Compliance timeframe	Rule(s) affected
Increasing Maximum WEA Character Length.	Within 30 months of the rule's publication in the **Federal Register**	47 CFR 10.430.
Classifying Public Safety Messages	Within 30 months of the rules' publication in the **Federal Register**	47 CFR 10.280(a), 47 CFR 10.400(d), 47 CFR 10.410.

Rule amendment	Compliance timeframe	Rule(s) affected
Supporting Embedded References and Multimedia.	The removal of our prohibition on the use of embedded references is effective 30 days from the rules' publication in the **Federal Register** Our requirement to support embedded references is effective one year from the rules' publication in the **Federal Register**.	47 CFR 10.440, 47 CFR 10.441.
Spanish-language Alerting	Within 2 years of the rule's publication in the **Federal Register**	47 CFR 10.480.
Alert Logging	Within 60 days of publication in the **Federal Register** of a notice announcing the approval by the Office of Management and Budget of the modified information collection requirements.	47 CFR 10.320(g).
WEA Geo-targeting	Within 60 days of the rule's publication in the **Federal Register**	47 CFR 10.450.
WEA Presentation	Within 30 months of the rule's publication in the **Federal Register**	47 CFR 10.510.
State/Local WEA Testing	Within 30 months of the rule's publication in the **Federal Register**	47 CFR 10.350(c).
C-interface Backup Testing	Within 30 days of the rule's publication in the **Federal Register**	47 CFR 10.350(b).
WEA PSAs	Within 30 days of the rule's publication in the **Federal Register**	47 CFR 10.520(d).

85. Therefore, nationwide Participating CMS Providers' subscribers should have greater confidence that WEA Alert Messages they receive are intended for them as of February, 2017. Participating CMS Providers' subscribers should expect to be able to receive Alert Messages in Spanish by 2019. Then, by June 2019, they should expect to see 360-character maximum alerts on 4G LTE and future networks, Public Safety Messages, Alert Messages that contain embedded references, and State/Local WEA Tests presented as soon as they are received. While we expect that updates to our WEA PSA, C-interface backup testing, and alert logging rules will produce significant public safety benefits, as described below, we do not anticipate that consumers will immediately notice a change in service due to these updates.

II. Ordering Clauses

86. Accordingly, *it is ordered*, pursuant to sections 1, 2, 4(i), 4(o), 301, 303(r), 303(v), 307, 309, 335, 403, 624(g), 706, and 715 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(o), 301, 301(r), 303(v), 307, 309, 335, 403, 544(g), 606, and 615, as well as by sections 602(a), (b), (c), (f), 603, 604 and 606 of the WARN Act, 47 U.S.C. 1202(a), (b), (c), (f), 1203, 1204 and 1206, that the *WEA Report and Order and Further Notice of Proposed Rulemaking* in PS Docket Nos. 15–91 and 15–94 *is hereby adopted.*

87. *It is further ordered* that the Commission's rules *are hereby amended* as set forth in Appendix A.

88. *It is further ordered* that the rules adopted herein *will become effective* as described herein,[1] including those rules and requirements which contain new or modified information collection requirements that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act that *will become effective* after publication in the **Federal Register** of a notice announcing such approval and the relevant effective date.[2]

89. Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the *WEA Report and Order and Further Notice of Proposed Rulemaking,* including the Final and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

The rules in this part are issued pursuant to the authority contained in the Warning, Alert, and Response Network Act, Title VI of the Security and Accountability for Every Port Act of 2006, Public Law 109–347, Titles I through III of the Communications Act of 1934, as amended, and Executive Order 13407 of June 26, 2006, Public Alert and Warning System, 71 FR 36975 (June 28, 2006).

List of Subjects

47 CFR Part 10

Communications common carriers, Emergency alerting.

47 CFR Part 11

Radio, Television, Emergency alerting.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer, Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 10 and 11 to read as follows:

PART 10—WIRELESS EMERGENCY ALERTS

■ 1. The authority citation for part 10 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i) and (o), 201, 303(r), 403, and 606; sections 602(a), (b), (c), (f), 603, 604 and 606 of Pub. L. 109–347, 120 Stat. 1884.

■ 2. Effective May 1, 2019, § 10.280 is amended by revising paragraph (a) to read as follows:

§ 10.280 Subscribers' right to opt out of WEA notifications.

(a) CMS providers may provide their subscribers with the option to opt out of the ''Child Abduction Emergency/AMBER Alert,'' ''Imminent Threat Alert'' and ''Public Safety Message'' classes of Alert Messages.

* * * * *

■ 3. Effective on the date to be announced by the Commission in a document published in the **Federal Register**, § 10.320 is amended by adding paragraph (g) to read as follows:

§ 10.320 Provider alert gateway requirements.

* * * * *

(g) *Alert logging.* The CMS provider gateway must perform the following functions:

(1) *Logging requirements.* Log the CMAC attributes of all Alert Messages received at the CMS Provider Alert Gateway, including time stamps that verify when the message is received, and when it is retransmitted or rejected by the Participating CMS Provider Alert Gateway. If an Alert Message is rejected, a Participating CMS Provider is required to log the specific error code generated by the rejection.

(2) *Maintenance of logs.* Participating CMS Providers are required to maintain a log of all active and cancelled Alert Messages for at least 12 months after receipt of such alert or cancellation.

(3) *Availability of logs.* Participating CMS Providers are required to make their alert logs available to the Commission and FEMA upon request. Participating CMS Providers are also required to make alert logs available to emergency management agencies that offer confidentiality protection at least

[1] *See supra* Section III.D (Compliance Timeframes.)

[2] Public Law 104–13, 109 Stat. 163 (May 22, 1995), *codified at* 44 U.S.C. 3501 *et seq.*

equal to that provided by the federal Freedom of Information Act (FOIA) upon request, but only insofar as those logs pertain to Alert Messages initiated by that emergency management agency.

■ 4. Effective December 1, 2016, § 10.350 is amended by revising the section heading, introductory text, and paragraph (b) to read as follows:

§ 10.350 WEA testing and proficiency training requirements.

This section specifies the testing that is required of Participating CMS Providers.

* * * * *

(b) *Periodic C interface testing.* In addition to the required monthly tests, a Participating CMS Provider must participate in periodic testing of the interfaces between the Federal Alert Gateway and its CMS Provider Gateway, including the public television broadcast-based backup to the C-interface. This periodic interface testing is not intended to test the CMS Provider's infrastructure nor the mobile devices but rather is required to ensure the availability/viability of both gateway functions. Each CMS Provider Gateway shall send an acknowledgement to the Federal Alert Gateway upon receipt of such interface test messages. Real event codes or Alert Messages shall not be used for this periodic interface testing.

* * * * *

■ 5. Effective May 1, 2019, § 10.350 is amended by adding paragraph (c) to read as follows:

§ 10.350 WEA testing and proficiency training requirements.

* * * * *

(c) *State/Local WEA Testing.* A Participating CMS Provider must support State/Local WEA Tests in a manner that complies with the Alert Message Requirements specified in Subpart D.

(1) A Participating CMS Provider's Gateway shall support the ability to receive a State/Local WEA Test message initiated by the Federal Alert Gateway Administrator.

(2) A Participating CMS Provider shall immediately transmit a State/Local WEA Test to the geographic area specified by the alert originator.

(3) A Participating CMS Provider may forego a State/Local WEA Test if the State/Local WEA Test is pre-empted by actual alert traffic or if an unforeseen condition in the CMS Provider infrastructure precludes distribution of the State/Local WEA Test. If a Participating CMS Provider Gateway forgoes a State/Local WEA Test, it shall send a response code to the Federal Alert Gateway indicating the reason.

(4) Participating CMS Providers shall provide their subscribers with the option to opt in to receive State/Local WEA Tests.

■ 6. Effective May 1, 2019, § 10.400 is amended by revising the introductory text and adding paragraph (d) to read as follows:

§ 10.400 Classification.

A Participating CMS Provider is required to receive and transmit four classes of Alert Messages: Presidential Alert; Imminent Threat Alert; Child Abduction Emergency/AMBER Alert; and Public Safety Message.

* * * * *

(d) *Public Safety Message.* A Public Safety Message is an essential public safety advisory that prescribes one or more actions likely to save lives and/or safeguard property during an emergency. A Public Safety Message may only be issued in connection with an Alert Message classified in paragraphs (a), (b) or (c) of this section.

■ 7. Effective May 1, 2019, § 10.410 is revised to read as follows:

§ 10.410 Prioritization.

A Participating CMS Provider is required to transmit Presidential Alerts upon receipt. Presidential Alerts preempt all other Alert Messages. A Participating CMS Provider is required to transmit Imminent Threat Alerts, AMBER Alerts and Public Safety Messages on a first in-first out (FIFO) basis.

■ 8. Effective May 1, 2019, § 10.430 is revised to read as follows:

§ 10.430 Character limit.

A Participating CMS Provider must support transmission of an Alert Message that contains a maximum of 360 characters of alphanumeric text. If, however, some or all of a Participating CMS Provider's network infrastructure is technically incapable of supporting the transmission of a 360-character maximum Alert Message, then that Participating CMS Provider must support transmission of an Alert Message that contains a maximum of 90 characters of alphanumeric text on and only on those elements of its network incapable of supporting a 360 character Alert Message.

§ 10.440 [Removed].

■ 9. Effective December 1, 2016, remove § 10.440.

■ 10. Effective November 1, 2017, § 10.441 is added to read as follows:

§ 10.441 Embedded references.

Participating CMS Providers are required to support Alert Messages that include an embedded Uniform Resource Locator (URL), which is a reference (an address) to a resource on the Internet, or an embedded telephone number.

■ 11. Effective January 3, 2017, § 10.450 is revised to read as follows:

§ 10.450 Geographic targeting.

This section establishes minimum requirements for the geographic targeting of Alert Messages.

(a) A Participating CMS Provider will determine which of its network facilities, elements, and locations will be used to geographically target Alert Messages. A Participating CMS Provider must transmit any Alert Message that is specified by a geocode, circle, or polygon to an area that best approximates the specified geocode, circle, or polygon. If, however, the Participating CMS Provider cannot broadcast the Alert Message to an area that best approximates the specified geocode, circle, or polygon, a Participating CMS Provider may transmit an Alert Message to an area not larger than the propagation area of a single transmission site.

(b) Upon request from an emergency management agency, a Participating CMS Provider will disclose information regarding their capabilities for geo-targeting Alert Messages. A Participating CMS Provider is only required to disclose this information to an emergency management agency insofar as it would pertain to Alert Messages initiated by that emergency management agency, and only so long as the emergency management agency offers confidentiality protection at least equal to that provided by the federal FOIA.

■ 12. Effective November 1, 2018, § 10.480 is added to subpart D to read as follows:

§ 10.480 Language support.

Participating CMS Providers are required to transmit WEA Alert Messages that are issued in the Spanish language or that contain Spanish-language characters.

■ 13. Effective May 1, 2019, § 10.510 is revised to read as follows:

§ 10.510 Call preemption prohibition.

Devices marketed for public use under part 10 must present an Alert Message as soon as they receive it, but may not enable an Alert Message to preempt an active voice or data session. If a mobile device receives a WEA Alert Message during an active voice or data session, the user may be given the option to control how the Alert Message is presented on the mobile device with respect to the use of the common vibration cadence and audio attention signal.

■ 14. Effective December 1, 2016, § 10.520 is amended by revising paragraph (d) to read as follows:

§ 10.520 Common audio attention signal.

* * * * *

(d) No person may transmit or cause to transmit the WEA common audio attention signal, or a recording or simulation thereof, in any circumstance other than in an actual National, State or Local Area emergency or authorized test, except as designed and used for Public Service Announcements (PSAs) by federal, state, local, tribal and territorial entities, and non-governmental organizations in coordination with those entities, to raise public awareness about emergency alerting, provided that the entity presents the PSA in a non-misleading manner, including by explicitly stating that the emergency alerting attention signal is being used in the context of a PSA for the purpose of educating the viewing or listening public about emergency alerting.

* * * * *

PART 11—EMERGENCY ALERT SYSTEM

■ 15. The authority citation for part 11 continues to read as follows:

Authority: 47 U.S.C. 151, 154 (i) and (o), 303(r), 544(g) and 606.

■ 16. Effective December 1, 2016, § 11.45 is revised to read as follows:

§ 11.45 Prohibition of false or deceptive EAS transmissions.

No person may transmit or cause to transmit the EAS codes or Attention Signal, or a recording or simulation thereof, in any circumstance other than in an actual National, State or Local Area emergency or authorized test of the EAS, or as specified in § 10.520(d) of this chapter.

[FR Doc. 2016–26120 Filed 10–31–16; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 395

[Docket No. FMCSA–2016–0096]

Hours of Service of Drivers: Specialized Carriers & Rigging Association (SC&RA); Application for Exemption; Final Disposition

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

ACTION: Notice of final disposition; partial grant and partial denial of application for exemption.

SUMMARY: FMCSA announces its decision to grant the Specialized Carriers & Rigging Association (SC&RA) an exemption from the 30-minute rest break rule of the Agency's hours-of-service (HOS) regulations for certain commercial motor vehicle (CMV) drivers. The Agency denies SC&RA's further request for exemption from the 14-hour driving window of the HOS rules. All qualifying motor carriers and drivers operating mobile cranes with a rated lifting capacity of greater than 30 tons are exempt from the 30-minute break provision. FMCSA has analyzed the exemption application and public comments and has determined that the exemption, subject to the terms and conditions imposed, will achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.

DATES: The exemption is effective November 1, 2016 and expires on November 1, 2018.

FOR FURTHER INFORMATION CONTACT: For information concerning this notice, contact Mr. Thomas Yager, Chief, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 614–942–6477. Email: *MCPSD@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Background

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

Request for Exemption

On December 27, 2011 (76 FR 81133), FMCSA published a final rule amending its HOS regulations for drivers of property-carrying CMVs. The rule requires most drivers to take a rest break during the workday. Generally, if 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes, the driver may not operate a CMV until he or she takes at least 30 minutes off duty (49 CFR 395.3(a)(3)(ii)). FMCSA did not specify when drivers must take the 30-minute break. The HOS rules also limit drivers of property-carrying CMVs to a 14-hour driving window each duty day (49 CFR 395.3(a)(2)). The window begins when the driver comes on duty following at least 10 consecutive hours off duty. After the 14th consecutive hour from that point, the driver cannot operate a CMV until he or she obtains at least 10 consecutive hours off duty. The requirements of the HOS rules apply to drivers of CMVs and to their motor carrier employers who direct the drivers to operate the CMVs.

On June 18, 2015, FMCSA granted SC&RA an exemption from the 30-minute rest-break requirement for qualifying drivers operating certain large and heavy vehicles that require an oversize/overweight (OS/OW) permit issued by State or local government (80 FR 34957). The Agency granted this exemption for the maximum period of 2 years permitted by the FMCSRs at that time. On December 4, 2015, the President signed the ''Fixing America's Surface Transportation Act'' (FAST Act)(Pub. L. 114–94). Section 5206(a)(3) of the FAST Act amended 49 U.S.C. 31315(b) to give FMCSA the authority to grant exemptions for up to 5 years. In addition section 5206(b)(2)(A) extended any HOS exemption in effect on the date of enactment for a period of 5 years from the date it was issued. While that provision automatically extended SC&RA's June 2015 exemption for drivers of vehicles requiring an oversize/overweight permit, FMCSA is using its authority under 49 U.S.C. 31315(b)(2)(1) to issue the exemption from the 30-minute break requirement for mobile crane operators for 2 years from the date of this notice.

SC&RA advises that there are approximately 85,000 trained and certified mobile crane operators in the United States, and, of these, approximately 65,000 operate cranes with a lifting capacity over 30 tons. While some of these cranes require a permit due to their size or weight, others do not. SC&RA seeks an exemption from the 14-hour rule and the requirement for a 30-minute break for drivers operating mobile cranes with a rated lifting capacity of greater than 30 tons. SC&RA states that the HOS rules create complications because it is difficult to find suitable parking when crane drivers are required to go off duty. SC&RA cites data indicating that there is a shortage of parking places for CMVs in the United States and notes ongoing Federal and State efforts to address this problem. Parking for cranes is even more limited because of their size. SC&RA asserts that these two HOS rules often require crane drivers to stop operating a CMV to avoid violating their provisions. The result is that cranes are often parked on the shoulder of public roads. SC&RA states the width of some cranes means they cannot be parked entirely off the travel lanes, creating a safety hazard for their own drivers and others.

SC&RA describes the unpredictable nature of the typical workday of a crane operator. It lists a variety of variables that can complicate the scheduling of operations, including delays waiting for the item to be lifted to arrive at the work site or to be rigged for lifting. Unexpected inclement weather can also trigger delays. SC&RA asserts that the primary result is that the workday may be extended unexpectedly. Thus, timing a crane's movement from the worksite and onto public roads at the end of the day is highly problematic. It notes that State and local restrictions limit the hours of the day, and sometimes the days of the week, that cranes may move on public roads. In addition, the movement of cranes may require a pilot car, the display of signs and lights, and even a police escort. Cranes normally move much slower than the posted speed limit, and are highly susceptible to weather and traffic conditions.

SC&RA does not foresee any negative impact to safety from the requested exemption. It believes that granting the exemption would have a favorable impact on overall safety by reducing the frequency of cranes being parked along public roads. It points out that its members generally drive a crane less than 2 hours a day and have low crash rates.

Public Comments

FMCSA published the SC&RA exemption application for comment on March 16, 2016 (81 FR 14052). The Agency received 13 comments, most supporting the exemption. These commenters asserted that crane operators actually drive very little on public roads, and thus are less likely to suffer from driving fatigue than long-haul CMV drivers. Commenters also described the typical duty day of crane operators at the work site, and pointed out that there are substantial periods when they have to wait for others to complete preparations for the lift. These commenters also described the relatively short distances cranes are driven on public roads at the beginning and end of the day. NationsBuilders Insurance Services, Inc. commented that the drive unit of a crane generally logs only 60,000 miles in 9 years.

Commenters opposing the exemption suggest that motor carriers could avoid or ameliorate their scheduling difficulties by employing a second crane driver. Advocates for Highway and Auto Safety (Advocates) found the application for exemption fatally deficient because it ''fails to include any analysis of the safety impacts of the requested exemption.'' Advocates also stated that SC&RA ignored the requirement that it ''carefully review the regulation to determine whether there are any practical alternatives already available'' that would allow it to conduct its operations and comply with the HOS rules. Advocates also believes that SC&RA carriers could overcome the numerous variables affecting these operations by stronger management of their CMV fleets.

FMCSA Decision

FMCSA has evaluated SC&RA's application and the public comments and has decided to grant an exemption from the 30-minute rule but to deny an exemption from the 14-hour rule. The Agency believes that the exempt crane drivers will likely achieve a level of safety that is equivalent to or greater than, the level of safety achieved without the exemption [49 CFR 381.305(a)]. The schedules of these CMV drivers are characterized by daytime hours, low-stress periods of waiting during the workday, and very limited hours of actual driving on public roads. In addition, these loads are sometimes escorted by other vehicles and operate at low speeds.

The unpredictable workday of a mobile-crane operator, with its frequent interruptions and down time, reduces the risk of cumulative fatigue and thus the urgency of a 30-minute break. Providing an exemption from the break will also reduce the number of situations where a crane operator has to park at roadside midway through a move between job sites in order to comply with the 30-minute break rule. The Agency is concerned with parking shortages, especially for very large vehicles. It is highly undesirable to have cranes parked on the shoulders of highways, much less extending into the travel lanes. No matter how well marked, trucks parked at roadside, especially at night, are too easily mistaken for moving vehicles and struck at full speed, with serious consequences.

However, the Agency is not granting exemption from the 14-hour rule. The absence of this limit would allow drivers to operate without any restriction on the length of their duty day. The risk that safety would deteriorate in the absence of this requirement is high. While we agree that the 30-minute break rule is unnecessarily restrictive for operators of large mobile cranes, the 14-hour window is far less restrictive. It is a critical factor in containing fatigue that might otherwise develop. The 14-hour rule is a limit that should be built into the planning of mobile crane operations.

For these reasons, the Agency grants an exemption from the 30-minute rest-break requirement, subject to the terms and conditions in this **Federal Register** notice, but denies an exemption from the 14-hour rule.

Terms of the Exemption

1. All motor carriers and drivers operating mobile cranes with a rated lifting capacity of greater than 30 tons are exempt from the 30-minute break requirement of 49 CFR 395.3(a)(3)(ii). The lifting capacity of the crane must be displayed on a manufacturer's certification plate on the crane or in manufacturer's documentation carried on the vehicle.

2. Drivers must have a copy of this exemption document in their possession while operating under the terms of the exemption. The exemption document

must be presented to law enforcement officials upon request.

3. Motor carriers operating under this exemption must have a ''Satisfactory'' safety rating with FMCSA, or be ''Unrated.'' Motor carriers with ''Conditional'' or ''Unsatisfactory'' FMCSA safety ratings are prohibited from using this exemption.

Period of the Exemption

This exemption from the requirements of 49 CFR 395.3(a)(3)(ii) is granted for the period from 12:01 a.m., November 1, 2016 through 11:59 p.m., November 1, 2018.

Extent of the Exemption

This exemption is limited to the provisions of 49 CFR 395.3(a)(3)(ii). These motor carriers and drivers must comply with all other applicable provisions of the FMCSRs.

Preemption

In accordance with 49 U.S.C. 31313(d), as implemented by 49 CFR 381.600, during the period this exemption is in effect, no State shall enforce any law or regulation applicable to interstate commerce that conflicts with or is inconsistent with this exemption with respect to a firm or person operating under the exemption. States may, but are not required to, adopt the same exemption with respect to operations in intrastate commerce.

Notification to FMCSA

Any motor carrier utilizing this exemption must notify FMCSA within 5 business days of any accident (as defined in 49 CFR 390.5), involving any of the motor carrier's CMV drivers operating under the terms of this exemption. The notification must include the following information:

a. Name of Exemption: ''SC&RA cranes''

b. Name of operating motor carrier and USDOT number,

c. Date of the accident,

d. City or town, and State, in which the accident occurred, or closest to the accident scene,

e. Driver's name and license number and State of issuance

f. Vehicle number and State license plate number,

g. Number of individuals suffering physical injury,

h. Number of fatalities,

i. The police-reported cause of the accident,

j. Whether the driver was cited for violation of any traffic laws or motor carrier safety regulations, and

k. The driver's total driving time and total on-duty time prior to the accident.

Reports filed under this provision shall be emailed to *MCPSD@DOT.GOV.*

Termination

FMCSA believes motor carriers conducting crane operations under this exemption will continue to maintain their safety record while operating under this exemption. However, should safety be compromised, FMCSA will take all steps necessary to protect the public interest, including revocation or restriction of the exemption. The FMCSA will immediately revoke or restrict the exemption for failure to comply with its terms and conditions.

Issued on: October 20, 2016.

T.F. Scott Darling, III,

Administrator.

[FR Doc. 2016–26333 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–EX–P

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Parts 800, 803, and 804

[Docket No.: NTSB–GC–2017–001]

RIN 3147–AA03, 3147–AA08, 3147–AA09

Administrative Rules; Official Seal; Rules Implementing the Government in the Sunshine Act

AGENCY: National Transportation Safety Board (NTSB).

ACTION: Final rule.

SUMMARY: The NTSB makes technical updates and corrects citations in its administrative regulations governing agency organization and functions, delegations of authority to staff members, and procedures for adopting rules, regulations governing the agency's official seal, and regulations implementing the Government in the Sunshine Act. These revisions make no substantive changes.

DATES: This rule is effective November 1, 2016.

ADDRESSES: A copy of this Final Rule, published in the **Federal Register** (FR), is available for inspection and copying in the NTSB's public reading room, located at 490 L'Enfant Plaza SW., Washington, DC 20594–2003. Alternatively, a copy is available on the government-wide Web site on regulations at *http://www.regulations.gov* (Docket ID Number NTSB–GC–2017–001).

FOR FURTHER INFORMATION CONTACT: Matthew D. McKenzie, Attorney-Advisor, (202) 314–6080, *rulemaking@ntsb.gov*.

SUPPLEMENTARY INFORMATION:

I. Legal Basis for the Final Rule

The Administrative Procedure Act (APA), 5 U.S.C. 553, provides exceptions to its notice and public comment rulemaking procedures where (1) the rules are rules of agency organization, procedure, or practice; or (2) the agency finds there is good cause to forego notice and comment, and incorporates the finding and a brief statement of reasons therefore in the rule issued. Generally, good cause exists where the agency determines that notice and public comment procedures are impractical, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b).

Parts 800, 803, and 804 govern internal agency organization, procedure, or practice. Part 800, subparts A and B, describes the organization of the agency. Part 800, subpart C, prescribes procedures for the agency's rulemakings. Part 803 describes the agency's seal and limits its use. Part 804 prescribes procedures for the agency's open meetings.

The amendments made in this final rule merely correct inadvertent errors and omissions, remove obsolete references, and make minor editorial changes to improve clarity and consistency. The technical amendments do not impose any new requirements, nor do they make any substantive changes to the Code of Federal Regulations. For these reasons, the NTSB finds good cause that notice and public comment on this final rule are unnecessary. For these same reasons, this rule will be effective on the date of publication in the **Federal Register**.

II. Background

On June 25, 2012, the NTSB announced its plan to review its regulations, 49 CFR parts 800 through 850, to comply with Executive Order (E.O.) 13563, *Improving Regulation and Regulatory Review,* 76 FR 3821 (Jan. 21, 2011); E.O. 13579, *Regulation and Independent Regulatory Agencies,* 76 FR 41587 (July 11, 2011); and E.O. 13610, *Identifying and Reducing Regulatory Burdens,* 77 FR 28469 (May 14, 2012). *NTSB Plan for Retrospective Analysis of Existing Rules,* 77 FR 37865. Though the Executive Orders require retrospective review of only ''significant regulations,'' NTSB stated it would review all of its regulations to implement the principles in the Orders. *Id.* at 37867.

On January 8, 2013, after reviewing its regulations, the NTSB announced its plan to update its regulations, including revising internal agency procedures for which no public comment was required. *Retrospective Analysis of Existing Rules; Notification,* 78 FR 1193, 1194.

Pursuant to that plan, in this Final Rule, the NTSB makes editorial improvements and corrects obsolete information and citations in parts 800 (Administrative Rules), 803 (Official Seal), and 804 (Rules Implementing the Government in the Sunshine Act).

III. Regulatory Analysis

This rule does not require an assessment of its potential costs and benefits under section 6(a)(3) of E.O. 12866, *Regulatory Planning and Review,* 58 FR 51735 (Sept. 30, 1993), because it is not a ''significant regulatory action'' under section 3(f) of that Order. Thus, the Office of Management and Budget has not reviewed this rule under E.O. 12866. Likewise, this rule does not require an analysis under the Unfunded Mandates Reform Act, 2 U.S.C. 1501–71, or the National Environmental Policy Act, 42 U.S.C. 4321–47.

In addition, under the Regulatory Flexibility Act, 5 U.S.C. 601–12, the NTSB has considered whether this rule would have a significant economic impact on a substantial number of small entities. The NTSB certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. Moreover, in accordance with 5 U.S.C. 605(b), the NTSB will submit this certification to the Chief Counsel for Advocacy at the Small Business Administration.

Moreover, the NTSB does not anticipate this rule will have a substantial, direct effect on state or local governments or will preempt state law; as such, this rule does not have implications for federalism under E.O. 13132, *Federalism,* 64 FR 43255 (Aug. 4, 1999).

This rule also complies with all applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, *Civil Justice Reform,* 61 FR 4729 (Feb. 5, 1996), to minimize litigation, eliminate ambiguity, and reduce burden.

NTSB has evaluated this rule under: E.O. 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights,* 53 FR 8859 (Mar. 15, 1988); E.O. 13045, *Protection of Children from Environmental Health Risks and Safety Risks,* 62 FR 19885 (Apr. 21, 1997); E.O. 13175, *Consultation and Coordination with Indian Tribal Governments,* 65 FR 67249 (Nov. 6, 2000); E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,* 66 FR 28355 (May 18, 2001); and the National Technology Transfer and Advancement Act, 15 U.S.C. 272 note. The NTSB has concluded that this Final Rule neither violates, nor requires further consideration under, those Orders and statutes.

List of Subjects

49 CFR Part 800

Administrative practice and procedure, Authority delegations (Government agencies), Government employees, Organization and functions (Government agencies).

49 CFR Part 803

Seals and insignia.

49 CFR Part 804

Sunshine Act.

For the reasons stated in the preamble, the National Transportation Safety Board amends 49 CFR parts 800, 803, and 804 as set forth below:

PART 800—ADMINISTRATIVE RULES

■ 1. The authority citation for part 800 is revised to read as follows:

Authority: 49 U.S.C. 1101 *et seq.;* 49 U.S.C.40101 *et seq.*

Subpart A—Organization and functions

§ 800.1 [Amended]

■ 1. Amend § 800.1 by removing ''part'' and adding in its place ''subpart''.

§ 800.2 [Amended]

■ 2. Amend § 800.2 as follows:
■ a. In the introductory text, remove ''the Federal Aviation Act of 1958, as amended (49 U.S.C. 40101 *et seq.*), and the Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*)'' and add in its place ''49 U.S.C. chapter 11''.
■ b. In paragraph (d), remove ''the Federal Aviation Act of 1958, as amended'' and add in its place ''49 U.S.C. 1133''.

■ 3. Revise § 800.3 to read as follows:

§ 800.3 Functions.

(a) The primary function of the Board is to promote safety in transportation. The Board is responsible for the investigation, determination of facts, conditions, and circumstances and the cause or probable cause or causes of:

(1) All accidents involving civil aircraft, and certain public aircraft;

(2) Highway accidents, including railroad grade-crossing accidents, the investigation of which is selected in cooperation with the States;

(3) Railroad accidents in which there is a fatality, substantial property damage, or which involve a passenger train;

(4) Pipeline accidents in which there is a fatality, significant injury to the environment, or substantial property damage; and

(5) Major marine casualties and marine accidents involving a public and a non-public vessel or involving Coast Guard functions.

(b) The Board makes transportation safety recommendations to federal, state, and local agencies and private organizations to reduce the likelihood of transportation accidents. It initiates and conducts safety studies and special investigations on matters pertaining to safety in transportation, assesses techniques and methods of accident investigation, evaluates the effectiveness of transportation safety consciousness and efficacy of other Government agencies, and evaluates the adequacy of safeguards and procedures concerning the transportation of hazardous materials.

(c) Upon application of affected parties, the Board reviews in quasijudicial proceedings, conducted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* denials by the Administrator of the Federal Aviation Administration of applications for airman certificates and orders of the Administrator modifying, amending, suspending, or revoking certificates or imposing civil penalties. The Board also reviews on appeal the decisions of the head of the agency in which the U.S. Coast Guard is operating, on appeals from orders of administrative law judges suspending, revoking, or denying seamen licenses, certificates, or documents.

(d) The Board, as provided in part 801 of this chapter, issues reports and orders pursuant to its duties to determine the cause or probable cause or causes of transportation accidents and to report the facts, conditions and circumstances relating to such accidents; issues opinions and/or orders in accordance with 49 U.S.C. 1133 after reviewing on appeal the imposition of a civil penalty or the suspension, amendment, modification, revocation, or denial of a certificate or license issued by the Secretary of the Department of Transportation (who acts through the Administrator of the Federal Aviation Administration) or by the Commandant of the United States Coast Guard; and issues and makes available to the public safety recommendations, safety studies, and reports of special investigations.

§ 800.4 [Amended]

■ 4. Amend § 800.4 as follows:
■ a. In paragraph (b), removing ''Government Printing Office'' and

adding in its place ''Government Publishing Office''.

■ b. In paragraph (e), adding '', or the Commandant of the United States Coast Guard'' after ''Department of Transportation''.

§ 800.5 [Amended]

■ 5. Amend § 800.5 by adding ''–003'' after ''20594''.

Subpart B—Delegations of Authority to Staff Members

§ 800.21 [Amended]

■ 6. Amend § 800.21 by removing ''Subpart B'' and adding in its place ''subpart''.

§ 800.22 [Amended]

■ 7. Amend § 800.22(a)(2) by removing ''sections 304(a)(2) and 307 of the Independent Safety Board Act of 1974 (49 U.S.C. 1131(d) and 1135(c))'' adding in its place ''49 U.S.C. 1131(e), 1135(c)''.

§ 800.24 [Amended]

■ 8. Amend § 800.24(f) by removing ''the Independent Safety Board Act of 1974, as amended,'' adding in its place ''49 U.S.C. chapter 11, subchapter IV,''.

§ 800.25 [Amended]

■ 9. Amend § 800.25 as follows:

■ a. In paragraph (c), removing ''§ 845.41 of this Chapter'' adding in its place ''§ 845.32 of this chapter''.

■ b. In paragraph (d), removing ''§ 304(a) of the Independent Safety Board Act of 1974, as amended (49 U.S.C. 1131(a)) and the Appendix to this Part'' adding in its place ''49 U.S.C. 1131 and the appendix to this part''.

§ 800.26 [Amended]

■ 10. Amend § 800.26 by removing ''board'' and adding in its place ''Board''.

§ 800.27 [Amended]

■ 11. Amend § 800.27 by removing ''of the Safety Board''.

Subpart C—Procedures for Adoption of Rules

§ 800.30 [Amended]

■ 12. Amend § 800.30 by removing ''1101–1155'' and adding in its place ''1113(f)''.

§ 800.31 [Amended]

■ 13. Amend § 800.31 by removing ''deemed relevant by the NTSB relating to rulemaking'' and adding in its place ''relevant to NTSB rulemaking''.

§ 800.33 [Amended]

■ 14. Amend § 800.33 by removing ''551'' and adding in its place ''553''.

§ 800.35 [Amended]

■ 15. Amend § 800.35(a) by:

■ a. Removing ''in rulemaking'' and adding in its place ''in a rulemaking''; and

■ b. Removing ''comments in writing containing'' adding in its place ''written comments,''.

§ 800.41 [Amended]

■ 16. Amend § 800.41 by removing ''unless all persons subject to it are named and are personally served with a copy of it''.

PART 803—OFFICIAL SEAL

■ 17. The authority citation for part 803 is revised to read as follows:

Authority: 49 U.S.C. 1111(j), 1113(f).

§ 803.3 [Amended]

■ 18. Amend § 803.3 by removing ''Bureau'' everywhere it appears and adding in its place ''Office''.

§ 803.5 [Amended]

■ 19. Amend § 803.5(c) by:

■ a. Removing ''Bureau'' and adding in its place ''Office'';

■ b. Removing ''800 Independence Avenue'' and adding in its place ''490 L'Enfant Plaza''; and

■ c. Adding ''–003'' after ''20594''.

PART 804—RULES IMPLEMENTING THE GOVERNMENT IN THE SUNSHINE ACT

■ 20. The authority citation for part 804 is revised to read as follows:

Authority: 5 U.S.C. 552b; 49 U.S.C. 1113(f).

§ 804.1 [Amended]

■ 21. Amend § 804.1(b) by removing ''the NTSB regulations (49 CFR part 801)'' and adding in its place ''this chapter''.

■ 22. Revise § 804.5(d) to read as follows:

§ 804.5 Ground on which meetings may be closed or information may be withheld.

* * * * *

(d) Disclose trade secrets or privileged or confidential commercial or financial information obtained from a person;

* * * * *

§ 804.6 [Amended]

■ 23. Amend § 804.6(b) by:

■ a. Removing ''800 Independence Avenue'' and adding in its place ''490 L''Enfant Plaza''; and

■ b. Adding ''–003'' after ''20594''.

§ 804.7 [Amended]

■ 24. Amend § 804.7(b)(2) by removing ''be'' and adding in its place ''is''.

§ 804.10 [Amended]

■ 25. Amend § 804.10 by removing ''the NTSB shall maintain'' and adding in its place ''The NTSB shall maintain''.

David Tochen,

General Counsel.

[FR Doc. 2016–26232 Filed 10–31–16; 8:45 am]

BILLING CODE 7533–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 151215999–6960–02]

RIN 0648–BF64

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Specification of Management Measures for Atlantic Herring for the 2016–2018 Fishing Years

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

ACTION: Final rule.

SUMMARY: NMFS is implementing final specifications and management measures for the 2016–2018 Atlantic herring fishery. This action sets harvest specifications and river herring/shad catch caps for the herring fishery for the 2016–2018 fishing years, as recommended to NMFS by the New England Fishery Management Council. The river herring/shad catch caps are area and gear-specific. River herring and shad catch from a specific area with a specific gear counts against a cap for trips landing more than a minimum amount of herring. The specifications and management measures in this action meet conservation objectives while providing sustainable levels of access to the fishery.

DATES: Effective December 1, 2016.

ADDRESSES: Copies of supporting documents used by the New England Fishery Management Council, including the Environmental Assessment (EA) and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from: Thomas A. Nies, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950, telephone (978) 465–0492. The EA/RIR/IRFA is also accessible via the Internet at *http://www.greateratlantic.fisheries.noaa.gov/*.

FOR FURTHER INFORMATION CONTACT: Shannah Jaburek, Fishery Management

Specialist, (978) 282–8456, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

NMFS published a proposed rule for the 2016–2018 specifications on June 21, 2016 (81 FR 40253). The comment period on the proposed rule ended on July 21, 2016. NMFS received 32 comments, which are summarized in the ''Comments and Responses'' section of this final rule.

Regulations implementing the Atlantic Herring Fishery Management Plan (FMP) appear at 50 CFR part 648, subpart K. Regulations at § 648.200 require NMFS to make final determinations on the herring specifications recommended by the New England Fishery Management Council in the **Federal Register**, including: The overfishing limit (OFL); acceptable biological catch (ABC); annual catch limit (ACL); optimum yield (OY); domestic annual harvest (DAH); domestic annual processing (DAP); U.S. at-sea processing (USAP); border transfer (BT); management area sub-ACLs; and the amount to be set aside for the research set aside (RSA) (up to 3 percent of any management area sub-ACL) for 3 years. These regulations also allow for river herring/shad catch caps to be developed and implemented as part of the specifications. The 2016–2018 herring specifications are consistent with these provisions, and provide the necessary elements to comply with the ACL and accountability measure (AM) requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Complete details on the development of the herring specifications and river herring/shad catch caps were included in the proposed rule; NMFS has not repeated that information here.

Herring Specifications

TABLE 1—ATLANTIC HERRING SPECIFICATIONS

2016–2018 Atlantic Herring Specifications—2016–2018 (mt)	
Overfishing Limit	138,000–2016. 117,000–2017. 111,000–2018.
Acceptable Biological Catch	111,000.
Management Uncertainty	6,200.
Optimum Yield/ACL	104,800.*
Domestic Annual Harvest	104,800.
Border Transfer	4,000.
Domestic Annual Processing.	100,800.
U.S. At-Sea Processing	0.
Area 1A Sub-ACL	30,300.*
Area 1B Sub-ACL	4,500.
Area 2 Sub-ACL	29,100.
Area 3 Sub-ACL	40,900.
Fixed Gear Set-Aside	295.
Research Set-Aside	3 percent of each sub-ACL.

* If New Brunswick weir fishery catch through October 1 is less than 4,000 mt, then 1,000 mt will be subtracted from the management uncertainty buffer and added to the ACL and Area 1A Sub-ACL.

An operational update to the herring stock assessment, completed in May 2015, indicated that herring was not overfished and overfishing was not occurring. However, the assessment contained a retrospective pattern suggesting that spawning stock biomass (SSB) is likely overestimated and fishing mortality (F) is likely underestimated. Following an adjustment for the retrospective pattern, the assessment estimated the herring stock at approximately double its target biomass (SSB_{MSY}) and F at approximately half the fishing mortality threshold (F_{MSY}).

The herring ABC of 111,000 mt (a 3-mt decrease from status quo) for 2016–2018 is based on the current control rule (constant catch with 50-percent probability that $F > F_{MSY}$ in last year) and is consistent with the Council's Scientific and Statistical Committee's (SSC) advice. The OFL is 138,000 mt in 2016, 117,000 mt in 2017, and 111,000 mt in 2018. While the ABC control rule does not explicitly adjust for herring's role in the ecosystem, herring's high biomass (approximately 74 percent of unfished biomass) and low fishing mortality (ratio of catch to consumption by predators is 1:4) likely achieves ecosystem goals, including accounting for herring's role as forage. The herring ABC is typically reduced from the OFL to account for scientific uncertainty. Using the current constant catch control rule means that the ABC will equal the OFL in 2018. When the SSC considered the ABC of 111,000 mt, it concluded that the probability of the stock becoming overfished during 2016–2018 is near zero. Further, this final rule is consistent with the status quo specifications that set ABC equal to OFL in 2015 and overfishing did not occur.

Under the FMP, the herring ACL is reduced from ABC to account for management uncertainty, and the primary source of management uncertainty is catch in the New Brunswick weir fishery. Catch in the weir fishery is variable, but has declined in recent years. This final rule implements a management uncertainty buffer of 6,200 mt, which is equivalent to the value of the buffer in 2015. To help ensure catch in the New Brunswick weir fishery does not exceed the management uncertainty buffer, NMFS specifies a buffer greater than the most recent 3-year and 5-year average catch in the New Brunswick weir fishery. The resulting stockwide ACL will be 104,800 mt.

Given the variability of the New Brunswick weir catch and the likelihood that weir catch may be less than 6,200 mt, NMFS also specifies a New Brunswick weir fishery payback provision. Specifically, NMFS will subtract 1,000 mt from the management uncertainty buffer and add it to the ACL if the weir fishery harvests less than 4,000 mt by October 1. The 1,000 mt added to the ACL would also increase the sub-ACL for Herring Management Area 1A. NMFS selects the October 1 date to trigger the payback provision for two reasons. First, there is typically only minimal catch in the New Brunswick weir fishery after October 1 (less than four percent of total reported landings from 1978 to 2014) so the likelihood of weir catch exceeding the management uncertainty buffer after October 1 is low. Second, adding 1,000 mt to the Area 1A sub-ACL in October is expected to allow herring vessels to access the additional harvest before catch in the herring fishery is limited in Area 1A. NMFS implements a 2,000-lb (907-kg) herring possession limit in Area 1A when it projects that 92 percent the sub-ACL has been harvested. If New Brunswick weir catch is less than 4,000 mt by October 1, the management uncertainty buffer will be reduced to 5,200 mt, the ACL will be increased to 105,800 mt, and the Herring Management Area 1A sub-ACL will be increased to 31,300 mt. The New Brunswick weir fishery payback provision was last in effect during fishing years 2010–2012, so this final rule puts the payback provision back in place for 2016–2018. NMFS is currently awaiting final data to decide whether or not to subtract 1,000 mt from the management uncertainty buffer and increase the ACL and the Area 1A sub-ACL.

BT is a processing allocation available to Canadian dealers. The MSA provides for the issuance of permits to Canadian vessels transporting U.S.-harvested herring to Canada for sardine processing. The amount specified for BT has equaled 4,000 mt since 2000. As there continues to be interest in transporting herring to Canada for sardine processing, NMFS maintains BT at 4,000 mt.

The Atlantic Herring FMP specifies that DAH will be set less than or equal to OY and be composed of DAP and BT. DAP is the amount of U.S. harvest that is processed domestically, as well as herring that is sold fresh (*i.e.,* bait). DAP is calculated by subtracting BT from DAH. DAH should reflect the actual and potential harvesting capacity of the U.S. herring fleet. Since 2001, total landings in the U.S. fishery have decreased, but herring catch has remained somewhat consistent from 2003–2014, averaging 91,925 mt. When previously considering the DAH specification, the Council evaluated the harvesting capacity of the directed herring fleet and determined that the herring fleet is capable of fully utilizing the available yield from the fishery. This determination is still true. NMFS therefore sets DAH at 104,800 mt and DAP at 100,800 mt for the 2016–2018 fishing years in this final rule.

A portion of DAP may be specified for the at-sea processing of herring in Federal waters. When determining this USAP specification, the Council considered the availability of shore-side processing, status of the resource, and opportunities for vessels to participate in the herring fishery. During the 2007–2009 fishing years, the Council maintained a USAP specification of 20,000 mt (Herring Management Areas 2⁄3 only) based on information received about a new at-sea processing vessel that intended to utilize a substantial amount of the USAP specification. At that time, landings from Areas 2 and 3–where USAP was authorized–were considerably lower than recent sub-ACLs for Areas 2 and 3. Moreover, the specification of 20,000 mt for USAP did not restrict either the operation or the expansion of the shoreside processing facilities during the 2007–2009 fishing years. However, this operation never materialized, and none of the USAP specification was used during the 2007–2009 fishing years. Consequently, NMFS set USAP at zero for the 2010–2015 fishing years. Lacking any additional information that would support changing this specification, NMFS maintains the USAP at zero for fishing years 2016–2018.

The herring ABC specification recommended by the SSC for 2016–2018 is not substantially different from the 2013–2015 ABC specification because, in part, key attributes of the herring stock (SSB, recruitment, F, and survey indices) have not significantly changed since the 2013–2015 herring specifications. Therefore, NMFS determined that there is no new information on which to modify the allocation of the total ACL between the herring management areas. This final rule maintains status quo percentage allocations for the herring sub-ACLs for the 2016–2018 specifications. The resulting sub-ACLs are slightly lower than 2013–2015 specifications (see Table 1).

NMFS maintains the 2016–2018 RSA specification at 3 percent of each herring management area sub-ACL. The herring RSA is removed from each sub-ACL prior to allocating the sub-ACL to the fishery. If an RSA proposal is approved, but a final award is not made by NMFS, or if NMFS determines that the RSA cannot be utilized by a project, NMFS shall reallocate the unallocated or unused amount of the RSA to the respective sub-ACL. On February 29, 2016, NMFS fully awarded the herring RSA for fishing years 2016–2018.

Herring regulations at § 648.201(e) specify that up to 500 mt of the Herring Management Area 1A sub-ACL shall be allocated for the fixed gear fisheries (weirs and stop seines) in Area 1A that occur west of 67°16.8′ W. long. This set-aside shall be available for harvest by the fixed gear fisheries within Area 1A until November 1 of each year; any unused portion of the allocation will be restored to the Area 1A sub-ACL after November 1. During the 2013–2015 fishing years, the fixed gear set-aside was specified at 295 mt. Because the proposed Area 1A sub-ACL for the 2016–2018 fishing years is not substantially different from the Area 1A sub-ACL in 2015, NMFS maintains the fixed gear set-aside at 295 mt.

River Herring/Shad Catch Caps

Framework 3 to the Atlantic Herring FMP established gear and area-specific river herring/shad catch caps for the herring fishery in 2014. These included catch caps for midwater trawl vessels fishing in the Gulf of Maine, off Cape Cod, and in Southern New England, as well as for small-mesh bottom trawl vessels fishing in Southern New England. The caps are intended to minimize river herring and shad bycatch and bycatch mortality to the extent practicable while allowing the herring fishery an opportunity to fully harvest the herring ACL. The incentive to minimize the catch of river herring and shad is to avoid the implementation of a herring possession limit. Herring regulations at § 648.201(a)(4)(ii) state that once 95 percent of a catch cap is harvested, the herring possession limit for vessels using that gear type and fishing in that area is reduced to 2,000 lb (907 kg) for the remainder of the fishing year. Once a 2,000-lb (907-kg) possession limit is in effect for a particular gear and area, the herring fishery's ability to harvest the herring sub-ACL associated with that area is limited. The herring fleet's avoidance of river herring and shad combined with the catch caps are expected to minimize river herring and shad bycatch and bycatch mortality. Additionally, the herring fishery is expected to be able to harvest the herring ACL, provided the fishery continues to avoid river herring and shad.

As noted in Framework 3, available data are not robust enough to specify biologically-based catch caps that reflect river herring and shad abundance or to evaluate the potential impacts of catch caps on the river herring and shad stocks. Specific biological impacts on river herring and shad are influenced by fishing activity, environmental factors, climate change, restoration efforts, and other factors. In the absence of sufficient data to specify biologically-based catch caps, the caps have been set using recent river herring and shad catch data with the intent of keeping catch below its highest levels to limit fishing mortality on river herring and shad. Limiting fishing mortality is expected to result in positive impacts on the stocks.

To date the values of the caps have been specified using the median catch of river herring and shad catch over the previous 5 years (2008–2012). The 2016–2018 river herring/shad catch caps, as specified below in Table 2, are calculated using a revised methodology and updated data over a longer time period. The revised methodology uses a weighted mean catch of river herring and shad (versus median catch). This methodology better accounts for the inter-annual variability in the level of sampling by both observers and portside samplers by weighting years with higher sampling levels more heavily than years with lower sampling levels. Additionally, the revised methodology includes previously omitted catch data, including some shad landings and trips from catch cap areas where trips did not meet the 6,600-lb (3-mt) herring landing threshold, and updated extrapolation methodology (using sampled trips to estimate catch on unsampled trips). Lastly, by using a longer time series (the most recent 7 years versus 5 years), the value of the caps can be based on more data, especially the most recent catch information, to better ensure the catch caps reflect the herring fishery's interactions with river herring and shad and overall fishing effort.

NMFS determined that using a longer time series, including more recent and previously omitted data, as well as using a weighted mean to generate the values for river herring/shad catch caps is consistent with using the best available science. Setting cap amounts using recent catch data better reflects current fishing behavior and catch levels. Similarly, relying more heavily on years with higher levels of sampling should provide cap values that more precisely reflect recent catch. Additionally, catch data may indirectly reflect stock abundance. For example, increases in stock abundance may potentially result in increased incidental catch whereas decreases in abundance may result in decreased incidental catch. Therefore, setting catch cap amounts based on catch data are expected to result in catch caps that are more consistent with current fishing activity, and possibly stock conditions, while balancing the incentive to avoid river herring and shad against the opportunity for the herring fishery to harvest the ACL.

NMFS is adjusting the river herring/shad catch caps to reflect the use of best available scientific data and a revised, superior methodology. This adjustment increases the catch caps for three of the four river herring/shad catch caps in the herring fishery. Based on fishing practices to date, however, NMFS expects river herring and shad catch to remain below the catch cap amounts. For example, the herring industry currently has harvested only 57 percent of the total river herring and shad catch allowed under the 2015 river herring/shad catch caps. Because river herring and shad catch is currently well below allowable catch limits, NMFS does not expect that any catch cap increases implemented in this action will result in a substantial increase in river herring and shad catch. Rather, NMFS anticipates that the 2,000-lb (907-kg) herring possession limit that will result if a cap is harvested will continue to provide a strong incentive for the herring industry to avoid catching river herring and shad and that the herring industry will continue to harvest less than the river herring and shad catch allowed under the adjusted catch caps.

TABLE 2—RIVER HERRING/SHAD CATCH CAPS

Area	Gear	Amount (mt)
2016–2018 River Herring/Shad Catch Caps		
Gulf Of Maine	Midwater Trawl	76.7
Cape Cod	Midwater Trawl	32.4
Southern New England/Mid-Atlantic	Midwater Trawl	129.6
Southern New England/Mid-Atlantic	Bottom Trawl	122.3
Total	All Gears	361.0

Comments and Responses

NMFS received 32 comment letters on the proposed rule: 9 from interested members of the public; 3 from herring industry participants; 2 from other fishing industry participants (Massachusetts Lobstermen's Association (MLA) and the Cape Cod Commercial Fishermen's Alliance); 4 from local watershed groups (Jones River, Ipswich River, Mystic River, and the Herring Ponds Watershed Associations); and 12 from non-governmental organizations (NGOs), including 6 prominent environmental advocacy groups (Conservation Law Foundation, Earth Justice, the Herring Alliance, Save the Bay-Narragansett, the Mohegan Tribe, and Alewife Harvesters of Maine). Two of the environmental advocacy group comments were form letters that contained signatures and personalized comments, including: A letter from PEW Charitable Trusts with 10,593 signatures and 931 personalized comments; and a letter from Earth Justice with 2,298 signatures and 234 personalized comments.

Comment 1: Three herring fishery participants and the MLA commented in support of the proposed 2016–2018 herring specifications and river herring/shad caps.

Response: NMFS approved the 2016–2018 herring specifications and river herring/shad catch caps because they promote achieving optimal yield, fishery conservation, are based upon best available science, and are consistent with the goals and objectives of the Atlantic Herring FMP.

Comment 2: The Cape Cod Commercial Fishermen's Alliance, Jones River Watershed Association, Herring Alliance, Mohegan Tribe, and Earth Justice opposed setting the ABC equal to the OFL in 2018. Their comments claimed that the 2018 ABC does not adequately account for scientific uncertainty. Earth Justice commented that NMFS could revise the specifications to account for scientific uncertainty in a number of ways. They suggested NMFS could implement ABCs in 2017 and 2018 with the same scientific uncertainty buffer that was set for 2016 (27,000 mt) or implement the 2017 scientific uncertainty buffer (6,000 mt) in 2018. They further commented that NMFS could request advice from the SSC for an appropriate buffer in 2018. Additionally, the Herring Alliance, Mohegan Tribe, and Earth Justice commented that NMFS should use its authority to implement a revised ABC that appropriately buffers for scientific uncertainty in 2018.

Response: NMFS disagrees. The recent herring stock assessment update completed in May 2015 contained a retrospective pattern suggesting that the spawning stock biomass (SSB) is likely overestimated and fishing mortality (F) is likely underestimated. The assessment was adjusted to account for the retrospective pattern. Even with the adjustment to account for the scientific uncertainty associated with the retrospective pattern, the assessment estimated the herring stock at approximately double its target biomass (SSB_{MSY}) and F is approximately half the fishing mortality threshold (F_{MSY}). The stock assessment update generated catch projections for 2016–2018 based on the constant catch control rule. When the SSC evaluated the resulting ABC, it supported the resulting ABC and did not recommend specifying a scientific uncertainty buffer between OFL and ABC in 2018. Because the recent stock assessment update adjusted for scientific uncertainty and the SSC did not recommend that an additional scientific uncertainty buffer be specified for 2018, NMFS implements an ABC that equals OFL in 2018.

Comment 3: The Cape Cod Commercial Fishermen's Alliance, Jones River Watershed Association, Herring Alliance, Mohegan Tribe, and Earth Justice opposed setting the ABC equal to the OFL in 2018. Their comments noted that this introduces unnecessary risk of overfishing.

Response: NMFS disagrees. Herring are currently not overfished and overfishing is not occurring. While setting the ABC equal to the OFL in 2018 has a 50-percent probability of overfishing in 2018, the overall probability of overfishing herring during 2016–2018 is near zero. In addition, the realized catch in the fishery is generally well below ABC, further reducing the likelihood of overfishing. Lastly, setting the ABC equal to OFL in 2018 would continue to provide the herring fishery with some economic stability, an important consideration in the Council's harvest risk policy.

Comment 4: The Herring Alliance, Mohegan Tribe, and Earth Justice oppose using the current constant catch control rule because it does not adjust the ABC to explicitly account for herring's role as forage in the ecosystem and recommend that NMFS consider further reductions in ABC.

Response: NMFS disagrees. When generating ABC catch projections for 2016–2018, the 2015 stock assessment update adjusted for predator consumption of herring by maintaining a relatively high natural mortality rate. Additionally, the recent stock assessment update indicated that herring has a high biomass (approximately 74 percent of unfished biomass) and low fishing mortality (ratio of catch to consumption by predators is 1:4). The constant catch ABC control rule is expected to maintain the high herring biomass, bolstered by two very large year classes, and low fishing mortality. Thus, the ABC control rule should meet forage demands and maintain a biomass level consistent with forage-based control rules in the short-term while the Council continues its consideration of herring's role as forage in Amendment 8 to the Atlantic Herring FMP. For these reasons, NMFS concludes that the current constant control rule, as well as the associated ABC, sufficiently account for herring's role as forage in the ecosystem during 2016–2018.

Comment 5: Earth Justice commented that the ABC was not selected as part of a reasonable range of alternatives as required by the National Environmental Policy Act (NEPA) because none of the alternatives accounted for scientific uncertainty in 2018. They also stated that the EA acknowledged this lack of uncertainty buffer is not consistent with the best available science.

Response: NFMS disagrees. As described above, the ABC sufficiently accounts for scientific uncertainty. The Council developed three ABC alternatives and fully analyzed them in the EA supporting this action. NEPA requires a Federal agency to consider a range of alternatives, and that the alternatives are reasonable alternatives (*i.e.,* those that meet the stated purpose and need, and objectives, for the action). The SSC recommended that the ABC for 2016–2018 remain relatively similar or modestly reduced compared to status quo. Consistent with SSC advice, the range of ABC alternatives considered in the EA were similar but reduced from status quo. For the status quo alternative, the EA cautioned that setting ABC equal to OFL for all three years appears to be inconsistent with best available science. The EA also explained that the ABC implemented in this action is more precautionary and expected to have *more positive* impacts than the status quo ABC because the scientific uncertainty buffer between the OFL and ABC during 2016 and 2017 results in a lower risk of overfishing. For these reasons, NMFS has determined that the range of ABC alternatives considered in this action was sufficient and consistent with the requirements of NEPA.

Comment 6: One member of the public commented that the herring ACL should be decreased to 90,000 mt.

Response: NMFS disagrees. The commenter provided no basis for setting the ACL at 90,000 mt. The most recent stock assessment update indicated herring was not overfished and overfishing was not occurring. Setting specifications always requires a balance between conservation and harvesting opportunity. The most current data show that an ABC of 111,000 mt would have a low positive economic impact on fishery-related businesses and communities while equaling less than half a sustainable fishery morality rate.

Comment 7: The Alewife Harvesters of Maine commented in favor of the proposed decrease of the Gulf of Maine river herring/shad catch cap. It also commented in support of using the revised methodology with the longer time series and weighted mean, however, it ''would propose a more gentle increase in catch cap that accounts for the biological uncertainty, raising the cap to the full weighted mean estimate over the course of several years.''

Response: NMFS agrees with the Alewife Harvesters of Maine that using a longer time series and weighted mean is appropriate to calculate river herring/shad catch caps. But NMFS disagrees with the suggestion that the value of the cap, rather than the methodology, should be the primary consideration when setting catch caps. The catch cap methodology uses the best available science to reflect recent fishing behavior and recent catch levels. Without a reasonable basis for developing different methodologies for each area or gear type, the methodology used to calculate one catch cap should apply to all catch caps.

Comment 8: Five interested members of the public, six state and local advocacy groups, all four river watershed associations, Conservation Law Foundation, Earth Justice, Herring Alliance, and letters from PEW Charitable Trust and Earth Justice on behalf of numerous U.S. citizens expressed concern that raising the river herring/shad catch caps will set back ongoing efforts by the states and local advocacy groups to restore river herring and shad to sustainable levels. Additionally, the Mohegan Tribe, Mystic River Watershed, Earth Justice, and Conservation Law Foundation suggests that the herring fishery may be a contributing factor to declines in Southern New England river herring and shad stock, based on a study by Hasselman et al. in 2015.

Response: NMFS recognizes and supports the effort, time, and resources that states and local advocacy groups have devoted to river herring and shad restoration efforts. However, NMFS disagrees with the commenters that raising the river herring/shad catch caps will set back those efforts. Although the comments suggest otherwise, NMFS cannot directly link catch levels of river herring and shad in the herring fishery to impacts on river herring and shad recovery efforts by the states in specific rivers and streams. NMFS considered the Hasselman et al. study, despite it being published almost two months after the Council took final action at its meeting on September 29, 2015. NMFS acknowledges that certain river herring stocks may be disproportionately affected by the herring fishery, but points out the study also cautions that currently river herring and shad catch in the ocean cannot be confidently assigned to a specific population of origin. Instead, the catch caps are designed to minimize bycatch and bycatch mortality so that the catch of river herring and shad is kept below recent levels and limit fishing mortality to provide an opportunity for positive impacts on stocks. The incentive for the herring fishery to avoid river herring and shad catch comes from the potential that river herring and shad catch will limit the fishery's ability to harvest the ACL. While this action increases the value of caps off Cape Cod and in Southern New England, the incentive to avoid river herring and shad catch remains while the caps are in place and are set based on fishing activity. NMFS has determined that the river herring/shad catch caps implemented in this action will support ongoing conservation efforts by the states and local advocacy groups and will help achieve conservation and management objectives outlined in the River Herring Conservation Plan coordinated by the Atlantic States Marine Fisheries Commission and NMFS.

Comment 9: Three NGOs, one interested member of the public, the Mystic River Watershed Association, Conservation Law Foundation, Earth Justice, Herring Alliance, and letters from PEW Charitable Trust and Earth Justice submitted on behalf of numerous U.S. citizens commented that the caps do not provide an incentive to avoid river herring and shad. One interested member of the public, Conservation Law Foundation, Earth Justice, Herring Alliance, and letters from PEW Charitable Trust and Earth Justice on behalf of numerous U.S. citizens commented that the herring industry has stayed well within the current river herring/shad catch caps since 2015 and does not need more river herring and shad catch to operate. Additionally, the Conservation Law Foundation, Earth Justice, Herring Alliance, The Mohegan Tribe, and Save the Bay-Narragansett further suggest that NMFS use its authority to implement river herring/shad catch caps that reduce catch and stay consistent with the incentive to avoid and minimize river herring and shad catch.

Response: NMFS disagrees with the commenters that the catch caps do not provide an incentive for the herring fishery to avoid river herring and shad catch. River herring/shad catch caps were first implemented in the herring fishery in 2014. As described previously, caps have been based on recent catch with the intent of keeping catch below its highest levels. Once 95 percent of a catch cap is harvested, the herring possession limit for vessels using that gear type and fishing in that area is reduced to 2,000 lb (907 kg) for the remainder of the fishing year. Implementation of this possession limit in a catch cap area decreases the herring fishery's ability to harvest the herring sub-ACL associated with that areas as well as the herring ACL.

The incentive to minimize the catch of river herring and shad is to avoid the implementation of a herring possession limit. For example, catch tracked against the Southern New England/Mid-Atlantic bottom trawl cap is currently 21 mt compared to 51 mt at this same time last year. This suggests that the existence of the catch caps is an effective incentive to avoid river herring and shad catch and more restrictive caps are not required to provide an incentive to continue to avoid river herring and shad catch.

The University of Massachusetts and Massachusetts Division of Marine Fisheries operate a river herring avoidance program for vessels participating in the herring fishery. This program is funded, in part, by the herring RSA for 2016–2018. The participation level of midwater trawl and bottom trawl vessels in the avoidance program has increased in recent years and currently includes the majority of midwater trawl and bottom trawl vessels. The river herring avoidance program provides vessels with near real-time information on where herring vessels are encountering river herring and encourages vessels to avoid and/or leave those areas. Select vessels that comply with the requirements of the avoidance program are able to harvest the herring RSA. Both the river herring avoidance program and the opportunity to harvest the herring RSA provide additional incentive for herring vessels to avoid river herring and shad.

For these reasons, NMFS concludes the catch caps implemented in this action are consistent with the incentives to avoid and minimize catch to the extent practicable.

Comment 10: Conservation Law Foundation, Earth Justice, Save the Bay-Narragansett, and the Earth Justice form letter stated that using a longer time series and a weighted mean to calculate the catch caps, compared to prior years, increases bias toward outlier years. Earth Justice, Conservation Law Foundation, Herring Alliance, Save the Bay-Narragansett, and the Earth Justice letter on behalf of 2,298 citizens commented that the industry had an incentive to catch more river herring and shad in 2013 and 2014 because it knew that more river herring and shad catch would mean higher catch caps in the future. Earth Justice and Save the Bay-Narragansett also commented that using the revised methodology is arbitrary and capricious in that it rewards the fleet for increasing river herring and shad catch 2013 and 2014.

Response: Catch caps were implemented in Framework 3 to minimize river herring and shad bycatch and bycatch mortality to the extent practicable, while allowing the herring fishery an opportunity to fully harvest the herring ACL. Additionally, catch caps were intended to be adjusted when new information became available. The catch caps implemented in this action were calculated using updated data and a revised methodology.

Catch caps for the 2016–2018 fishing years were calculated by using previously omitted catch data and a longer time series (most recent 7 years rather than 5 years). This ensures that the value of the catch caps are based on more data, especially the most recent catch information, to better ensure the catch caps reflect the herring fishery's interactions with river herring and shad and overall fishing effort. Because catch data may indirectly reflect stock abundance, setting catch caps based on recent catch data are expected to result in catch caps that are more consistent with current fishing activity, and possibly stock conditions. Commenters provided no information to substantiate claims that the herring industry intentionally caught more river herring and shad in 2013 and 2014 in order to artificially inflate catch caps. Therefore, NMFS concludes extending the time series used to calculate caps to include the two most recent years (2013 and 2014) best reflects the recent catch of river herring and shad, makes the best use of new information, and is consistent with Framework 3.

Using a weighted mean, rather than the median or unweighted mean, to calculate catch caps best accounts for the inter-annual variability in the level of sampling (both observer and portside) of river herring and shad catch. Caps calculated using the median catch of river herring and shad would base the value of the cap on the total number of catch estimates, giving equal weight to all years regardless of sampling level. Using the unweighted mean, caps would be based on the average catch each year regardless of sampling level. In contrast, using a weighted mean to calculate catch caps adjusts for the sampling level each year and incorporates those averages into the overall average, thereby giving more weight to years with more sampling versus years with less sampling. Therefore, using a weighted mean helps account for the fluctuations in levels of sampling relative to observed catch of river herring and shad to help mitigate the effects of any outlier years.

The revised methodology was developed by the Herring Plan Development Team (PDT). The PDT is the Council's technical group responsible for developing and preparing analyses to support the Council's management actions. The PDT is responsible for generating analyses to calculate quotas, caps, or any other technical aspects of the FMP. For the 2016–2018 catch caps, the PDT reviewed updated river herring and shad catch data and generated a range of catch cap alternatives for the

Council's consideration. The PDT concluded that using a weighted mean and longer time series would be the most technically sound approach for specifying the values of the caps because it is consistent with using the best available science. The Council ultimately decided to adopt the river herring/shad catch caps based on the revised methodology recommended by the PDT.

Using the revised methodology to calculate river herring/shad catch caps is consistent with using the best available science and it balances the incentive to avoid river herring and shad against the opportunity for the herring fishery to harvest the ACL. For these reasons, NMFS disagrees that the basis for setting river herring/shad catch caps implemented through this action, including the revised methodology, is arbitrary and capricious.

Comment 11: Conservation Law Foundation, Earth Justice, and Save the Bay-Narragansett expressed concern that basing the river herring/shad catch caps on historical landings and not on biological status is problematic and not scientifically sound. The Ipswich River Watershed also commented that there is no science to support raising the caps.

Response: NMFS disagrees. As described previously, available data are not robust enough to specify biologically-based catch caps that reflect river herring and shad abundance. Harvest limits are often based on recent catch when estimates of relative abundance are not available. For example, the herring ABC recommended by the SSC and implemented for 2010–2012 was based on recent catch because of scientific uncertainty associated with the 2009 herring stock assessment. In the absence of sufficient data to specify biologically-based catch caps, the catch caps are set based on recent catch data with the intent of keeping catch below its highest levels to limit fishing mortality on river herring and shad. Limiting catch to recent levels is expected to result in positive impacts on the stocks.

Comment 12: Letters generated by PEW Charitable Trusts and Earth Justice on behalf of numerous U.S. citizens commented that river herring and shad should be added as stocks in the Atlantic Herring FMP and managed based on science.

Response: The intent of this action is to set herring specifications and river herring/shad catch caps for the 2016–2018 fishing years. Adding river herring and shad as stocks in the fishery and developing management measures for both the river herring and shad stocks under the Atlantic Herring FMP are beyond the scope of this action and would require a regulatory amendment.

Comment 13: Earth Justice commented that the revised methodology used to set the river herring/shad catch caps for the 2016–2018 fishing years is not consistent with the Mid-Atlantic Fishery Management Council's (MAFMC) approach for setting the same cap in the Atlantic Mackerel, Squid, and Butterfish FMP. They also commented that implementing the proposed river herring/shad catch caps would interfere with the catch measures first implemented by the MAFMC and are thus inconsistent with the MSA's requirement that new regulations be consistent with existing FMPs, amendments, MSA, and applicable law as stated in U.S.C. 1854(b)(1).

Response: The MSA requires regulations to be consistent with the FMP. The MSA provision cited by the commenters does not require measures to be the same between FMPs. NMFS has determined that the river herring/shad catch caps for the herring and mackerel fisheries, including the associated methodologies for setting caps, are consistent with the Atlantic Herring FMP and the Atlantic Mackerel, Squid, and Butterfish FMP, respectively.

When the MAFMC developed the river herring and shad catch cap for the mackerel fishery, the catch cap was based on median river herring and shad catch in the mackerel fishery during 2005–2012. This methodology was identical to the river herring and shad catch cap methodology developed by the Council for the 2014–2015 herring fishery. However, the Council considers both observer and portside sampling data to set catch caps while the MAFMC only considers observer data. The MAFMC continues to use the median river herring and shad catch estimate from 2005–2012 to set the catch cap for the mackerel fishery. However, if the mackerel fishery harvests 10,000 mt of mackerel in a given year, the river herring and shad catch cap is scaled up to the match the median river herring and shad catch estimate based on the mackerel ACL.

NMFS agrees that river herring/shad catch caps for the herring and mackerel fisheries should not cause management inconsistencies between the two fisheries. Midwater trawl and bottom trawl vessels often participate in both the herring and mackerel fisheries. When fishing trips meet the minimum harvest threshold for catch caps in the herring fishery (6,600 lb (3 mt) of herring) and the minimum harvest threshold for the catch cap in the mackerel fishery (20,000 lb (9,072 kg) of mackerel), then river herring and shad catch on those trips is counted against both caps and vessels would be subject to the most restrictive catch cap. Rather than management inconsistencies, river herring/shad catch caps in both the herring and mackerel fisheries provide an additional incentive to avoid river herring and shad catch, thereby potentially limiting fishing mortality on these species.

Comment 14: Three NGOs, one interested member of the public, the Mystic River Watershed Association, Conservation Law Foundation, Earth Justice, Herring Alliance, and letters from PEW Charitable Trust and Earth Justice submitted on behalf of numerous U.S. citizens commented that raising the river herring/shad catch caps does not minimize bycatch and is inconsistent with the MSA and the goals and objectives of the Atlantic Herring FMP. Earth Justice further commented that raising the catch caps is inconsistent with National Standard 9, which requires that conservation and management measures minimize bycatch to the extent practicable. Lastly, Earth Justice commented that the small-mesh bottom trawl fleet in Southern New England discards an estimated 73 percent of its river herring and shad catch at sea, but NMFS does not explain how it plans to minimize this bycatch, consistent with the MSA.

Response: NMFS disagrees. The MSA, specifically National Standard 9, does not require the elimination of bycatch or bycatch mortality, nor does it require minimizing bycatch at the exclusion of other considerations. Rather, National Standard 9 requires minimizing bycatch and bycatch mortality to the extent practicable, which includes a consideration of the net benefits to the nation. This consideration includes evaluating the negative impacts on affected stocks and other species in the ecosystem, incomes accruing to participants in the directed fishery in both the short and long-term, changes in fishing practices and behavior, and environmental consequences.

As discussed previously, the incentive to minimize the catch of river herring and shad is to avoid the implementation of a herring possession limit. Once a 2,000-lb (907-kg) possession limit is in effect for a particular gear and area, the herring fishery's ability to harvest the herring sub-ACL associated with that area or the herring ACL is limited. This potential economic loss must be weighed against the role of river herring and shad in the herring fishery. River herring and shad are not target species in the herring fishery. Rather, they are harvested because they co-occur with herring and the incidental catch and bycatch of these species is low. Thus, the river herring/shad catch caps are not designed to eliminate all incidental catch. The caps are also not designed to remain static or continually decrease over time. These design features would not provide the flexibility for a full consideration of the net benefits to the nation because they may preclude an opportunity for herring industry to harvest its allowable catch.

When evaluating the river herring/shad catch caps recommended by the Council, NMFS considered the ecological and economic considerations associated with the catch caps, as well fishing practices and behavior. The catch caps are intended to minimize river herring and shad bycatch and bycatch mortality to the extent practicable, while allowing the herring fishery an opportunity to fully harvest the herring ACL. The total catch of river herring and shad (both retained and discarded) is tracked against the catch caps. Because total catch of river herring and shad catch is counted against the catch caps, these caps not only help minimize the retained catch of river herring and shad, but they also help minimize any river herring and shad catch that is discarded at sea. As described in the responses to previous comments, NMFS concludes that catch caps are calculated using new and updated information and are based on the best available science. NMFS also concludes that if vessels continue to avoid river herring and shad, they would have an opportunity to harvest the herring ACL. Additionally, NMFS concludes that catch caps may limit fishing mortality on river herring and shad, thereby supporting ongoing Federal, state, and local conservation efforts. For these reasons, NMFS determines the river herring/shad catch caps implemented in this action reduce bycatch and bycatch mortality to the extent practicable and are consistent with the MSA, National Standard 9, and the Atlantic Herring FMP.

Comment 15: The Mystic River Watershed Association, Conservation Law Foundation, Herring Alliance, and Earth Justice all commented that there is a lack of onboard monitoring and that it is highly likely that more river herring and shad are/will be discarded at sea than reported.

Response: In 2016, NMFS increased observer coverage allocated to New England midwater trawl vessels to approximately 440 days, consistent with the standardized bycatch reporting methodology (SBRM). This is an increase of 401 days (175 percent) over the 160 days observed on the New England midwater trawl fleet in 2015. Three of the four river herring/shad catch caps implemented in this action are for vessels using midwater trawl gear. Additionally, observer coverage allocated to New England small-mesh bottom trawl vessels in 2016 (798 days) is expected to be similar to days observed in 2015 (933 days). The increase in observer coverage should help NMFS more precisely track catch against river herring/shad catch caps. Portside sampling by the Commonwealth of Massachusetts and the State of Maine is expected to continue into the future, collecting data on river herring and shad that are landed by midwater trawl and small-mesh bottom trawl vessels participating in the herring fishery. NMFS is currently considering if it would be appropriate to use portside sampling data along with observer data to track the catch of river herring and shad. Lastly, the Council is considering increasing monitoring in the herring fishery in the Industry-Funded Monitoring Omnibus Amendment. The Council is expected to take final action on this amendment in early 2017.

Comment 16: Conservation Law Foundation, Herring Alliance, and Alewife Harvesters of Maine commented that all the biological uncertainty surrounding river herring and shad estimates demands a precautionary approach to management that requires either no increase in the catch caps or a more gradual increase.

Response: The river herring/shad catch caps were developed by the Council to minimize river herring and shad bycatch to the extent practicable while allowing the herring fishery an opportunity to fully harvest the herring ACL. While NMFS acknowledges the uncertainty in the abundance estimates in the stock assessment for river herring and shad, that uncertainty was not intended to directly factor into the calculation of the river herring/shad catch caps. In fact, because of the absence of sufficient data to specify biologically-based catch caps, the catch caps are set based on recent catch data. The methodology used to calculate the catch caps, which accounts for variability of catch from year to year, incorporates precaution by keeping the catch caps below the highest catch levels and by establishing an incentive for the herring industry to avoid river herring and shad catch.

Comment 17: Save the Bay-Narragansett commented that catch caps are being increased based on socio-economic concerns and that only the Council, and its supporting scientists, and the herring industry support increases to the catch caps.

Response: NMFS must consider all factors, biological and socio-economic factors, when determining whether to accept or reject the Council's recommendations. NMFS has determined that the Council's recommended river herring/shad catch caps are consistent with the Atlantic Herring FMP, the MSA, and other applicable laws, and that comments opposing the increased catch caps provide no compelling information to reject the Council's recommendations.

Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this rule is consistent with the national standards and other provisions of the MSA and other applicable laws.

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

NMFS, pursuant to section 604 of the Regulatory Flexibility Act (RFA), has completed a final regulatory flexibility analysis (FRFA) in support of this action. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS responses to those comments, and a summary of the analyses completed in the 2016–2018 herring specifications EA. A summary of the IRFA was published in the proposed rule for this action and is not repeated here. A description of why this action was considered, the objectives of, and the legal basis for this action is contained in the preamble to the proposed rule (81 FR 40253), and is not repeated here. All of the documents that constitute the FRFA are available from NMFS and a copy of the IRFA, the RIR, and the EA are available upon request (see **ADDRESSES**) or via the Internet at *www.greateratlantic.fisheries.noaa.gov.*

A Summary of the Significant Issues Raised by the Public in Response to the IRFA, a Summary of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments

NMFS received 32 comment letters on the proposed rule. Those comments, and NMFS' responses, are contained in the Comments and Responses section of this final rule and are not repeated here. None of the comments addressed the IRFA and NMFS did not make any changes in the final rule based on public comment.

Description and Estimate of Number of Small Entities to Which This Rule Would Apply

This final rule would affect all permitted herring vessels; therefore, the regulated entity is the business that owns at least one herring permit. From 2014 permit data, there were 1,206 firms that held at least one herring permit; of those, 1,188 were classified as small businesses. There were 103 firms, 96 classified as small businesses, which held at least one limited access permit. There were 38 firms, including 34 small businesses, which held a limited access permit and were active in the herring fishery. All four of the active large entities, held at least one limited access herring permit. The small firms with limited access permits had 60 percent higher gross receipts and 85 percent higher revenue from herring than the small firms without a limited access herring permit. Based on 2014 permit data, the number of potential fishing vessels in each permit category in the herring fishery are as follows: 39 for Category A (limited access, all herring management areas); 4 for Category B (limited access, Herring Management Areas 2/3); 46 for Category C (limited access, all herring management areas); 1,841 for Category D (open access, all herring management areas); and 4 for Category E (open access, Herring Management Areas 2/3).

On December 29, 2015, NMFS issued a final rule establishing a small business size standard of $11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for RFA compliance purposes only (80 FR 81194, December 29, 2015). The $11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. Small Business Administration's (SBA) previous standards of $20.5 million, $5.5 million, and $7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors, respectively, of the U.S. commercial fishing industry.

An IRFA was developed for this regulatory action prior to July 1, 2016, using SBA's previous size standards. Under the SBA's size standards, 4 of 38 active herring fishing entities with limited access permits were determined to be large. NMFS has qualitatively reviewed the analyses prepared for this action using the new size standard. The new standard could result in fewer commercial finfish businesses being considered small (due to the decrease in size standards).

Taking this change into consideration, NMFS has identified no additional significant alternatives that accomplish statutory objectives and minimize any significant economic impacts of the proposed rule on small entities. The ACLs are fishery wide and any closures would apply to the entire fishery, and should be felt proportionally by both large and small entities. Further, the new size standard does not affect the decision to prepare a FRFA as opposed to a certification for this regulatory action.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This final rule does not introduce any new reporting, recordkeeping, or other compliance requirements.

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

Specification of commercial harvest and river herring/shad catch caps are constrained by the conservation objectives set forth in the FMP and implemented at 50 CFR part 648, subpart K under the authority of the MSA. Furthermore, specifications must be based on the best available scientific information, consistent with National Standard 2 of the MSA. With the specification options considered, the measures in this final rule are the only measures that both satisfy these overarching regulatory and statutory requirements while minimizing, to the extent possible, impacts on small entities. This rule implements the herring specifications outlined in Table 1 and the river herring/shad catch caps outlined in Table 2. Other options considered by the Council, including those that could have less of an impact on small entities, failed to meet one or more of these stated objectives and, therefore, cannot be implemented. Under Alternatives 1 and 2 for harvest specifications, small entities may have experienced slight increases in both gross revenues and herring revenues over the preferred alternative due to higher ACLs. However, Alternative 1 would fail to create a sustainable fishery because the ABC exceeds the ABC recommended by the SSC for 2016–2018 and has an increased risk of overfishing as compared to the preferred alternative. The ABC associated with Alternative 2 is equal to the ABC associated with the preferred alternative; however, the management uncertainty buffer is less under Alternative 2, resulting in a higher ACL than the preferred alternative. Rather than select an alternative with a higher ACL, the Council selected Alternative 3 to be more precautionary. Alternatives 1 and 2 for the river herring/shad catch caps failed to use the best available science as compared to the Alternative 3, which uses a longer time series, including more recent and previously omitted data, as well as a weighted mean, to best account for the inter-annual variability in the level of river herring and shad sampling, to generate the values for river herring/shad catch caps. The impacts of the specifications, as implemented by this final rule, are not expected to disproportionately affect large or small entities.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as small entity compliance guide was prepared. Copies of this final rule are available from the Greater Atlantic Regional Fisheries Office (GARFO), and the compliance guide, *i.e.,* permit holder letter, will be sent to all holders of permits for the Atlantic herring fishery. The guide and this final rule will be posted or publicly available on the GARFO Web site.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: October 26, 2016.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.201, add paragraph (h) to read as follows:

§ 648.201 AMs and harvest controls.

* * * * *

(h) If NMFS determines that the New Brunswick weir fishery landed less than

4,000 mt through October 1, NMFS will allocate an additional 1,000 mt to the stockwide ACL and Area 1A sub-ACL. NMFS will notify the Council of this adjustment and publish the adjustment in the **Federal Register**.

[FR Doc. 2016–26320 Filed 10–31–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 150916863–6211–02]

RIN 0648–XF009

Fisheries of the Exclusive Economic Zone Off Alaska; Exchange of Flatfish in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is exchanging unused flathead sole and rock sole Community Development Quota (CDQ) for yellowfin sole CDQ acceptable biological catch (ABC) reserves in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the 2016 total allowable catch of yellowfin sole in the Bering Sea and Aleutian Islands management area to be harvested.

DATES: Effective November 1, 2016 through December 31, 2016.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7228.

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

The 2016 flathead sole, rock sole, and yellowfin sole CDQ reserves specified in the BSAI are 1,233 metric tons (mt), 4,970 mt, and 17,562 mt as established by the final 2016 and 2017 harvest specifications for groundfish in the BSAI (81 FR 14773, March 18, 2016) and following revision (81 FR 72740, October 21, 2016). The 2016 flathead sole, rock sole, and yellowfin sole CDQ ABC reserves are 5,856 mt, 12,268 mt, and 5,090 mt as established by the final 2016 and 2017 harvest specifications for groundfish in the BSAI (81 FR 14773, March 18, 2016) and following revision (81 FR 72740, October 21, 2016).

The Yukon Delta Fisheries Development Association has requested that NMFS exchange 73 mt of flathead sole and 606 mt of rock sole CDQ reserves for 679 mt of yellowfin sole CDQ ABC reserves under § 679.31(d). Therefore, in accordance with § 679.31(d), NMFS exchanges 73 mt of flathead sole and 606 mt of rock sole CDQ reserves for 679 mt of yellowfin sole CDQ ABC reserves in the BSAI. This action also decreases and increases the TACs and CDQ ABC reserves by the corresponding amounts. Tables 11 and 13 of the final 2016 and 2017 harvest specifications for groundfish in the BSAI (81 FR 14773, March 18, 2016), and following revision (81 FR 72740, October 21, 2016), are revised as follows:

TABLE 11—FINAL 2016 COMMUNITY DEVELOPMENT QUOTA (CDQ) RESERVES, INCIDENTAL CATCH AMOUNTS (ICAS), AND AMENDMENT 80 ALLOCATIONS OF THE ALEUTIAN ISLANDS PACIFIC OCEAN PERCH, AND BSAI FLATHEAD SOLE, ROCK SOLE, AND YELLOWFIN SOLE TACS

[Amounts are in metric tons]

Sector	Pacific ocean perch			Flathead sole	Rock sole	Yellowfin sole
	Eastern Aleutian District	Central Aleutian District	Western Aleutian District	BSAI	BSAI	BSAI
TAC	7,900	7,000	9,000	16,013	54,329	151,758
CDQ	845	749	963	1,160	4,364	18,241
ICA	200	75	10	5,000	6,000	3,500
BSAI trawl limited access	685	618	161	0	0	14,979
Amendment 80	6,169	5,558	7,866	9,853	43,965	115,038
Alaska Groundfish Cooperative	3,271	2,947	4,171	1,411	11,129	43,748
Alaska Seafood Cooperative	2,898	2,611	3,695	8,442	32,836	71,290

Note: Sector apportionments may not total precisely due to rounding.

TABLE 13—FINAL 2016 AND 2017 ABC SURPLUS, COMMUNITY DEVELOPMENT QUOTA (CDQ) ABC RESERVES, AND AMENDMENT 80 ABC RESERVES IN THE BSAI FOR FLATHEAD SOLE, ROCK SOLE, AND YELLOWFIN SOLE

[Amounts are in metric tons]

Sector	2016 Flathead sole	2016 Rock sole	2016 Yellowfin sole	2017 Flathead sole	2017 Rock sole	2017 Yellowfin sole
ABC	66,250	161,100	211,700	64,580	145,000	203,500
TAC	16,013	54,329	151,758	21,000	57,100	144,000
ABC surplus	50,237	106,771	59,942	43,580	87,900	59,500
ABC reserve	50,237	106,771	59,942	43,580	87,900	59,500
CDQ ABC reserve	5,929	12,874	4,411	4,663	9,405	6,367
Amendment 80 ABC reserve	44,308	93,897	55,531	38,917	78,495	53,134
Alaska Groundfish Cooperative for 2016[1]	4,145	22,974	24,019	n/a	n/a	n/a

TABLE 13—FINAL 2016 AND 2017 ABC SURPLUS, COMMUNITY DEVELOPMENT QUOTA (CDQ) ABC RESERVES, AND AMENDMENT 80 ABC RESERVES IN THE BSAI FOR FLATHEAD SOLE, ROCK SOLE, AND YELLOWFIN SOLE—Continued

[Amounts are in metric tons]

Sector	2016 Flathead sole	2016 Rock sole	2016 Yellowfin sole	2017 Flathead sole	2017 Rock sole	2017 Yellowfin sole
Alaska Seafood Cooperative for 2016 [1] ..	40,163	70,923	31,512	n/a	n/a	n/a

[1] The 2017 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2016.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the flatfish exchange by the Yukon Delta Fisheries Development Association in the BSAI. Since these fisheries are currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 24, 2016.

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

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

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

Dated: October 27, 2016.

Emily H. Menashes,

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

[FR Doc. 2016–26350 Filed 10–27–16; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 81, No. 211

Tuesday, November 1, 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 ENERGY

10 CFR Part 431

[Docket No. EERE–2013–BT–STD–0006]

RIN 1904–AC55

Energy Conservation Standards for Commercial and Industrial Fans and Blowers: Availability of Provisional Analysis Tools

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of data availability (NODA).

SUMMARY: The U.S. Department of Energy (DOE) has completed a provisional analysis that estimates the potential economic impacts and energy savings that could result from promulgating a regulatory energy conservation standard for commercial and industrial fans and blowers (''fans''). At this time, DOE is not proposing any energy conservation standard for fans. However, it is publishing this analysis so stakeholders can review the analysis results and the underlining assumptions and calculations that might ultimately support a proposed standard. DOE encourages stakeholders to provide any additional data or information that may improve the analysis. The analysis is now publically available at *http://www.regulations.gov/docket?D=EERE-2013-BT-STD-0006*.

DATES: DOE will accept comments, data, and information regarding the NODA no later than December 1, 2016.

ADDRESSES: *Instructions:* Any comments submitted must identify the NODA for Energy Conservation Standards for Commercial and Industrial Fans and Blowers, and provide docket number EERE–2013–BT–STD–0006 and/or regulatory information number (RIN) 1904–AC55. Comments may be submitted using any of the following methods: Interested persons may submit comments, identified by docket number EERE–2013–BT–STD–0006 and/or regulatory information number (RIN) 1904–AC55, by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: CIFB2013STD0006@ee.doe.gov*. Include the docket number and/or RIN in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.
- *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.
- *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW., 6th Floor, Washington, DC 20024. Telephone: (202) 586–6636. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.
- *Docket:* The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, some documents listed in the index may not be publicly available, such as those containing information that is exempt from public disclosure.

The docket Web page can be found at: *http://www.regulations.gov/docket?D=EERE-2013-BT-STD-0006.* The docket Web page contains simple instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–6590. Email: *ApplianceStandardsQuestions@ee.doe.gov*.

Mr. Peter Cochran, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–9496. Email: *peter.cochran@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. History of Energy Conservation Standards Rulemaking for Commercial and Industrial Fans and Blowers

On June 28, 2011, DOE published a notice of proposed determination of coverage to initiate the energy conservation standards rulemaking for fans, blowers, and fume hoods. 76 FR 37678. Subsequently, DOE published a notice of public meeting and availability of the Framework document for commercial and industrial fans and blowers (''fans'') in the **Federal Register**. 78 FR 7306 (February 1, 2013). In the Framework document, DOE requested feedback from interested parties on many issues, including the engineering analysis, the manufacturer impact analysis (MIA), the life-cycle cost (LCC) and payback period (PBP) analyses, and the national impact analysis (NIA).

On December 10, 2014, DOE published a notice of data availability (December 2014 NODA) that estimated the potential economic impacts and energy savings that could result from promulgating energy conservation standards for fans. 79 FR 73246. The December 2014 NODA comment period was originally scheduled to close on January 26, 2015. However, DOE subsequently published a notice extending the comment period to February 25, 2015, to allow additional time for interested parties to submit comments. 80 FR 1477 (January 12, 2015). The December 2014 NODA analysis used a ''wire-to-air'' fan electrical input power metric, the fan energy index (FEI), to characterize fan performance. FEI is the ratio of the weighted-average fan electrical input power of a minimally compliant fan to the weighted-average fan electrical input power of a given fan, at three specified operating points. The FEI metric relied on an equation describing fan efficiency as a function of airflow and pressure in order to set the minimum fan efficiency of each considered efficiency level (EL) analyzed in the December 2014 NODA. In October 2014, several representatives of fan manufacturers and energy efficiency advocates [1] (Joint Stakeholders) presented DOE with an alternative metric approach called ''Fan Efficiency Ratio,'' which included a fan efficiency-only metric approach (FER_H) and a wire-to-air metric approach (FER_W).[2] Both the FEI approach, presented in the December 2014 NODA, and the FER_W approaches relied on an equation to determine required fan efficiency as a function of the fan's airflow and pressure. The main differences between the December 2014 NODA FEI and the FER_W approaches were the form of the equation used for the fan efficiency, and the operating conditions at which the metric was evaluated. While in the December 2014 NODA, the FEI was calculated as a weighted average of the fan performance at three specific operating points, the FER_W was calculated at all manufacturer-declared operating points. On May 1, 2015, based on the additional information received and comments to the December 2014 NODA, DOE published a second NODA (May 2015 NODA) that announced the availability of data from DOE analyses conducted using a modified FEI metric. 80 FR 24841. The modified FEI metric used in the May 2015 NODA is similar to the FER_W metric presented by the Joint Stakeholders.

Concurrent with these efforts, DOE also began a process through the Appliance Standards Rulemaking Federal Advisory Committee (ASRAC) to discuss negotiated energy conservation standards and test procedure for fans.[3] On April 1, 2015, DOE published a notice of intent to establish a negotiated rulemaking Working Group for fans. 80 FR 17359. Twenty-five nominees were selected to serve as members of the Working Group in addition to one member from ASRAC and one DOE representative. Members of the Working Group were selected to ensure all stakeholders' interests and areas of expertise were represented.

The Working Group negotiations comprised 16 meetings and three webinars and covered scope, metrics, test procedures, and energy conservation standard levels for fans.[4] The negotiations were initially scheduled to end on August 6, 2015, but the Working Group voted to extend the process by 30 days. The Working Group concluded its negotiations on September 3, 2015, with a consensus vote to approve and publish a term sheet containing recommendations for DOE on scope, energy conservation standards analysis methodology, and the test procedure for fans. The term sheet containing the Working Group recommendations is available in the fans energy conservation standard rulemaking docket.[5] ASRAC subsequently voted to approve the recommendations of the Working Group during the September 24, 2015 webinar meeting.

II. Current Status

Since the negotiations, DOE has revised its analysis to reflect the term sheet recommendations regarding the metric and energy conservation standards. DOE is publishing this NODA to inform stakeholders of the impacts of potential energy conservation standards for fans based on term sheet recommendations and to request feedback on specific issues.

DOE made several changes to its analysis in preparing this NODA to address the term sheet recommendations as well as other stakeholder concerns expressed during the negotiations. Table II–1 lists the stakeholders who commented on issues addressed in this NODA. These changes and the ensuing results are described in section III, the accompanying analysis spreadsheets, or both. The most significant changes include

(1) the augmentation of the AMCA sales data used in the May 2015 NODA to better account for fans made by companies that incorporate those fans for sale in their own equipment (see section III.G);

(2) the augmentation of the AMCA sales data used in the May 2015 NODA to represent additional sales of forward curved fans, which AMCA stated were underrepresented in the original data AMCA provided. (AMCA, Public Meeting Transcript, No. 85 at p. 91); and

(3) the inclusion of OEM equipment conversion costs.

At this time, DOE is not proposing any energy conservation standards for fans. DOE may revise the analyses presented in today's NODA based on any new or updated information or data it obtains during the course of the rulemaking. DOE encourages stakeholders to provide any additional data or information that may improve the analysis.

TABLE II–2—LIST OF COMMENTERS ON ENERGY CONSERVATION STANDARD ISSUES ADDRESSED IN THIS NODA

Company or organization	Abbreviation	Affiliation
ACME Engineering & Manufacturing Corporation	ACME	Manufacturer.
AcoustiFLO	AcoustiFLO	Manufacturer.
Air-Conditioning, Heating, and Refrigeration Institute	AHRI	Trade Association.
Air Movement and Control Association, Inc	AMCA	Trade Association.
Appliance Standards Awareness Program	ASAP	Efficiency Advocate.
California Investor-Owned Utilities	CA IOUs	Utilities.
ebm-papst, Inc	ebm-papst	Manufacturer.

[1] The Air Movement and Control Association (AMCA), New York Blower Company, Natural Resources Defense Council (NRDC), the Appliance Standards Awareness Project (ASAP), and the Northwest Energy Efficiency Alliance (NEEA).

[2] Supporting documents from this meeting, including presentation slides are available at: *http://www.regulations.gov/document?D=EERE-2013-BT-STD-0006-0029.*

[3] Information on the ASRAC, the commercial and industrial fans Working Group, and meeting dates is available at: *http://energy.gov/eere/buildings/appliance-standards-and-rulemaking-federal-advisory-committee.*

[4] Details of the negotiation sessions can be found in the public meeting transcripts that are posted to the docket for the energy conservation standard rulemaking at: *http://www.regulations.gov/docket?D=EERE-2013-BT-STD-0006.*

[5] The term sheet, document No. 179, is posted on the docket for the energy conservation standards rulemaking at: *http://www.regulations.gov/docket?D=EERE-2013-BT-STD-0006.*

TABLE II–2—LIST OF COMMENTERS ON ENERGY CONSERVATION STANDARD ISSUES ADDRESSED IN THIS NODA—Continued

Company or organization	Abbreviation	Affiliation
Flowcare Engineering Inc	Flowcare	Manufacturer.
Greenheck Fan Corporation	Greenheck	Manufacturer.
Ingersoll Rand/Trane	Ingersoll Rand/Trane	Manufacturer.
Morrison Products	Morrison	Manufacturer.
United Technologies/Carrier	United Technologies/Carrier	Manufacturer.

III. Summary of the Analyses Performed by DOE

DOE developed provisional analyses of fans in the following areas: (1) Engineering; (2) manufacturer impacts; (3) LCC and PBP; and (4) national impacts. The Government Regulatory Impact Model (GRIM), the engineering spreadsheet, the life-cycle cost spreadsheet, and the national impact analysis spreadsheet used in preparing these analyses and their respective results are available at: *http://www.regulations.gov/docket?D=EERE-2013-BT-STD-0006.* Each individual spreadsheet includes an introduction that provides an overview of the contents of the spreadsheet. These spreadsheets present the various inputs and outputs to the analysis and, where necessary, instructions. Brief descriptions of the calculation of the considered energy conservation standard levels, of the scope, of the provisional analyses, and of the supporting spreadsheet tools are provided in this preamble. If DOE proposes energy conservation standards for fans in a future NOPR, then DOE will publish a technical support document (TSD) containing a detailed written account of the analyses performed in support of the NOPR, which will include updates to the analyses made available in this NODA.

A. Fan Electrical Input Power

Fan energy performance is a critical input in the provisional analyses discussed in this notice. DOE used the fan electrical input power metric (FEP) as recommended by the Working Group to characterize the efficiency levels and represent fan performance. (No. 179, Recommendation #6 at p. 5) [6]

The recommended FEP metric represents the electrical input power of the fan and includes the performance of the motor, and any transmission and/or control if integrated, assembled, or packaged with the fan. The Working Group recommended to require manufacturers to determine the FEP at each manufacturer-declared operating point, at standard air density, where the operating point is characterized by a value of airflow and total pressure for ducted fans and by a value of airflow and static pressure for unducted fans.[7] [8] Two methods were recommended by the Working Group for determining the FEP: (1) A fan shaft input power measurement combined with default values to represent the performance of the motor and any transmission and/or control (default value testing method); or (2) a direct measurement of the fan electrical input power (direct testing method). The recommended default value testing method provides different sets of calculation algorithms and default values to establish the FEP of a fan depending on its configuration (*e.g.,* bare shaft fan, fan with regulated electric motor, or fan with motor with transmission and/or control). The Working Group also recommended allowing the representation of an index metric, the FEI, to allow for better comparability across all regulated fans. The engineering analysis and conversion cost spreadsheet presents the algorithms and default values used by the default value testing method and calculations of the FEP for both testing methods. (No. 179, Recommendation #9–16 at pp. 6–10)

As noted previously, the FEP of a fan includes the performance of the bare shaft fan and of its drive system.[9] In the December 2014 NODA and the May 2015 NODA, DOE calculated the FEP of a fan that exactly meets a given efficiency level (FEP_{STD}) using a fan efficiency equation and the default values and calculation algorithms of a fan sold with a regulated electric motor and transmission, such as a belt drive. During the negotiations, the Working Group voted to retain this approach and provided further recommendations on how to establish the fan efficiency equation and default values for standalone fans.[10] (No. 179, Recommendation #18 at p. 11)

Based on this recommendation, and applying the same approach for embedded fans (see Section III.B), this NODA calculates the $FEP_{STD,i}$ of a fan based on the following equation, in kW, at a given operating point i:

$$FEP_{STD,i} = 0.746 \times \left(\frac{Q_i \times P_i}{6343 \times \eta_{STD,i}} \times \frac{1}{\eta_{T,i}} + L_{M,i} \right) \quad \textbf{Eq. 1}$$

Where:

Q_i = airflow (cfm) at operating point i;
P_i = total pressure for ducted fans, static pressure for unducted fans (in.wg.) at operating point i;
$\eta_{STD,i}$ = standard level fan total efficiency for ducted fans, standard level fan static efficiency for unducted fans at operating point i (percent), calculated in accordance with Eq. 2;
$\eta_{T,i}$ = default transmission efficiency (percent) at operating point i;
$L_{M,i}$ = default electric motor losses (hp) at operating point i;
6343 = conversion factor for I–P units; and
0.746 = hp to kW conversion factor.

[6] A notation in this form refers to a specific recommendation from the Working Group term sheet, document No. 179.

[7] Ducted fans are: Axial cylindrical housed, centrifugal housed, inline and mixed-flow, and radial housed fans. Unducted fans are panel fans, centrifugal unhoused fans, and power roof ventilators. (No. 179, Appendix C at p. 16)

[8] In this document, all pressures refer to standard air densities. Standard air density is defined by a density of 0.075 lb/ft^3, corresponding to air at 68 °F, 50 percent relative humidity and 406.78 in.wg.

[9] The drive system includes the motor and any transmission and/or control if integrated, assembled or packaged with the fan.

[10] A standalone fan is a fan that is not exclusively distributed in commerce for incorporation or incorporated in a larger piece of equipment.

The Working Group recommended a fan efficiency equation to use for all fans when calculating FEP_{STD}. (No. 179, Recommendations #19–21 at pp. 11–12)

For each efficiency level considered, this NODA uses the equation recommended by the Working Group to determine the fan total efficiency for ducted fans and the fan static efficiency for unducted fans (percent) at a given operating point i (percent):

$$\eta_{STD,i} = \eta_{target} \frac{Q_i \times P_i}{(Q_i + 250)(P_i + 0.4)} \qquad \textbf{Eq. 2}$$

Where:

$\eta_{STD,i}$ = standard level fan total efficiency for ducted fans, standard level fan static efficiency for unducted fans (percent) at operating point i and considered efficiency level;
Q_i = flow (CFM) at operating point i;
P_i = total pressure for ducted fans, static pressure for unducted fans (in.wg.) at operating point i;
η_{target} = constant (percent) used to establish the efficiency level associated with each standards case considered (see section III.E).

The detailed equations and assumptions used to calculate FEP_{STD} are included in the engineering analysis and conversion cost spreadsheet.

In addition, for this NODA, DOE maintained the Working Group recommendation for the FEI calculation, with one modification as follows: DOE calculated the FEI using a reference value of FEP (FEP_{REF}) instead of using a value equal to the first energy conservation standards DOE may set (FEP_{STD}). As a reference value, DOE used the mid-point efficiency level (EL3).

DOE requests feedback on the calculation of the FEP_{STD} and FEI.

B. Scope of the Analysis and Addition of Certain Embedded Fans

In the December 2014 NODA and the May 2015 NODA, DOE analyzed the following fan categories: Axial housed fans, axial unhoused fans, centrifugal housed fans, centrifugal unhoused fans, inline and mixed flow fans, radial fans, and power roof ventilators. This NODA analyzes the same fan categories based on the recommendation of the Working Group, but renames axial housed fans as axial cylindrical housed fans and axial unhoused fans as panel fans based on information provided by the Working Group. In addition, based on the discussions of the Working Group, DOE incorporated more embedded fans into its analysis for this NODA.[11] DOE also added more sales of forward curved fans for this NODA, which AMCA stated were under-represented in the original data AMCA provided. (AMCA, Public Meeting Transcript, No. 85 at p. 91) Accordingly, this NODA analyzes the fans listed in Table III–1 with the characteristics discussed in this section and exemptions listed in Table III–2. (No. 179, Recommendation #1–4 at pp. 1–4)

TABLE III–1—FAN CATEGORIES ANALYZED

Family	Fan category	In NODA scope?
Axial	Axial cylindrical housed	Yes *
	Panel	Yes *
	Power Roof Ventilator	Yes *
	Induced flow fans	No
	Safety fan	No
	Circulating fans	No
Centrifugal	Centrifugal housed	Yes *
	Centrifugal unhoused	Yes *
	Radial shrouded	Yes *
	Radial unshrouded	No if impeller is less than 30 inches in diameter or less than 3 inches in blade width.
	Power Roof Ventilator	Yes *
	Induced flow fans	No
	Safety fan	No
	Inline	Yes *
Mixed flow		Yes *
Cross flow		No

* Excluding embedded fans listed in Table III–2.

TABLE III–2—EMBEDDED FANS RECOMMENDED EXEMPTIONS

Equipment category
Fans exclusively embedded in:
Single phase central air conditioners and heat pumps with a certified cooling capacity rated less than 65,000 Btu per hour, subject to DOE's energy conservation standard at 10 CFR 430.32(c).
Three phase, air-cooled, small commercial packaged air-conditioning and heating equipment with a certified cooling capacity rated less than 65,000 Btu per hour, subject to DOE's energy conservation standard at 10 CFR 431.97(b).
Residential furnaces subject to DOE's energy conservation standard at 10 CFR 430.32(y).
Transport refrigeration (*i.e.*, Trailer refrigeration, Self-powered truck refrigeration, Vehicle-powered truck refrigeration, Marine/Rail container refrigerant).
Vacuums.
Heat Rejection Equipment:
Packaged evaporative open circuit cooling towers.

TABLE III–2—EMBEDDED FANS RECOMMENDED EXEMPTIONS—Continued

Equipment category
Evaporative field erected open circuit cooling tower.
Packaged evaporative closed circuit cooling towers.
Evaporative field erected closed circuit cooling tower.
Packaged evaporative condensers.
Field erected evaporative condensers.
Packaged air cooled (dry) coolers.
Field erected air cooled (dry) coolers.
Air cooled steam condensers.
Hybrid (water saving) versions of all of the previously listed equipment that contain both evaporative and air cooled heat exchange sections.
Air curtains.
Supply or Condenser fans, exclusively embedded in:
Air-cooled commercial package air conditioners and heat pumps (CUAC, CUHP) between 5.5 and 63.5 tons regulated by DOE's energy conservation standard at 10 CFR 431.97(b).
Water-cooled, evaporatively-cooled, and water-source commercial air conditioners or heat pumps regulated by DOE's energy conservation standard at 10 CFR 431.97(b).
Single package vertical air conditioners and heat pumps regulated by DOE's energy conservation standard at 10 CFR 431.97(d).
Packaged terminal air conditioners (PTAC) and packaged terminal heat pumps (PTHP) regulated by DOE's energy conservation standard at 10 CFR 431.97(c).
Computer room air conditioners regulated by DOE's energy conservation standard at 10 CFR 431.97(e).
Variable refrigerant flow multi-split air conditioners and heat pumps regulated by DOE's energy conservation standard at 10 CFR 431.97(f).

In addition, based on the recommendation of the Working Group, this NODA only considered fans with operating points with a fan shaft input power equal to, or greater than, 1 horsepower and a fan airpower equal to or less than 150 horsepower. (No. 179, Recommendation #5 at p. 4) The horsepower scope limitations are further explained in the engineering analysis and conversion cost spreadsheet.

C. Equipment Classes

When evaluating and establishing energy conservation standards, DOE divides covered equipment into equipment classes by the type of energy used or by capacity or other performance-related features that justify differing standards. In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. (42 U.S.C. 6295(q)) In the December 2014 and May 2015 NODAs, DOE divided commercial and industrial fans into seven equipment classes based primarily on the direction of the airflow through the fan and other features that impact the energy use and utility of a fan (see Table III–3). In addition, DOE grouped inline and mixed flow fans into a single equipment class and included all power roof ventilators in a single equipment class.

TABLE III–3—FAN EQUIPMENT CLASSES

Airflow	Fan category	Feature	Equipment class
Axial	Axial cylindrical housed	Cylindrical housing	Axial cylindrical housed.
	Panel	Orifice panel or ring	Panel.
	Power Roof Ventilator	Weather protection housing	Power Roof Ventilator.
Centrifugal	Power Roof Ventilator	Weather protection housing..	
	Centrifugal housed	Scroll Housing	Centrifugal housed.
	Centrifugal unhoused	No Housing	Centrifugal unhoused.
	Radial shrouded	Radial impellers and housing (dust/material handling).	Radial housed.
	Radial unshrouded		
	Inline	Cabinet or cylindrical Housing	Inline and Mixed Flow.
Mixed flow			

During the negotiations, the Working Group did not come to a consensus regarding the equipment classes and stakeholders provided several suggestions for modifying these equipment classes. (No. 179, Recommendation #30 at p. 19)

ASAP and AMCA, supported by the CA IOUs, recommended grouping all ducted fans into a single equipment class, and all unducted fans in a single equipment class. (ASAP and AMCA, No. 50 at p. 2; CA IOUs, No. 49 at p. 2) Flowcare commented that fans should be classified into three classes: Axial fans, centrifugal fans, and mixed flow fans. (Flowcare, No. 46 at p. 6)

Ingersoll Rand/Trane commented that centrifugal housed fans with a forward curved blade design have a distinct utility compared to other centrifugal housed fans (*e.g.*, backward curved centrifugal housed fans) and should be in a separate equipment class. Ingersoll Rand/Trane commented that forward curved centrifugal housed fans are compact, have a relatively good sound quality, and are most suitable for low-pressure applications, in which they are relatively efficient. (Ingersoll Rand/Trane, No. 153 at p. 5) AHRI provided similar comments. AHRI stated that forward curved centrifugal housed fans require a separate equipment class for the following reasons: (1) Their compact sizes compared to backward curved fans providing the same airflow and pressure; (2) their specific applications in low pressure and speed ranges, providing good sound quality; and (3) the European Regulation 327/2011 considers them separately. (AHRI, No. 129–2 at pp. 1–6)

DOE did not group all fans into only ducted and unducted equipment classes because fans have other unique features that provide different utilities to the customer and, as a result, justify additional equipment classes. However, DOE recognizes that ducted and unducted fans perform differently. For this NODA, the FEP_{std} at each EL is calculated differently for ducted and unducted fans to account for these performance differences. (See section III.A for more details) For this same reason, DOE also did not establish equipment classes based solely on airflow.

With respect to establishing a separate equipment class for forward curved centrifugal housed fans, DOE analyzed a sample of fan selections [12] and found forward curved centrifugal housed fans that meet every efficiency level being analyzed. In addition, for small diameter fans, DOE also found an example of a forward curved fan with a small impeller diameter (*i.e.*, less than 6.5 inches) that met all efficiency levels up to EL 5, showing that it is technologically feasible for small forward curved fans to reach high efficiency levels.[13] DOE notes that there may be many more forward curved fans with small impeller diameters at high efficiency levels in the market than its database shows. DOE recognizes that maintaining the utility of small forward curved fans across all operating points is important and requires preserving forward curved fan availability or acceptable non-forward curved fan replacements across sizes and operating points. Based on analysis of the data available, DOE believes small forward curved fans or acceptable non-forward curved replacements would be available up to EL 5 across all current sizes and operating points. DOE therefore believes that more-efficient forward curved centrifugal housed fans could replace inefficient forward curved centrifugal housed fans up to EL 5. In addition, to consider the possibility that an original equipment manufacturer (OEM) might opt to replace a forward curved centrifugal housed fan incorporated in a larger piece of heating, ventilation, air-conditioning, and refrigeration (HVACR) equipment with a backward curved centrifugal housed fan, DOE included the costs of redesigning the HVACR equipment to accommodate a different fan in the standards case fan price calculation. (See section III.F.1 for more details) Therefore, DOE does not believe that forward curved centrifugal housed fans merit a separate equipment class.

Regarding the application range, DOE agrees with AHRI and Ingersoll Rand/Trane that forward curved centrifugal housed fans are most typically used in low pressure (less than 5.0 in.wg.), low speed applications (between 800 and 1200 rpm). DOE accounted for the specificity of the application range in the metric, which allows calculating the FEP_{STD} of a fan based on a fan efficiency equation that provides lower values at decreased pressure and airflow (see Eq. 2). In other words, the required FEP at a given efficiency level decreases with pressure and airflow in order to account for the fact that fans operating in these ranges are inherently less efficient.

Finally, DOE notes that the latest revision of the European Regulation 327/2011 [14] is considering grouping forward curved centrifugal housed fans with backward curved centrifugal housed fans for fans with an electrical input power greater than 5 kW (equivalent to approximately 6.7 hp). At a given diameter, the European study states that forward curved fans typically output more flow compared to backward bladed fans, which allows them to run relatively slower. This effect is more apparent for smaller diameters and becomes less significant as fan diameter increases. The EU therefore concluded that forward and backward curved centrifugal housed fans of larger sizes (greater than 5 kW of fan electrical input power) could be treated in the same product category with the same minimum efficiencies. For capacities less than 5 kW, the latest revision of the European regulation is considering maintaining forward curved centrifugal housed fans as a separate equipment class. DOE's fan selection analysis found forward curved centrifugal housed fans with electrical input power below 5kW that were compliant up to EL 6. Therefore, DOE believes such distinction is not necessary when using the FEP metric. In addition, as previously noted, DOE accounted for the costs of potentially incorporating a larger fan in a larger piece of equipment as part of the OEM equipment conversion costs. Therefore, DOE is not considering applying the distinction made in the European regulation 327/2011 and retains forward curved centrifugal housed fans in the same equipment class as other centrifugal housed fans for this NODA analysis.

AHRI and Bade commented that regulating return fans and exhaust fans requires special consideration because they typically operate at similar flows but lower static pressures compared to supply fans, which inherently affects the fan operating efficiency. (AHRI, No. 158 at pp. 5–6; Bade, No 116 at p. 1) Similarly, Ingersoll Rand/Trane commented that using efficient fans in variable-air-volume applications might decrease the capability of the fans to achieve an airflow reduction at lower system requirements, which may increase a building's energy consumption by pushing consumers to constant volume systems or requiring different systems. (Ingersoll Rand/Trane, No. 153 at p. 3) DOE agrees with AHRI and Ingersoll Rand/Trane that fans operating at lower pressures will have a lower efficiency compared to fans of equivalent design operating at higher pressures. To account for this effect and preserve the utility of low-pressure fans, DOE is considering a metric that is a function of the operating pressure, where the required FEP at a given efficiency level is less stringent at lower operating pressures. Consequently, a return or exhaust fan operating at a lower pressure than a supply fan at a given flow would have a lower required FEP at a given efficiency level, which mitigates the disproportionate impacts suggested by AHRI and Ingersoll Rand/Trane.

Based on these comments, DOE maintained the equipment classes used in the May 2015 NODA and presented in Table III–3.

DOE seeks comments on the equipment classes used in this notice, including information on specific sizes or operating points for which forward curved fans would no longer be available at efficiency levels up to EL 5 and whether, at those sizes or operating points, an acceptable non-forward curved fan is available.

D. Compliance Year

For this analysis, DOE assumed a compliance date of five years after publication of a final energy conservation standards rule. (42 U.S.C. 6316(a); 42 U.S.C. 6295(l)(2)) The Working Group did not make any recommendation on the compliance year, and DOE believes that five years would allow fan manufacturers sufficient time to redesign their existing equipment, as necessary, to meet new energy conservation standards. DOE anticipates the final rule to publish in

[12] See description of the fan selection sample in the life cycle analysis section III.F.1.

[13] See engineering analysis discussion in section III.E for details about the considered efficiency levels.

[14] Ecodesign Fan Review, Review Study of Commission Regulation (EU) No 327/2011, Final Report prepared by Van Holsteijn en Kemna B.V. for the European Commission, Directorate-General for Energy. Available at *http://www.fanreview.eu/documents.htm* (last accessed 02/02/2016).

2017, resulting in a compliance date for the standards of 2022. Stakeholders provided several suggestions for the compliance date.

ebm-papst commented that a three-year compliance period would represent sufficient time. (ebm-papst, No. 45 at p. 2) Morrison commented that even five years may not be enough. (Morrison, No. 51 at p. 9)

Ingersoll Rand/Trane and AHRI commented that, in order to allow OEMs to redesign their existing equipment to use fans of different types or sizes, the compliance date for fans that are components of larger piece of equipment should be delayed. For such fans, Ingersoll Rand/Trane recommended an additional two years and AHRI recommended an additional five years after the compliance date for standalone fans. (Ingersoll Rand/Trane, No. 153 at p. 4; AHRI, No. 158 at p. 9)

In the December 2014 NODA, DOE requested comments on the redesign time per fan model. United Technologies/Carrier stated three years would be too short in terms of compliance period and that it could take 18 to 24 months per fan for an OEM to complete a redesign for an embedded fan and the equipment incorporating the fan. (United Technologies/Carrier, No. 43 at p. 2)

DOE believes that manufacturers will be able to offer fans that are compliant with any energy conservation standards DOE may set before 5 years after publication of a final rule. Many fans are compliant with the highest efficiency levels for at least part of their operating range. Consequently, for many fans, any standard may only require certifying a different operating range rather than redesigning the fan. DOE's analysis estimates that at the most stringent EL (EL 6), 70 percent of current fan selections [15] would not meet the standard but that more than half of these could be replaced by existing compliant substitutes. This means that even at the highest EL, only 33 percent of all fan selections would require a redesigned fan. Therefore, DOE believes that a five-year compliance period is sufficient for fan manufacturers, including OEMs to either redesign their fans and equipment or select compliant, alternative fans. For the analyses in this NODA, DOE assumed a compliance date of five years after the publication of the final rule.

DOE seeks comments on the use a compliance date of five years after the publication of the final rule.

[15] Based on 2012 data, see section III.G for more details. A fan selection is the combination of a fan model and design point at which it is purchased.

E. Engineering Analysis

The engineering analysis establishes the relationship between the manufacturer production cost (MPC) and efficiency levels of fans. This relationship serves as the basis for calculations performed in the other analysis tools to estimate the costs and benefits to individual consumers, manufacturers, and the Nation.

DOE used the same methodology in the engineering analysis of this NODA as for the December 2014 NODA and the May 2015 NODA. For each fan equipment class, DOE identified existing technology options that could affect efficiency. Next, DOE conducted a screening analysis to review each technology option and decide whether it: (1) Is technologically feasible; (2) is practicable to manufacture, install, and service; (3) would adversely affect product utility or product availability; or (4) would have adverse impacts on health and safety. The technology options remaining after the screening analysis consisted of a variety of impeller types and guide vanes. DOE categorized the fan equipment classes into subcategories by the technology options the fans use. DOE then conducted a market-based assessment of the prevalence of each subcategory at each efficiency level analyzed. DOE estimated market prevalence using the sales data provided by AMCA that was within the scope of the analysis and for which there was sufficient information. This NODA, like the May 2015 NODA has fewer subgroups than the December 2014 NODA due to limitations in the sales data provided by AMCA.

For this NODA, DOE augmented the AMCA sales data used in the May 2015 NODA to account for embedded fans made by companies that incorporate those fans for sale in their own equipment (see section III.G) and to represent additional sales of forward curved fans, which AMCA stated were underrepresented in the original data AMCA provided. (AMCA, Public Meeting Transcript, No. 85 at p. 91) The resulting engineering database was analyzed at six efficiency levels (ELs) representing different target efficiencies (η_{target}, see section III.A). In this NODA, efficiency levels were set separately for ducted and unducted fans, based on the recommendation of the working group. (No. 179, Recommendation #18 at pp. 10–11) For ducted fans, the six efficiency levels are calculated using the same six total efficiency targets used in the May 2015 NODA. At each of the analyzed efficiency levels in this NODA, the static efficiency targets used for unducted fans are 0.04 less than the total efficiency target at each respective level. The exact target efficiencies used in this NODA are presented in Table 3 of the ''MPC Approach'' tab of the engineering analysis and conversion cost spreadsheet.

DOE calculated MPCs at each efficiency level using the same methodology as used in the December 2014 NODA and the May 2015 NODA. The MPCs were derived from product teardowns and publically available product literature and were informed by interviews with manufacturers. DOE calculated the MPCs for fans in each subcategory. DOE used these MPCs to characterize the relationship between MPC and blade or impeller diameter for each subcategory. DOE found that all fan subcategories were represented at all ELs, so DOE did not use subcategory MPC differences to directly represent higher efficiency. DOE found some subcategories to be more prevalent at higher ELs. Therefore, DOE calculated MPCs for each fan equipment class at each efficiency level analyzed by weighting the MPCs of each subcategory within a class by its prevalence at the efficiency level being analyzed.

DOE's preliminary MPC estimates indicate that the changes in MPC as efficiency level increases are small or, in some fan equipment classes, zero. However, DOE is aware that aerodynamic redesigns are a primary method by which manufacturers improve fan performance. These redesigns require manufacturers to make large upfront investments for R&D, testing and prototyping, and purchasing new production equipment. DOE's preliminary findings indicate that the magnitude of these upfront costs are more significant than the difference in MPC of a fan redesigned for efficiency compared to its precursor. For this NODA, DOE included a conversion cost markup in its calculation of the manufacturer selling price (MSP) to account for these conversion costs. These markups and associated MSPs were developed and applied in downstream analyses. They are discussed in section III.F and presented in the LCC spreadsheet.

The main outputs of the fans engineering analysis are the MPCs of each fan equipment class (including material, labor, and overhead) and technology option distributions at each efficiency level analyzed.

F. Manufacturer Impact Analysis

For the MIA, DOE used the Government Regulatory Impact Model (GRIM) to assess the economic impact of potential standards on commercial and industrial fan manufacturers. DOE developed key industry average financial parameters for the GRIM using publicly available data from corporate annual reports along with information received through confidential interviews with manufacturers. These values include average industry tax rate; working capital rate; net property, plant, and equipment rate; selling, general, and administrative expense rate; research and development expense rate; depreciation rate; capital expenditure rate; and manufacturer discount rate.

Additionally, DOE calculated total industry capital and product conversion costs associated with meeting all analyzed efficiency levels. Using a proprietary cost model and feedback received from manufacturers during interviews, DOE first estimated the average industry capital and product conversion costs associated with redesigning a single size of a fan series to meet a specific efficiency level. DOE estimated the costs for all subcategories within each fan equipment class. DOE multiplied these per model conversion costs by the number of models that would be required to be redesigned at each efficiency level to arrive at the total industry conversion costs. The number of models that would be redesigned was calculated using information from the engineering database developed from the AMCA sales database (see section III.E). Additional information on the number of models redesigned is available in the engineering analysis and conversion cost spreadsheet, ''Total Fan Conversion Costs'' section of the ''Database Overview and Use'' tab.

The GRIM uses these estimated values in conjunction with inputs from other analyses, including the MPCs from the engineering analysis, the annual shipments by fan equipment class from the NIA, and the fan manufacturer markups for the cost recovery markup scenario from the LCC analysis to model industry annual cash flows from the reference year through the end of the analysis period. The primary quantitative output of this model is the industry net present value (INPV), which DOE calculates as the sum of industry annual cash flows, discounted to the present day using the industry specific weighted average cost of capital, or manufacturer discount rate.

Standards can affect INPV in several ways including requiring upfront investments in manufacturing capital as well as research and development expenses, which increase the cost of production and potentially alter manufacturer markups. DOE expects that manufacturers may lose a portion of INPV due to standards. The potential loss in INPV due to standards is calculated as the difference between INPV in the no-standards case (absent new energy conservation standards) and the INPV in the standards cases (with new energy conservation standards in effect). DOE examines a range of possible impacts on industry by modeling various pricing strategies commercial and industrial fan manufacturers may adopt following the adoption of new energy conservations standards for fans.

In addition to INPV, the MIA also calculates the manufacturer markups, which are applied to the MPCs derived in the engineering analysis, to arrive at the manufacturer selling prices (MSPs) in the no-standards case. In the standards cases manufacturers will incur costs from the redesign of models that do not meet the required FEP at a given efficiency levels. DOE modeled two markup scenarios for the standards cases, a preservation of gross margin markup scenario and a conversion cost pass through markup scenario.

In the preservation of gross margin markup scenario, DOE assumes that manufacturers maintain the same manufacturer markup, as a percentage, in the standards cases as they do in the no-standards case, despite higher levels of investment in the standards cases. This markup scenario represents the lower bound, or worst-case scenario for manufacturers, since manufacturers are not able to pass the conversion costs associated with complying with higher efficiency levels on to their customers. In the fan conversion cost recovery markup scenario, DOE assumes that manufacturers are able to pass on to their customers the fan conversion costs they incur to meet higher efficiency levels. In this markup scenario, manufacturer markups are based on the total manufacturer fan conversion costs and calculated to allow manufacturers to recover their upfront fan conversion costs, in addition to their normal no-standards case markup. DOE calculated the conversion cost pass through markups for each efficiency level by amortizing the conversion costs over the units shipped throughout the analysis period that were redesigned to meet the efficiency level being analyzed. This fan conversion cost pass through markup scenario represents the upper bound, or best-case scenario for manufacturers, since manufacturers are able to pass on to their customers the fan conversion costs associated with complying with higher efficiency levels. For the standards cases, all other downstream analyses use the fan manufacturer markups calculated in the fan conversion costs pass through markup scenario.

DOE requests information on the per-model (size of a fan series) redesign costs presented in the engineering analysis and conversion cost spreadsheet.

DOE requests information on the number of models (sizes of a fan series) that are currently in the scope of the rulemaking nationally.

DOE requests feedback on the quantity of redesigns, methodology, and results used to calculate the total industry conversion costs by equipment class and EL, as presented in the engineering analysis and conversion cost spreadsheet.

DOE requests information on the extent to which product conversion costs and/or capital conversion costs are shared among sizes in a fan series.

DOE requests information on the extent to which product conversion costs and/or capital conversion costs are shared between belt and direct drive fans with the same aerodynamic design.

DOE requests information on the extent to which product conversion costs and/or capital conversion costs are shared between fans of different construction classes of the same aerodynamic design.

1. Impacts on OEMs

Several stakeholders commented that the previous DOE analyses did not take into account the significant costs incurred by manufacturers who incorporate fans into their equipment. Ingersoll Rand/Trane, United Technologies/Carrier, Morrison, AHRI, and Greenheck commented that separate costs to redesign the units in which fans are installed would be incurred due to this regulation. (Ingersoll Rand/Trane, No. 42 at p. 4; United Technologies/Carrier, No. 43 at p. 4; Morrison, No. 51 at p. 5; AHRI, No. 53 at p. 6; Greenheck, No. 54–A at pp. 4–5) AHRI added that the cost to redesign the units in which fans are installed can be several times greater in terms of both time and money than the cost to redesign the fan itself. (AHRI, No. 53 at p. 7) Morrison and Ingersoll Rand/Trane commented that fans in commercial and industrial building applications are typically housed within other equipment such as air handlers or unitary rooftop units that are sized specifically around the fan. (Morrison, No. 51 at p. 5; Ingersoll Rand/Trane, No. 42 at p. 11) AHRI commented that any change to fan size, operating range, or fan type will increase the OEM production cost, and urged DOE to consider the production cost impact to OEMs as part of the rulemaking. (AHRI, No. 53 at p. 6) Ingersoll Rand/Trane added that this increased cost would affect building owners and could decrease adoption rate by consumers. (Ingersoll Rand/Trane, No. 42 at p. 11).

AHRI also commented that in order to pass a regulation imposing additional costs (testing, implementation, time-frame, spare part availability, re-certification) on OEMs, DOE must consider the costs to these manufacturers and compare them to the potential energy saved, and in order to do so must conduct manufacturer interviews with OEMs. AHRI requested that DOE conduct such interviews and delineate DOE-covered equipment made by OEMs as a separate fan equipment class to assess the costs and relative benefits of a second layer of regulation on currently regulated HVACR equipment and publish a new NODA specifically addressing the impact on OEMs who were excluded from DOE's initial analysis. (AHRI, No. 158 at p. 3).

After careful consideration of these comments and the Working Group discussions, DOE recognizes that its previous analyses did not accurately account for the cost impacts of a fans regulation on all impacted manufacturers. DOE revised its analysis for this NODA to better account for cost impacts on fan manufacturers, especially OEMs. DOE understands that some OEMs manufacture their own fans that they then incorporate in the equipment that they manufacture for sale. As discussed in section III.B, DOE augmented the database it used for this NODA by incorporating fans made by companies that then incorporate those fans for sale in their own equipment (see section III.G). The presence of these fans in the database DOE used for this NODA ensures that its analysis accounts for the impacts on MPC (see section III.E) and conversion costs (see previous discussion in this section) for OEMs that manufacture fans and incorporate them in the equipment that they manufacture for sale. DOE also understands that OEMs that incorporate fans may incur additional conversion costs for their equipment not directly associated with improving the efficiency of the fan. For this NODA, DOE estimated OEM equipment conversion costs and included them in its analysis. DOE conducted interviews with manufacturers of equipment with embedded fans. DOE used information gathered during these interviews in conjunction with its engineering database to estimate OEM equipment conversion costs at each EL. In each fan equipment class, fan models in the engineering database that were representing fans sold by OEMs (whether or not the OEM made the fan) and that needed to be redesigned or reselected were determined to incur OEM equipment conversion costs. The aggregated industry OEM equipment conversion costs are presented in the engineering analysis and conversion cost spreadsheet.

DOE applied OEM equipment conversion costs to all embedded fans in its analysis. For OEMs that manufacture the fans that they incorporate in the equipment they manufacture for sale, DOE added the OEM equipment conversion costs to the fan conversion costs to develop total conversion cost recovery markups at each EL, for each fan equipment class, using the cost recovery markup methodology described in section III.F. For OEMs that incorporate fans that they do not manufacture themselves, the OEM equipment conversion cost is used to develop a cost recovery markup that is applied downstream of the fan conversion cost recovery markup. DOE then used the results as an input to the LCC analysis. Consequently, the cost to consumers of embedded fans, and, in turn, the cost-justification for the analyzed efficiency levels, accounts for both fan and OEM equipment conversion costs in this NODA.

DOE believes the revisions made for this NODA analysis—augmenting DOE's database to more completely incorporate embedded fans and including OEM equipment conversion costs—better account for the costs and benefits associated with potential energy conservation standards for fans incorporated in larger pieces of equipment and address the concerns of Ingersoll Rand/Trane, United Technologies/Carrier, Morrison, AHRI, and Greenheck.

DOE did not analyze a separate equipment class for embedded fans. DOE believes the revisions to its analysis described previously in this section appropriately account for the costs and benefits associated with embedded fans. However, the LCC spreadsheet published as part of this NODA provides the option to view results by subgroup for embedded fans and standalone fans separately.

DOE requests information on the portion of equipment with embedded fans that would require heat testing for certification with any new energy conservation standards. DOE also requests feedback on the number of embedded fans that would require redesign as presented in the engineering analysis and conversion costs spreadsheet.

G. Life-Cycle Cost and Payback Period Analyses

The LCC and PBP analyses determine the economic impact of potential standards on individual consumers, in the compliance year. The LCC is the total cost of purchasing, installing, and operating a commercial or industrial fan over the course of its lifetime.

DOE determines the LCC by considering: (1) The total installed cost to the consumer (which consists of manufacturer selling price, the conversion costs, distribution channel markups, and sales taxes); (2) the range of fan annual energy consumption as they are used in the field; (3) the fan operating costs; (4) fan lifetime; and (5) a discount rate that reflects the real consumer cost of capital and puts the LCC in present-value terms. The PBP represents the number of years needed to recover the increase in purchase price of higher-efficiency fans through savings in the operating cost. The PBP is calculated by dividing the incremental increase in installed cost of the higher efficiency product, compared to the baseline product, by the annual savings in operating costs.

For each considered standards case corresponding to each efficiency level, DOE measures the change in LCC relative to the no-standards case. The no-standards case is characterized by the distribution of fan efficiencies in the absence of new standards (*i.e.*, what consumers would have purchased in the compliance year in the absence of new standards). In the standards cases, fans with efficiency below the standard levels "roll-up" to the standard level in the compliance year.

To characterize annual fan operating hours, DOE established statistical distributions of consumers of each fan equipment class across sectors and applications, which in turn determined the fan operating hours. Recognizing that several inputs to the determination of consumer LCC and PBP are either variable or uncertain (*e.g.*, annual operating hours, lifetime, discount rate), DOE conducts the LCC and PBP analysis by modeling both the uncertainty and variability in the inputs using Monte Carlo simulations and probability distributions.

In addition to characterizing several of the inputs to the analyses with probability distributions, DOE developed a sample of individual fan selections representative of the market.[16] By developing this sample, DOE was able to perform the LCC and

[16] A fan selection is a fan model and the fan shaft input power, operating flow, and pressure values for which it was purchased.

PBP calculations for each fan selection to account for the variability in energy consumption associated with each selection.

The primary outputs of the LCC and PBP analyses are: (1) Average LCC in each standards case; (2) average PBPs; (3) average LCC savings at each standards case relative to the no-standards case; and (4) the percentage of consumers that experience a net benefit, have no impact, or have a net cost for each fan equipment class and efficiency level. The average annual energy consumption derived in the LCC analysis is used as an input in the NIA (see section III.H).

In the December 2014 NODA and the May 2015 NODA, DOE developed a sample of individual fan selections (*i.e.*, representative database of fan models including data on the design flow, pressure, and fan shaft input power for which they were purchased, and the drive configuration) using fan sales data provided by AMCA. During the negotiations, AMCA commented that these sales data included some standalone fans purchased by OEMs for incorporation into larger HVACR equipment but was not representative of sales of embedded fans. Specifically, AMCA commented that forward curved centrifugal housed fans, which are very common in HVACR equipment, were under-represented. (AMCA, Public Meeting Transcript, No. 85 at p. 91).

In this NODA, DOE collected additional technical and market information specific to embedded fans and revised the LCC sample to represent both the embedded fan and standalone fan markets. For each fan equipment class, DOE used confidential AMCA sales data for over 57,000 fan selections (with complete performance data), representing over 92,000 units sold, to develop a sample representative of fans sold on the US market. Each row in the sample represents a fan selection. The number of rows was adjusted to match the US market distributions across fan equipment classes, subcategory, fan shaft input power, and drive configuration. DOE adjusted the number of standalone fans in the LCC sample to mirror the actual standalone fan market distributions based on confidential market estimates from AMCA for the U.S standalone fan market. For embedded fans, DOE adjusted the number of fan selections in the LCC sample to reflect the actual embedded fan market distributions based on embedded fan shipments data.[17] As a result, and in line with AMCA's comment, the share of forward curved centrifugal housed fans in the sample increased from 3 percent to 19 percent. Using this sample, DOE was able to perform individual energy use calculations for each row in the sample and account for the variability in energy consumption associated with each fan selection.

The ''2012 Shipments'' worksheet of the NIA spreadsheet presents the standalone fan market and embedded fan market data used to calibrate the LCC sample. The worksheet includes breakdowns by equipment class, subcategory, as well as the HVACR equipment shipments and estimated number of fans per unit used by DOE to calculate the number of embedded fans. The LCC sample description worksheet in the LCC spreadsheet provides more detailed breakdown of the fan selections by power bins and efficiency levels.

DOE seeks feedback and input on the 2012 standalone fan and embedded fan shipments values, by equipment class and subcategory. Specifically, DOE requests feedback on: (1) The estimated number of fans per HVACR equipment; (2) the distribution of HVACR fans across fan subcategories by fan application; and (3) the share of standalone fans purchased and incorporated in HVACR equipment.

DOE seeks feedback and input on the distribution of fan selections by power bin and subcategory for standalone fans and embedded fans as presented in the ''LCC sample Description'' worksheet of the LCC spreadsheet.

In the December 2014 NODA and the May 2015 NODA, DOE calculated the FEP of a fan selection in the LCC sample using the default values and calculation algorithms for bare shaft fans. DOE applied this approach because the fan selection data included performance data for fans in bare shaft configurations. In this NODA, in order to establish the FEP of a fan considered in the analysis, DOE retained this approach and used the default values and calculation algorithms for bare shaft fans as recommended by the Working Group. The engineering analysis and conversion cost spreadsheet presents the detailed equations and default values used to calculate the FEP of a given fan model in a bare shaft configuration. In addition, based on the Working Group recommendation, the spreadsheet includes default values and calculation algorithms for other fan configurations such as fans with dynamic continuous controls. (No. 179, Recommendation #12–16 at pp. 7–9)

After the publication of the December 2014 NODA, Morrison and AHRI commented that the operating hours seemed high but did not provide quantified estimates. (Morrison, No. 51 at p. 8; AHRI, No. 53 at p. 13) In the December 2014 and May 2015 NODAs, DOE used industrial plant assessment and Energy Plus building simulation data to estimate fan operating hours, which averaged around 6,500 hours per year.[18] In this NODA, DOE retained the same assumption for the operating hours of standalone fans and developed specific operating hours for embedded fans based on HVAC fan operating hours data which averaged 2,725 hours per year.[19]

DOE seeks feedback and inputs on fan operating hours.

In the December 2014 NODA and the May 2015 NODA, DOE assumed that all fans operated at full design flow and pressure when performing the energy use calculation. AHRI noted that most fans in HVAC equipment do not run at full design speed but at 60 percent of full speed (equivalent to running at 60 percent of design flow). (AHRI, No. 129–1 at p. 2) AHRI additionally provided input on the typical fan load profiles in VAV systems. (AHRI, No. 53 at p. 13) ACME commented that, 50 percent of the time, the actual operating point of a fan is not equal to the design point selection of the fan and has a higher pressure value. ACME added that in some situations, the design point of the fan is not known and the actual operating point of a fan may fall in a region of operation where the fan has a

[17] See description of the LCC sample in the LCC Spreadsheet.

[18] Database of motor nameplate and field measurement data compiled by the Washington State University Extension Energy Program (WSU) and Applied Proactive Technologies (APT) under contract with the New York State Energy Research and Development Authority (NYSERDA) (2011); Strategic Energy Group (Jan. 2008), Northwest Industrial Motor Database Summary from Regional Technical Forum. Retrieved March 5, 2013 from *http://rtf.nwcouncil.org/subcommittees/osumotor/Default.htm*; U.S. Department of Energy, Energy Efficiency and Renewable Energy, Building Technologies Office, EnergyPlus Energy Simulation Software (Aug. 2014). Available at *http://apps1.eere.energy.gov/buildings/energyplus.*

[19] Arthur D. Little, Inc. ''Opportunities for Energy Savings in the Residential and Commercial Sectors with High-Efficiency Electric Motors (Final Report),'' (Dec. 1999); U.S. Department of Energy–Office of Energy Efficiency and Renewable Energy. Energy Conservation Program for Certain Industrial Equipment: Energy Conservation Standards for Water-Cooled and Evaporatively-Cooled Commercial Packaged Air-Conditioning and Heating Equipment. Final Rule Technical Support Document, Chapter 4 Energy Use Characterization (2012). Available at *http://www.regulations.gov/document?D=EERE-2011-BT-STD-0029-0039;* 1 U.S. Department of Energy–Office of Energy Efficiency and Renewable Energy. Energy Conservation Program for Certain Industrial Equipment: Energy Conservation Standards for Small, Large, and Very Large Commercial Package Air Conditioning and Heating Equipment. NOPR Technical Support Document, Chapter 7 Energy Use Analysis (2014). Available at *http://www.regulations.gov/document?D=EERE-2013-BT-STD-0007-0027.*

poor efficiency. ACME estimated that this could happen at least 30 percent of the time. In addition, ACME commented that the energy use analysis should account for fans operating in variable air volume (VAV) systems, for which the actual fan operating point is different than the design point. ACME believes that accounting for these situations would reduce the energy savings as calculated in the May 2015 NODA. (ACME, No. 149 at pp. 1–2) For industrial fans, AcoustiFLO stated that most fans operate at their design point. (AcoustiFLO, Public Meeting Transcript, No. 85 at p. 193)

Based on these comments and stakeholder feedback received during negotiations DOE revised its December 2014 and May 2015 NODA analyses to account for part load operation. For the commercial sector, DOE assumed that 80 percent of the fans operated at an airflow that differed from the design flow at least some of the time. DOE based the 80 percent value on results from the EnergyPlus building energy use simulation software [20] that indicated that 80 percent of fans in the commercial sector operate along a variable load profile. To reflect this, DOE developed variable load profiles for 80 percent of the commercial fans based on the information provided by AHRI and the EnergyPlus building energy use simulation. In the case of the industrial sector, in line with the inputs from the stakeholders, DOE assumed about a third of the fans operated outside of the design flow (30 percent). The load profiles are presented in the ''Sectors and Applications'' worksheet of the LCC spreadsheet.

DOE seeks feedback and inputs on the fan load profiles used in the energy use calculation and on the percentage of fans used in variable load applications.

In the December 2014 NODA and the May 2015 NODA, DOE estimated the average fan lifetime for standalone fans to be 30 years. AHRI commented that the lifetimes seemed high but did not provide quantified estimates. Morrison commented that the lifetimes seemed high and that fans used in HVAC typically have 12–15 year lifetimes. (AHRI, No. 53 at p. 5, Morrison, No. 51 at p. 8) In this NODA, DOE revised the fan lifetimes to account for the fact that fans in HVACR application may have shorter lifetimes. In line with Morrison's comment, DOE used an average embedded fan lifetime of 17 years based on estimates of HVACR equipment lifetimes, but maintained an average lifetime of 30 years for other fans.[21] The LCC spreadsheet includes more details on the fan lifetime estimates and includes a sensitivity scenario that provides results for an average embedded fan lifetime of 15 years.[22]

DOE seeks feedback and inputs on fan lifetimes.

H. National Impact Analysis

The NIA estimates the national energy savings (NES) and the net present value (NPV) of total consumer costs and savings expected to result from potential new standards at each EL. DOE calculated NES and NPV for each EL as the difference between a no-standards case forecast (without new standards) and the standards case forecast (with standards). Cumulative energy savings are the sum of the annual NES determined for the lifetime of all fans shipped during a 30-year analysis period assumed to start in 2022. Energy savings include the full-fuel cycle energy savings (*i.e.*, the energy needed to extract, process, and deliver primary fuel sources such as coal and natural gas, and the conversion and distribution losses of generating electricity from those fuel sources). The NPV is the sum over time of the discounted net savings each year, which consists of the difference between total energy cost savings and increases in total equipment costs. NPV results are reported for discount rates of 3 and 7 percent.

To calculate the NES and NPV, DOE projected future shipments and efficiency distributions (for each EL) for each potential fan equipment class. DOE recognizes the uncertainty in projecting shipments and electricity prices; as a result, the NIA includes several different scenarios for each. Other inputs to the NIA include the estimated fan lifetime used in the LCC analysis, fan price, average annual energy consumption, and efficiency distributions from the LCC.

IV. Issues on Which DOE Seeks Public Comment

DOE is interested in receiving comment on all aspects of this analysis. DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

1. DOE requests feedback on the calculation of the FEP_{STD} and FEI.
2. DOE seeks comments on the equipment classes used in this notice.
3. DOE seeks information on whether there are specific sizes or operating points where forward curved fans would no longer be available at efficiency levels up to EL 5.
4. DOE seeks comments on the use a compliance date of five years after the publication of the final rule.
5. DOE requests information on the per-model (*i.e.,* a single size fan within a fan series) redesign costs presented in the engineering analysis and conversion cost spreadsheet.
6. DOE requests information on the number of models that are currently in the scope of the rulemaking nationally.
7. DOE requests feedback on the quantity of redesigns, methodology, and results used to calculate the total industry conversion costs by equipment class and EL, as presented in the engineering analysis and conversion cost spreadsheet.
8. DOE requests information on the extent to which product conversion costs and/or capital conversion costs are shared among sizes in a fan series.
9. DOE requests information on the extent to which product conversion costs and/or capital conversion costs are shared between belt and direct drive fans with the same aerodynamic design.
10. DOE requests information on the extent to which product conversion costs and/or capital conversion costs are shared between fans of different construction classes of the same aerodynamic design.
11. DOE requests information on the portion of equipment with embedded fans that would require heat testing for certification with any new energy conservation standards.
12. DOE requests feedback on the number of embedded fans that would require redesign presented in the engineering analysis and conversion costs spreadsheet.
13. DOE seeks feedback and input on the 2012 standalone fan and embedded fan shipments values, by equipment class and subcategory. Specifically, DOE

[20] The EnergyPlus building energy use simulation software is available at *http://apps1.eere.energy.gov/buildings/energyplus/.*

[21] Roth, Kurt, Detlef Westphalen, John Dieckmann, Sephir Hamilton, and William Goetzler. ''Energy Consumption Characteristics of Commercial Building HVAC Systems Volume III: Energy Savings Potential.'' National Technical Information Service (NTIS): U.S. Department of Commerce (July 2002). Available at *http://apps1.eere.energy.gov/buildings/publications/pdfs/commercial_initiative/hvac_volume3_final_report.pdf.*

U.S. Department of Energy–Office of Energy Efficiency and Renewable Energy. Energy Conservation Program for Certain Industrial Equipment: Energy Conservation Standards for Small, Large, and Very Large Commercial Package Air Conditioning and Heating Equipment. Life-Cycle Cost Spreadsheet (NOPR) (2014). Available at *http://www.regulations.gov/docket?D=EERE-2013-BT-STD-0007.*

[22] The sensitivity scenario used a mechanical lifetime of 45,000 hours based on typical annual operating hours of 3000 hours and a lifetime in years of 15. The lifetimes calculates in the LCC may lead to different lifetimes in years due to the variability in applications and associated annual operating hours (*i.e.*, fans operating fewer annual hours may have a longer lifetime).

requests feedback on: (1) The estimated number of fans per HVACR equipment; (2) the distribution of HVACR fans across fan subcategory by fan application; and (3) the share of standalone fans purchased and incorporated in HVACR equipment.

14. DOE seeks feedback and input on the distribution of fan selections by power bin and subcategory for standalone fans and embedded fans as presented in the ''LCC sample Description'' worksheet of the LCC spreadsheet.

15. DOE seeks feedback and inputs on the fan operating hours.

16. DOE seeks feedback and inputs on the fan load profiles used in the energy use calculation and on the percentage of fans used in variable load applications.

17. DOE seeks feedback and inputs on the fan lifetimes.

The purpose of this NODA is to notify industry, manufacturers, consumer groups, efficiency advocates, government agencies, and other stakeholders of the publication of an analysis of potential energy conservation standards for commercial and industrial fans and blowers. Stakeholders should contact DOE for any additional information pertaining to the analyses performed for this NODA.

Issued in Washington, DC, on October 19, 2016.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2016–26341 Filed 10–31–16; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 326 and 391

RIN 3064–AE47

Removal of Transferred OTS Regulations Regarding Minimum Security Procedures Amendments to FDIC Regulations

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this notice of proposed rulemaking (''NPR'' or ''Proposed Rule''), the Federal Deposit Insurance Corporation (''FDIC'') proposes to rescind and remove a part from the Code of Federal Regulations entitled ''Security Procedures'' and to amend FDIC regulations to make the removed Office of Thrift Supervision (''OTS'') regulations applicable to state savings associations.

DATES: Comments must be received on or before January 3, 2017.

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

- *FDIC Web site: http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on the agency Web site.
- *FDIC Email: Comments@fdic.gov.* Include RIN #3064–AE47 on the subject line of the message.
- *FDIC Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery to FDIC:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please include your name, affiliation, address, email address, and telephone number(s) in your comment. Where appropriate, comments should include a short Executive Summary consisting of no more than five single-spaced pages. All statements received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. You should submit only information that you wish to make publicly available.

Please note: All comments received will be posted generally without change to *http://www.fdic.gov/regulations/laws/federal/propose.html,* including any personal information provided. Paper copies of public comments may be requested from the Public Information Center by telephone at 1–877–275–3342 or 1–703–562–2200.

FOR FURTHER INFORMATION CONTACT: Lauren Whitaker, Attorney, Consumer Compliance Section, Legal Division (202) 898–3872; Martha L. Ellett, Counsel, Consumer Compliance Section, Legal Division, (202) 898–6765; Karen Jones Currie, Senior Examination Specialist, Division of Risk Management and Supervision (202) 898–3981.

SUPPLEMENTARY INFORMATION: Part 391, subpart A was included in the regulations that were transferred to the FDIC from the Office of Thrift Supervision (''OTS'') on July 21, 2011, in connection with the implementation of applicable provisions of title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). With the exception of one provision (§ 391.5) the requirements for State savings associations in part 391, subpart A are substantively identical to the requirements in the FDIC's 12 CFR part 326 (''part 326''), which is entitled ''Minimum Security Procedures.'' The one exception directs savings associations to comply with appendix B to subpart B of *Interagency Guidelines Establishing Information Security Standards* (*Interagency Guidelines*) contained in FDIC rules at part 364, appendix B. The FDIC previously revised part 364 to make the *Interagency Guidelines* applicable to both state nonmember banks and state savings associations.[1]

The FDIC proposes to rescind in its entirety part 391, subpart A and to modify the scope of part 326 to include state savings associations to conform to and reflect the scope of the FDIC's current supervisory responsibilities as the appropriate Federal banking agency. The FDIC also proposes to define ''FDIC-supervised insured depository institution or institution'' and ''State savings association.'' Upon removal of part 391, subpart A, the Security Procedures, regulations applicable for all insured depository institutions for which the FDIC has been designated the appropriate Federal banking agency will be found at 12 CFR part 326.

I. Background

The Dodd-Frank Act

The Dodd-Frank Act[1] provided for a substantial reorganization of the regulation of state and Federal savings associations and their holding companies. Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act, codified at 12 U.S.C. 5411, the powers, duties, and functions formerly performed by the OTS were divided among the FDIC, as to state savings associations, the Office of the Comptroller of the Currency (''OCC''), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (''FRB''), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act, codified at 12 U.S.C. 5414(b), provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such materials were in effect on the day before the transfer date, they continue to be in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

---

[1] 80 FR 65907 (Oct. 28, 2015).

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. 5301 *et seq.*).

Section 316(c) of the Dodd-Frank Act, codified at 12 U.S.C. 5414(c), further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations that would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC's Board of Directors approved a ''List of OTS Regulations to be enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.'' This list was published by the FDIC and the OCC as a Joint Notice in the **Federal Register** on July 6, 2011.[2]

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act, codified at 12 U.S.C. 5412(b)(2)(B)(i)(II), granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the FDI Act and other laws as the ''appropriate Federal banking agency'' or under similar statutory terminology. Section 312(c) of the Dodd-Frank Act amended the definition of ''appropriate Federal banking agency'' contained in section 3(q) of the FDI Act, 12 U.S.C. 1813(q), to add State savings associations to the list of entities for which the FDIC is designated as the ''appropriate Federal banking agency.'' As a result, when the FDIC acts as the designated ''appropriate Federal banking agency'' (or under similar terminology) for state savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations, as well as for state nonmember banks and insured branches of foreign banks.

As noted, on June 14, 2011, pursuant to this authority, the FDIC's Board of Directors reissued and redesignated certain transferring regulations of the former OTS. These transferred OTS regulations were published as new FDIC regulations in the **Federal Register** on August 5, 2011.[3] When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into other FDIC rules, amending them, or rescinding them, as appropriate.

One of the OTS rules transferred to the FDIC governed OTS oversight of minimum security devices and procedures for state savings associations. The OTS rule, formerly found at 12 CFR part 568, was transferred to the FDIC with only nominal changes and is now found in the FDIC's rules at part 391, subpart A, entitled ''Security Procedures.'' Before the transfer of the OTS rules and continuing today, the FDIC's rules contained part 326, subpart A entitled ''Minimum Security Procedures,'' a rule governing FDIC oversight of security devices and procedures to discourage burglaries, robberies and larcenies and assist law enforcement in the identification and apprehension of those who commit such crimes with respect to insured depository institutions for which the FDIC has been designated the appropriate Federal banking agency. One provision in part 391, subpart A (391.5) is not contained in part 326, subpart A. It directs savings associations and certain subsidiaries to comply with the *Interagency Guidelines Establishing Information Security Standards* which were adopted jointly by the OTS and the FDIC and other banking agencies and are contained in appendix B to part 364 in FDIC regulations.

After careful review and comparison of part 391, subpart A, and part 326, the FDIC proposes to rescind part 391, subpart A, because, as discussed below, it is substantively redundant to existing part 326 and simultaneously proposes to make technical conforming edits to the FDIC's existing rule.

FDIC's Existing 12 CFR Part 326 and Former OTS's Part 568 (Transferred to FDIC's Part 391, Subpart A)

Section 3 of the Bank Protection Act of 1968 directed the appropriate federal banking agencies and the OTS' predecessor, the Federal Home Loan Bank Board (''FHLBB'') to establish minimum security standards for banks and savings associations, at reasonable cost, to serve as a deterrent to robberies, burglaries, and larcenies and to assist law enforcement in identifying and prosecuting persons who commit such acts.[4] In the initial rulemakings, the agencies consulted and cooperated with each other to promote a goal of uniformity where practicable. The initial minimum security rules were simultaneously issued in January 1969 and were substantively the same.[5]

In 1991, the minimum security rules were substantially revised to reduce unnecessary specificity, remove obsolete requirements and place greater responsibility on the boards of directors of insured financial institutions for establishing and ensuring the implementation and maintenance of security programs and procedures. The former FHLBB rules at 12 CFR part 563a were redesignated as 12 CFR part 568 by the OTS. The OTS rules remained substantively the same as the FDIC's rules in part 326, subpart A.[6]

In 2001, the FDIC and other federal banking agencies and the OTS issued *Interagency Guidelines for Safeguarding Customer Information* pursuant to section 501 of the Gramm Leach Bliley Act (''Protection of Nonpublic Personal Information'').[7] At the same time, the OTS also added a provision at the end of its security procedures rules at section 568.5 directing saving associations and certain subsidiaries to comply with appendix B to the *Interagency Guidelines.* In a preamble footnote, the OTS indicated that the reason for the additional provision to its minimum security rules was ''[b]ecause information security guidelines are similar to physical security procedures.''[8] In 2004, following enactment of the Fair and Accurate Credit Transactions Act (FACT Act), the OTS, FDIC and other banking agencies revised the *Interagency Guidelines for Safeguarding Customer Information* and renamed them the *Interagency Guidelines for Establishing Information Security Standards.* The *Interagency Guidelines* were located in the FDIC rules at part 364. In 2015, the FDIC amended part 364 to, among other reasons, make it applicable to State savings associations.[9] After careful comparison of the FDIC's part 326, subpart A with the transferred OTS rule in part 391, subpart A, the FDIC has concluded that the transferred OTS rules governing minimum security procedures are substantively redundant. Based on the foregoing, the FDIC proposes to rescind and remove from the Code of Federal Regulations the transferred OTS rules located at part 391, subpart A, and to make technical amendments to part 326, subpart A to incorporate State savings associations.

II. The Proposal

Regarding the functions of the former OTS that were transferred to the FDIC, section 316(b)(3) of the Dodd-Frank Act, 12 U.S.C. 5414(b)(3), in pertinent part, provides that the former OTS's regulations will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law. After reviewing the rules currently found in part 391, subpart A, the FDIC proposes

[2] 76 FR 39247 (July 6, 2011).

[3] 76 FR 47652 (Aug. 5, 2011).

[4] 12 U.S.C. 1882.

[5] 34 FR 618 (January 16, 1969); 34 FR 621 (January 16, 1969).

[6] 56 FR 29565 (June 28, 1991); 56 FR 13579 (April 3, 1991).

[7] 66 FR 8616 (Feb. 1, 2001).

[8] *Id. a*t footnote 2.

[9] 80 FR 65903 (October 28, 2015).

(1) to rescind part 391, subpart A, in its entirety; (2) to modify to the scope of part 326, subpart A to include State savings associations and their subsidiaries to conform to and reflect the scope of FDIC's current supervisory responsibilities as the appropriate Federal banking agency for State savings associations; (3) delete the definition of ''insured nonmember bank'' and replace it with a definition of ''FDIC-supervised insured depository institution or institution,'' which means ''any state nonmember insured bank or state savings association for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q));'' (4) add a new subsection (i), which would define ''state savings association'' as having ''the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3));'' and (5) make conforming technical edits throughout, including replacing the term ''FDIC-supervised insured depository institution'' or ''institution'' in place of ''bank'' throughout the rule where necessary.

If the proposal is finalized, oversight of minimum security procedures in part 326, subpart A would apply to all FDIC-supervised institutions, including state savings associations, and part 391, subpart A, would be removed because it is largely redundant of the rules found in part 326. Rescinding part 391, subpart A, will serve to streamline the FDIC's rules and eliminate unnecessary regulations.

III. Request for Comments

The FDIC invites comments on all aspects of this proposed rulemaking, and specifically requests comments on the following:

(1.) What impacts, positive or negative, can you foresee in the FDIC's proposal to rescind part 391, subpart A?

Written comments must be received by the FDIC no later than January 3, 2017.

IV. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (''PRA'') of 1995, 44 U.S.C. 3501–3521, the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (''OMB'') control number.

The proposed rule would rescind and remove from FDIC regulations part 391, subpart A from the FDIC regulations. This rule was transferred with only nominal changes to the FDIC from the OTS when the OTS was abolished by title III of the Dodd-Frank Act. Part 391, subpart A, is substantively similar to the FDIC's existing part 326, subpart A regarding oversight of minimum security procedures for depository institutions with the exception of one provision at the end of Part 391, Subpart A which directs savings associations to comply with *Interagency Guidelines* which are located in appendix B to part 364. In 2015, the FDIC proposed and finalized revisions to part 364 that made part 364, including the *Interagency Guidelines* in Appendix B, applicable to State savings associations as well as State nonmember banks.

The proposed rule also would (1) amend part 326, subpart A to include state savings associations and their subsidiaries within its scope; (2) define ''FDIC-supervised insured depository institution or institution'' and ''state savings association;'' and (3) make conforming technical edits throughout. These measures clarify that state savings associations, as well as state nonmember banks are subject to part 326, subpart A. With respect to part 326, subpart A, the Proposed Rule does not revise any existing, or create any new information collection pursuant to the PRA. Consequently, no submission will be made to the Office of Management and Budget for review. The FDIC requests comment on its conclusion that this aspect of the NPR does not create a new or revise an existing information collection.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities (defined in regulations promulgated by the Small Business Administration to include banking organizations with total assets of less than or equal to $550 million).[10] However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory Statement in the **Federal Register** together with the proposed rule. For the reasons provided below, the FDIC certifies that the Proposed Rule would not have a significant economic impact on a substantial number of small entities.

As discussed in this notice of proposed rulemaking, part 391, subpart A, was transferred from OTS part 568, which governed minimum security procedures for depository institutions. The initial minimum security rules, though issued separately by the agencies, were all published in January 1969. The OTS rule, part 568 had been in effect since 1991 and all State savings associations were required to comply with it. Because it is substantially the same as existing part 326, subpart A of the FDIC's rules and therefore redundant, the FDIC proposes rescinding and removing the transferred regulation now located in part 391, subpart A. As a result, all FDIC-supervised institutions—including state savings associations and their subsidiaries—would be required to comply with the minimum security procedures in part 326, subpart A. Because all state savings associations and their subsidiaries have been required to comply with nearly identical security procedures rules since 1969, the Proposed Rule would not place additional requirements or burdens on any state savings association irrespective of its size. Therefore, the Proposed Rule would not have a significant impact on a substantial number of small entities.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act, codified at 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. The FDIC invites comments on whether the Proposed Rule is clearly stated and effectively organized, and how the FDIC might make it easier to understand. For example:

• Has the FDIC organized the material to suit your needs? If not, how could it present the rule more clearly?

• Have we clearly stated the requirements of the rule? If not, how could the rule be more clearly stated?

• Does the rule contain technical jargon that is not clear? If so, which language requires clarification?

• Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?

• What else could we do to make the regulation easier to understand?

[10] 5 U.S.C. 601 *et seq.*

D. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (''EGRPRA''), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions.[11] The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and is commencing the next decennial review. The action taken on this rule will be included as part of the EGRPRA review that is currently in progress. As part of that review, the FDIC invites comments concerning whether the Proposed Rule would impose any outdated or unnecessary regulatory requirements on insured depository institutions. If you provide such comments, please be specific and provide alternatives whenever appropriate.

List of Subjects

12 CFR Part 326

Banks, Banking, Minimum security procedures, Savings associations.

12 CFR Part 391

Security procedures.

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend 12 CFR part 326 and 12 CFR part 391 as set forth below:

PART 326—MINIMUM SECURITY DEVICES AND PROCEDURES AND BANK SECRECY ACT [1] COMPLIANCE

■ 1. The authority citation for part 326 continues to read as follows:

Authority: 12 U.S.C. 1813, 1815, 1817, 1818, 1819 (Tenth), 1881–1883; 31 U.S.C. 5311–5314 and 5316–5332.2.

■ 2. Revise subpart A to read as follows:

Subpart A—Minimum Security Procedures

Sec.
326.0 Authority, purpose, and scope.
326.1 Definitions.
326.2 Designation of security officer.
326.3 Security program.
326.4 Reports.

[11] Public Law 104–208, 110 Stat. 3009 (1996).

[1] In its orginal form, subchapter II of chapter 53 of title 31, U.S.C. was part of Public Law 92–508 which requires recordkeeping for and reporting of currency transactions by banks and others and is commonly known as the *Bank Secrecy Act.*

§ 326.0 Authority, purpose, and scope.

(a) This part is issued by the Federal Deposit Insurance Corporation (''FDIC'') pursuant to section 3 of the Bank Protection Act of 1968 (12 U.S.C. 1882). It applies to FDIC-supervised insured depository institutions. It requires each institution to adopt appropriate security procedures to discourage robberies, burglaries, and larcenies and to assist in identifying and apprehending persons who commit such acts.

(b) It is the responsibility of the institution's board of directors to comply with this part and ensure that a written security program for the institution's main office and branches is developed and implemented.

§ 326.1 Definitions.

For the purposes of this part—

(a) The term *FDIC-supervised insured depository institution* or *institution* means any insured depository institution for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q)(2) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q)(2).

(b) The term *banking office* includes any branch of an institution and, in the case of an FDIC-supervised insured depository institution, it includes the main office of that institution.

(c) The term *branch* for an institution chartered under the laws of any state of the United States includes any branch institution, branch office, branch agency, additional office, or any branch place of business located in any state or territory of the United States, District of Columbia, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Northern Mariana Islands or the Virgin Islands at which deposits are received or checks paid or money lent. In the case of a foreign banks defined in§ 347.202 of this chapter, the term branch has the meaning given in § 347.202 of this chapter.

(d) The term *state savings association* has the same meaning as in section (3)(b)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(3).

§ 326.2 Designation of security officer.

Upon the issuance of Federal deposit insurance, the board of directors of each institution shall designate a security officer who shall have the authority, subject to the approval of the board of directors, to develop, within a reasonable time, but no later than 180 days, and to administer a written security program for each banking office.

§ 326.3 Security program.

(a) *Contents of security program.* The security program shall:

(1) Establish procedures for opening and closing for business and for the safekeeping of all currency, negotiable securities, and similar valuables at all times;

(2) Establish procedures that will assist in identifying persons committing crimes against the institution and that will preserve evidence that may aid in their identification and prosecution; such procedures may include, but are not limited to:

(i) Retaining a record of any robbery, burglary, or larceny committed against the institution;

(ii) Maintaining a camera that records activity in the banking office; and

(iii) Using identification devices, such as prerecorded serial-numbered bills, or chemical and electronic devices;

(3) Provide for initial and periodic training of officers and employees in their responsibilities under the security program and in proper employee conduct during and after a robbery, burglar or larceny; and

(4) Provide for selecting, testing, operating and maintaining appropriate security devices, as specified in paragraph (b) of this section.

(b) *Security devices.* Each institution shall have, at a minimum, the following security devices:

(1) A means of protecting cash or other liquid assets, such as a vault, safe, or other secure space;

(2) A lighting system for illuminating, during the hours of darkness, the area around the vault, if the vault is visible from outside the banking office;

(3) An alarm system or other appropriate device for promptly notifying the nearest responsible law enforcement officers of an attempted or perpetrated robbery or burglary;

(4) Tamper-resistant locks on exterior doors and exterior windows that may be opened; and

(5) Such other devices as the security officer determines to be appropriate, taking into consideration:

(i) The incidence of crimes against financial institutions in the area;

(ii) The amount of currency or other valuables exposed to robbery, burglary, and larceny;

(iii) The distance of the banking office from the nearest responsible law enforcement officers;

(iv) The cost of the security devices;

(v) Other security measures in effect at the banking office; and

(vi) The physical characteristics of the structure of the banking office and its surroundings.

§ 326.4 Reports.

The security officer for each institution shall report at least annually to the institution's board of directors on the implementation, administration, and effectiveness of the security program.

PART 391—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

Subpart A—Security Procedures

■ 3. The authority citation for part 391 is revised to read as follows:

Authority: 12 U.S.C. 1819(Tenth).

Subpart A—[Removed and Reserved]

■ 4. Remove and reserve subpart A consisting of §§ 391.1 through 391.5.

Dated at Washington, DC, this 19th day of October, 2016.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–26062 Filed 10–31–16; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9303; Directorate Identifier 2016–NM–093–AD]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Dassault Aviation Model FAN JET FALCON airplanes; all Model FAN JET FALCON SERIES C, D, E, F, and G airplanes; and all Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes. This proposed AD was prompted by a determination that inspections for discrepancies of the fuselage bulkhead are necessary. This proposed AD would require repetitive inspections for discrepancies of the fuselage bulkhead, and repair if necessary. We are proposing this AD to detect and correct discrepancies of the fuselage bulkhead; such discrepancies could result in the deterioration and failure of the bulkhead, which could result in rapid decompression of the airplane and consequent injury to occupants.

DATES: We must receive comments on this proposed AD by December 16, 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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9303; 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: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone: 425–227–1137; fax: 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9303; Directorate Identifier 2016–NM–093–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2016–0096, dated May 19, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Dassault Aviation Model FAN JET FALCON airplanes; all Model FAN JET FALCON SERIES C, D, E, F, and G airplanes; and all Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes. The MCAI states:

A detailed inspection (DET) of the fuselage bulkhead at frame (FR) 33 is established through a subset of inspection/check maintenance procedure referenced in the applicable aircraft maintenance manual (AMM), task 53–10–0–6 ''MAIN FRAME—INSPECTION/CHECK'', with periodicity established in Chapter 5–10, at every C-Check. Failure to accomplish this DET could lead to deterioration of the affected structure.

This condition, if not detected and corrected, could lead to bulkhead failure, possibly resulting in a rapid depressurization of the aeroplane and consequent injury to occupants.

For the reasons described above, this [EASA] AD requires repetitive DET of the bulkhead at FR33 [for discrepancies, such as buckling, deformations, cracks, loose countersinks, scratches, dents, and corrosion], and depending on findings, repair of the affected structure.

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–2016–9303.

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 these same type designs.

Costs of Compliance

We estimate that this proposed AD affects 133 airplanes of U.S. registry.

We also estimate that it would take about 8 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be $90,440, or $680 per product.

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Dassault Aviation: Docket No. FAA–2016–9303; Directorate Identifier 2016–NM–093–AD.

(a) Comments Due Date

We must receive comments by December 16, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Dassault Aviation airplanes specified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category, all manufacturer serial numbers.

(1) Model FAN JET FALCON and FAN JET FALCON SERIES C, D, E, F, and G airplanes.

(2) Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by a determination that inspections for discrepancies of the fuselage bulkhead at frame (FR) 33 are necessary. We are issuing this AD to detect and correct discrepancies of the fuselage bulkhead; such discrepancies could result in the deterioration and subsequent failure of the bulkhead, which could result in rapid decompression of the airplane and consequent injury to occupants.

(f) Compliance

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

(g) Repetitive Inspections

Before exceeding 5,000 total flight cycles since first flight of the airplane, or within 500 flight cycles after the effective date of this AD, whichever occurs later: Do a detailed inspection for discrepancies of the fuselage bulkhead at FR 33 using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature. Repeat the inspection thereafter at intervals not to exceed 5,000 flight cycles.

(h) Repair

If any discrepancy is found during any inspection required by paragraph (g) of this AD: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Dassault Aviation's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature. Repair of an airplane as required by this paragraph does not constitute terminating action for the repetitive actions required by paragraph (g) of this AD, unless specified otherwise in the repair instructions.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone: 425–227–1137; fax: 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) Contacting the Manufacturer: 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, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Dassault Aviation's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Related Information

Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2016–0096, dated May 19, 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–2016–9303.

Issued in Renton, Washington, on October 26, 2016.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–26325 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9302; Directorate Identifier 2016–NM–037–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Services B.V. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Fokker Services B.V. Model F28 Mark 0100 series airplanes equipped with Rolls-Royce TAY 650–15 engines. This AD was prompted by reports of uncontained engine fan blade failures in Rolls-Royce TAY 650–15 engines. The fan blade failures occurred due to cracking of the fan blades, which was initiated under conditions of fan blade flutter during engine ground operation. This proposed AD would require installation of a caution placard in the flight compartment. We are proposing this AD to prevent certain engine thrust settings during ground operation, which can cause the fan blades to flutter and fail, resulting in damage to the airplane and possible injury to personnel.

DATES: We must receive comments on this proposed AD by December 16, 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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone: +31 (0)88–6280–350; fax: +31 (0)88–6280–111; email: *technicalservices@fokker.com;* Internet *http://www.myfokkerfleet.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.

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–2016–9302; 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: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9302; Directorate Identifier 2016–NM–037–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive Airworthiness Directive 2013–0141, dated July 12, 2013 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for Fokker Services B.V. Model F28 Mark 0100 series airplanes equipped with Rolls-Royce TAY 650–15 engines. The MCAI states:

In the past, two F28 [Mark] 0100 aeroplanes with TAY [650–15] engines were involved in incidents as a result of uncontained engine fan blade failures. The fan blade failures occurred due to cracking of the fan blades, which was initiated under conditions of fan blade flutter. This fan blade flutter can occur during stabilized reverse thrust operation within a specific N1 RPM-range [revolutions per minute], known as Keep Out Zone (KOZ), which has been identified to be between 57% and 75% N1 RPM.

To address this potential unsafe condition [which can result in damage to the airplane and possible injury to personnel], CAA–NL issued AD (BLA) nr. 2002–119 for the aeroplane, while Luftfahrt-Bundesamt (LBA) Germany issued AD (LTA) 2002–090 (later revised) for the Rolls-Royce Tay [650–15] engines. More recently, LBA AD 2002–090R1 was superseded by EASA AD 2013–0070.

During stabilized forward thrust operation of an engine with the aeroplane stationary on the ground (*e.g.* maintenance engine ground running), the same type of fan blade flutter can occur. To ensure maintenance personnel awareness of the engine speed KOZ when performing engine ground running (in forward or reverse thrust), a caution placard must be introduced in the flight compartment.

For the reasons described above, this [EASA] AD requires the installation of a caution placard in the flight compartment, between the Standby Engine Indicator (SEI) and the Multi-Functional Display Unit (MFDU).

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–2016–9302.

Related Service Information Under 1 CFR Part 51

We reviewed Fokker Service Bulletin SBF100–11–027, dated April 18, 2013. This service information describes procedures for the installation of a caution placard.

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 4 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Install Placard	1 work-hour × $85 per hour = $85	$46	$131	$524

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Fokker Services B.V.: Docket No. FAA–2016–9302; Directorate Identifier 2016–NM–037–AD.

(a) Comments Due Date

We must receive comments by December 16, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Fokker Services B.V. Model F28 Mark 0100 series airplanes, certificated in any category, all serial numbers if equipped with Rolls-Royce TAY 650–15 engines.

(d) Subject

Air Transport Association (ATA) of America Code 11, Placards and Markings.

(e) Reason

This AD was prompted by reports of uncontained engine fan blade failures in Rolls-Royce TAY 650–15 engines. The fan blade failures occurred due to cracking of the fan blades, which was initiated under conditions of fan blade flutter during engine ground operation. We are issuing this AD to prevent certain engine thrust settings during ground operation, which can cause the fan blades to flutter and fail, resulting in damage to the airplane and possible injury to personnel.

(f) Compliance

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

(g) Install Caution Placard

Within 6 months after the effective date of this AD, install a caution placard in the flight compartment, between the standby engine indicator (SEI) and the multi-functional display unit (MFDU), in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–11–027, dated April 18, 2013.

Note 1 to paragraph (g) of this AD: Additional information can be found in Fokker All Operators Message AOF100.177 #05, dated April 18, 2013.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) Contacting the Manufacturer: 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, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Fokker Services B.V.'s EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(i) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2013–0141, dated July 12, 2013, 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–2016–9302.

(2) For service information identified in this AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone: +31 (0)88–6280–350; fax: +31

(0)88–6280–111; email: *technicalservices@fokker.com;* Internet *http://www.myfokkerfleet.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 25, 2016.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–26324 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9128; Directorate Identifier 2016–NE–19–AD]

RIN 2120–AA64

Airworthiness Directives; CFM International S.A. Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain CFM International S.A. (CFM) CFM56–5B turbofan engines. This proposed AD was prompted by reports of the failure of the radial drive shaft (RDS) on CFM CFM56–5B engines. This proposed AD would require removal of the RDS assembly and the RDS outer housing and their replacement with parts eligible for installation. We are proposing this AD to prevent failure of the RDS, which could lead to failure of one or more engines, loss of thrust control, and damage to the airplane.

DATES: We must receive comments on this proposed AD by December 16, 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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact CFM International Inc., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; phone: 877–432–3272; fax: 877–432–3329; email: *aviation.fleetsupport@ge.com.* 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.

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–2016–9128; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kyle Gustafson, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7183; fax: 781–238–7199; email: *kyle.gustafson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ‘‘Docket No. FAA–2016–9128; Directorate Identifier 2016–NE–19–AD’’ at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received 9 reports of failure of the RDS on CFM CFM56–5B engines. CFM has identified an affected population of RDSs suspected of generating unbalance levels that would lead to failure of the RDS bearing. This proposed AD would require removal of the RDS assembly and the RDS outer housing for the affected population. This condition, if not corrected, could result in failure of the RDS, which could lead to failure of one or more engines, loss of thrust control, and damage to the airplane.

Related Service Information Under 1 CFR Part 51

We reviewed CFM Service Bulletin (SB) CFM56–5B S/B 72–0934, dated August 1, 2016. The service information describes procedures for removal of the suspect RDS assembly and the RDS outer housing. 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

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

Proposed AD Requirements

This proposed AD would require removal of the RDS assembly and the RDS outer housing and their replacement with parts eligible for installation.

Differences Between This Proposed AD and the Service Information

CFM SB CFM56–5B S/B 72–0934, dated August 1, 2016, separates the affected RDS population into three batches with different removal dates for each batch. This proposed AD requires removal of the affected RDS assembly and RDS outer housing within 6 months of the effective date after this AD.

Costs of Compliance

We estimate that this proposed AD affects eight engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Removal and replacement of the RDS assembly and RDS outer housing.	6 work-hours × $85 per hour = $510	$37,000	$37,510	$300,080

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 to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

CFM International S.A.: Docket No. FAA–2016–9128; Directorate Identifier 2016–NE–19–AD.

(a) Comments Due Date

We must receive comments by December 16, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to CFM International S.A. (CFM) CFM56–5B series, CFM56–5B/P series, CFM56–5B/3 series, CFM56–5B/2P series, CFM56–5B/P1 series, CFM56–5B/2P1 series, and CFM56–5B/3B1 series engines with a radial drive shaft (RDS) serial number (S/N) listed in Appendix A of CFM Service Bulletin (SB) CFM56–5B S/B 72–0934, dated August 1, 2016, installed.

(d) Subject

Air Transport Association (ATA) of America Code 83, Accessory Gearboxes.

(e) Unsafe Condition

This AD was prompted by reports of the failure of the RDS on CFM CFM56–5B engines. We are issuing this AD to prevent failure of the RDS, which could lead to failure of one or more engines, loss of thrust control, and damage to the airplane.

(f) Compliance

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

Within 6 months after the effective date of this AD, remove the RDS assembly, part number (P/N) 305–165–101–0, and RDS outer housing, P/N 301–295–106–0, and replace with parts eligible for installation.

(g) Installation Prohibition

After the effective date of this AD, do not install on any engine an RDS with an S/N identified in Appendix A of CFM S/B No. CFM56–5B S/B 72–0934, dated August 1, 2016.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request. You may email your request to: *ANE-AD-AMOC@faa.gov.*

(i) Related Information

(1) For more information about this AD, contact Kyle Gustafson, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7183; fax: 781–238–7199; email: *kyle.gustafson@faa.gov.*

(2) CFM SB CFM56–5B S/B 72–0934, dated August 1, 2016, can be obtained from CFM using the contact information in paragraph (i)(3) of this proposed AD.

(3) For service information identified in this AD, contact CFM International Inc., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; phone: 877–432–3272; fax: 877–432–3329; email: *aviation.fleetsupport@ge.com.*

(4) 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.

Issued in Burlington, Massachusetts, on October 21, 2016.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2016–26010 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1327; Directorate Identifier 2012–NE–47–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede airworthiness directive (AD) 2014–16–

10 that applies to all Rolls-Royce plc (RR) RB211 Trent 768–60, 772–60, and 772B–60 turbofan engines. AD 2014–16–10 requires initial and repetitive ultrasonic inspections (UIs) of the affected low-pressure (LP) compressor blades. Since we issued AD 2014–16–10, RR issued revised service information to reduce the inspection threshold. This proposed AD would retain the UIs in AD 2014–16–10 while applying the revised inspection threshold. We are proposing this AD to prevent LP compressor blade airfoil separations, damage to the engine, and damage to the airplane.

DATES: We must receive comments on this proposed AD by December 16, 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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Rolls-Royce plc, P.O. Box 31, Derby DE24 8BJ, UK; phone: 44 0 1332 242424; fax: 44 0 1332 249936. 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.

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–2012–1327; 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 mandatory continuing airworthiness information, regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *robert.green@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this NPRM. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1327; Directorate Identifier 2012–NE–47–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. We will consider all comments received by the closing date and may amend this NPRM because of those comments.

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

Discussion

On August 1, 2014, we issued AD 2014–16–10, Amendment 39–17934 (79 FR 48961, August 19, 2014), (''AD 2014–16–10'') for all RR RB211 Trent 768–60, 772–60, and 772B–60 turbofan engines. AD 2014–16–10 requires initial and repetitive UIs of the affected LP compressor blades. AD 2014–16–10 resulted from LP compressor blade partial airfoil blade release events. We issued AD 2014–16–10 to prevent LP compressor blade airfoil separations, damage to the engine, and damage to the airplane.

Actions Since AD 2014–16–10 Was Issued

Since we issued AD 2014–16–10, RR issued Alert Non-Modification Service Bulletin (NMSB) RB.211–72–AH465, Revision 2, dated May 11, 2016. The Alert NMSB reduced the inspection threshold for UI of the LP compressor blades. Also since we issued AD 2014–16–10, the European Aviation Safety Agency (EASA) issued a correction to AD 2016–0141, dated July 20, 2016, requiring the revised inspection threshold.

Related Service Information Under 1 CFR Part 51

RR has issued Alert NMSB RB.211–72–AH465, Revision 2, dated May 11, 2016. The NMSB describes procedures for performing a UI of the LP compressor blades. 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

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

Proposed AD Requirements

This proposed AD would require initial and repetitive UIs of the affected LP compressor blades. This proposed AD would require conducting the UIs at a reduced inspection threshold.

Costs of Compliance

We estimate that this proposed AD affects 56 engines installed on airplanes of U.S. registry. We also estimate that it would take about 40 hours per engine to comply with this proposed AD. The average labor rate is $85 per hour. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be $190,400.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, 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) 2014–16–10, Amendment 39–17934 (79 FR 48961, August 19, 2014), and adding the following new AD:

Rolls-Royce plc: Docket No. FAA–2012–1327; Directorate Identifier 2012–NE–47–AD.

(a) Comments Due Date

We must receive comments by December 16, 2016.

(b) Affected ADs

This AD supersedes AD 2014–16–10, Amendment 39–17934 (79 FR 48961, August 19, 2014).

(c) Applicability

This AD applies to Rolls-Royce plc (RR) RB211 Trent 768–60, 772–60, and 772B–60 turbofan engines, with low-pressure (LP) compressor blade, part number (P/N) FK23411, FK25441, FK25968, FW11901, FW15393, FW23643, FW23741, FW23744, KH23403, or KH23404, installed.

(d) Unsafe Condition

This AD was prompted by LP compressor blade partial airfoil release events. We are issuing this AD to prevent LP compressor blade airfoil separations, damage to the engine, and damage to the airplane.

(e) Compliance

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

(1) Ultrasonic Inspection (UI) of LP Compressor Blade

(i) After the effective date of this AD, for LP compressor blades that have accumulated less than 1,800 cycles since new (CSN) or cycles since last inspection (CSLI), perform a UI of each LP compressor blade before the blade exceeds 2,400 CSN or CSLI. Repeat the UI of the blade before exceeding 2,400 CSLI.

(ii) For any LP compressor blade that exceeds 1,800 CSN on the effective date of this AD, inspect the blade before exceeding 600 flight cycles after the effective date of this AD or before exceeding 3,600 CSN, whichever occurs first. Thereafter, perform the repetitive inspections before exceeding 2,400 CSLI.

(iii) For any blade that exceeds 2,200 CSLI on September 23, 2014 (the effective date of AD 2014–16–10), inspect the blade before exceeding 3,000 CSLI or before further flight, whichever occurs later. Thereafter, perform the repetitive inspections before exceeding 2,400 CSLI.

(iv) Use paragraph 3, excluding subparagraphs 3.C.(2)(b), 3.D.(2) and 3.G, of RR Alert Non-Modification Service Bulletin (NMSB) RB.211–72–AH465, Revision 2, dated May 11, 2016, to perform the inspections required by this AD.

(2) Use of Replacement Blades

(i) After the effective date of this AD, LP compressor blade, P/N FK23411, FK25441, FK25968, FW11901, FW15393, FW23643, FW23741, FW23744, KH23403, or KH23404, that has accumulated at least 2,400 CSN or CSLI is eligible for installation if the blade has passed the UI required by this AD.

(ii) Reserved.

(f) Credit for Previous Actions

You may take credit for the UI required by paragraph (e) of this AD, if you performed the UI before the effective date of this AD using RR NMSB No. RB.211–72–G702, dated May 23, 2011; or RR NMSB No. RB.211–72–G872, Revision 2, dated March 8, 2013, or earlier revisions; or RR NMSB No. RB.211–72–H311, dated March 8, 2013; or the Engine Manual E-Trent-1RR, Task 72–31–11–200–806.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request. You may email your request to: *ANE-AD-AMOC@faa.gov.*

(h) Related Information

(1) For more information about this AD, contact Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *robert.green@faa.gov.*

(2) Refer to MCAI European Aviation Safety Agency AD 2016–0141, dated July 20, 2016, for more information. You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2012–1327.

(3) RR Alert NMSB RB.211–72–AH465, Revision 2, dated May 11, 2016, can be obtained from RR, using the contact information in paragraph (h)(4) of this AD.

(4) For service information identified in this AD, contact Rolls-Royce plc, P.O. Box 31, Derby DE24 8BJ, UK; phone: 44 0 1332 242424; fax: 44 0 1332 249936.

(5) 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.

Issued in Burlington, Massachusetts, on October 26, 2016.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2016–26334 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2016–0244; FRL–9954–76–Region 9]

Approval and Promulgation of Implementation Plans; State of California; Coachella Valley; Attainment Plan for 1997 8-Hour Ozone Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve state implementation plan (SIP) revisions submitted by the State of California to provide for attainment of the 1997 8-hour ozone national ambient air quality standards in the Coachella Valley nonattainment area. The EPA is proposing to find the emissions inventories to be acceptable and to approve the reasonably available control measures, transportation control strategies and measures, rate of progress and reasonable further progress demonstrations, attainment demonstration, vehicle miles traveled offset demonstration and the transportation conformity motor vehicle emission budgets.

DATES: Any comments must be submitted by December 1, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2016–0244 at *http://www.regulations.gov,* or via email to *kelly.thomasp@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

Docket: The index to the docket for this action is available electronically on the *www.regulations.gov* Web site and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California 94105. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available at either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section below.

FOR FURTHER INFORMATION CONTACT: Tom Kelly, Air Planning Office (AIR–2), U.S. Environmental Protection Agency, Region IX, (415) 972–3856, *kelly.thomasp@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. The 8-Hour Ozone Standards and the Coachella Valley Nonattainment Area

A. Background on the 8-Hour Ozone Standards

Ground-level ozone is formed when oxides of nitrogen (NO_X) and volatile organic compounds (VOC) react in the presence of sunlight.[1] These two pollutants, referred to as ozone precursors, are emitted by many types of pollution sources, including on- and off-road motor vehicles and engines, power plants and industrial facilities, and smaller area sources such as lawn and garden equipment and paints.

Scientific evidence indicates that adverse public health effects occur following exposure to ozone, particularly in children and adults with lung disease. Breathing air containing ozone can reduce lung function and inflame airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases. Ozone exposure also has been associated with increased susceptibility to respiratory infections, medication use, doctor visits, as well as emergency department visits and hospital admissions for individuals with lung disease. Ozone exposure also increases the risk of premature death from heart or lung disease. Children are at increased risk from exposure to ozone because their lungs are still developing and they are more likely to be active outdoors, which increases their exposure. *See* ''Fact Sheet, Proposal to Revise the National Ambient Air Quality Standards for Ozone'' (January 6, 2010); 75 FR 2938 (January 19, 2010).

In 1979, under section 109 of the Clean Air Act (CAA), the EPA established primary and secondary national ambient air quality standards (NAAQS or standards) for ozone at 0.12 parts per million (ppm) averaged over a 1-hour period. *See* 44 FR 8202 (February 8, 1979).

On July 18, 1997, the EPA revised the primary and secondary standards for ozone to set the acceptable level of ozone in the ambient air at 0.08 ppm, averaged over an 8-hour period (''1997 8-hour ozone standards''). *See* 62 FR 38856 (July 18, 1997). The EPA set the 1997 8-hour ozone standard based on scientific evidence demonstrating that ozone causes adverse health effects at lower concentrations and over longer periods of time than was understood when the previous 1-hour ozone standards were set. The EPA determined that the 1997 8-hour standards would be more protective of human health, especially for children and adults who are active outdoors, and individuals with a pre-existing respiratory disease, such as asthma.[2] In 2008, the EPA revised and strengthened the NAAQS for ozone by setting the acceptable level of ozone in the ambient air at 0.075 ppm, averaged over an 8-hour period. 73 FR 16436 (March 27, 2008). In 2015, the EPA further tightened the 8-hour ozone standards to 0.070 ppm. 80 FR 65292 (October 26, 2015). While the 1979 1-hour ozone standards and the 1997 8-hour ozone standards have been revoked, certain requirements that had applied under the revoked standards continue to apply under the anti-backsliding provisions of CAA section 172(e), including an approved attainment plan.

B. The Coachella Valley 8-Hour Ozone Nonattainment Area

Following promulgation of a new or revised NAAQS, the EPA is required by the CAA to designate areas throughout the nation as attaining or not attaining the standards. Effective June 15, 2004, we designated nonattainment areas for the 1997 8-hour ozone standards. *See* 69 FR 23858 (April 30, 2004). The designations and classifications for the 1997 8-hour ozone standards for California areas are codified at 40 CFR 81.305. In a rule governing certain facets of implementation of the 8-hour ozone

[1] California plans use the term Reactive Organic Gases (ROG) for VOC. These terms are essentially synonymous. For simplicity, we use the term VOC herein to mean either VOC or ROG.

[2] On March 27, 2008, the EPA revised and further strengthened the primary and secondary NAAQS for ozone by setting the acceptable level of ozone in the ambient air at 0.075 ppm, averaged over an 8-hour period (''2008 8-hour ozone standards''). *See* 73 FR 16436. On May 21, 2012, the EPA designated areas of the country with respect to the 2008 8-hour ozone standards. *See* 77 FR 30088 and 40 CFR 81.330. On October 1, 2015, the EPA again strengthened the primary and secondary NAAQS for ozone in ambient air to 0.070 ppm averaged over 8 hours. *See* 80 FR 65292. For nonattainment areas classified as ''serious'' under the 2008 ozone standards, such as the Coachella Valley, attainment SIPs were due on July 21, 2016. We will evaluate the 2008 attainment SIPs in the timeframes specified by the CAA. We have not yet set SIP submittal dates for the 2015 8-hour ozone standards. Today's action applies only to the 1997 8-hour ozone standards and does not address requirements for the 2008 and 2015 8-hour ozone standards.

standards (the Phase 1 Rule), the EPA classified the Coachella Valley as ''Serious'' for the 1997 8-hour ozone standards, with an attainment date no later than June 15, 2013. *See* 69 FR 23858 (April 30, 2004). On November 28, 2007, the California Air Resources Board (CARB or State) requested that the EPA reclassify the Coachella Valley 8-hour ozone nonattainment area from ''Serious'' to ''Severe-15.'' The EPA granted the reclassification, effective June 4, 2010, with an attainment date of not later than June 15, 2019. *See* 75 FR 24409 (May 5, 2010).

The Coachella Valley area is located within Riverside County. For a precise description of the geographic boundaries of the area, see 40 CFR 81.305. The Coachella Valley is under the jurisdiction of the South Coast Air Quality Management District (SCAQMD or District). The District and CARB are responsible for adopting and submitting a state implementation plan (SIP) to attain the 1997 8-hour ozone standards for nonattainment areas in their jurisdiction.

Air quality in the Coachella Valley has steadily improved in recent years. Design values have declined from 0.108 ppm in 2003 to 0.088 ppm in 2015.[3] Design values are used to designate and classify nonattainment areas, as well as to assess progress towards meeting the air quality standards.[4]

The Coachella Valley is downwind from the South Coast Air Basin, which is also regulated by the SCAQMD. The South Coast Air Basin's continued progress toward meeting the 1997 Ozone standards is critical to the Coachella Valley attaining the 1997 ozone standards. The SCAQMD's Final 2007 Air Quality Management Plan (2007 AQMP) states, ''pollutant transport from the South Coast Air Basin to the Coachella Valley is the primary cause of its ozone nonattainment status.''[5] The 2007 AQMP cites several studies that confirm the transport between the two air basins.[6] It also describes the late daily peak in ozone concentrations, 6:00 p.m. for Palm Springs, as indicative of pollution that has been transported. The 2007 AQMP states, ''if this peak [in ozone concentrations] were locally generated, it would be occurring near mid-day and not in the late afternoon or early evening.''[7] The 2007 AQMP also compares the relative magnitudes of VOC and NO_X emissions in the Coachella Valley and the South Coast Air Basin, showing average annual VOC emissions to be 30–40 times greater in the South Coast Air Basin than in the Coachella Valley, and average annual NO_X emissions to be more than 20 times greater in the South Coast Air Basin.[8]

II. CAA and Regulatory Requirements for Ozone Nonattainment SIPs

States must implement the 1997 8-hour ozone standards under Title 1, Part D of the CAA, which includes section 172, ''Nonattainment plan provisions,'' and subpart 2, ''Additional Provisions for Ozone Nonattainment Areas'' (sections 181–185).

In order to assist states in developing effective plans to address ozone nonattainment problems, the EPA issued an implementation rule for the 1997 8-hour ozone standards (''1997 Ozone Implementation Rule''). This rule was finalized in two phases. The first phase of the rule addressed classifications for the 1997 8-hour ozone standards, applicable attainment dates for the various classifications, and the timing of emissions reductions needed for attainment. *See* 69 FR 23951 (April 30, 2004). The second phase addressed SIP submittal dates and the requirements for reasonably available control technology and measures (RACT and RACM), reasonable further progress (RFP), modeling and attainment demonstrations, contingency measures, and new source review. *See* 70 FR 71612 (November 29, 2005). The rule was codified at 40 CFR part 51, subpart X.

The EPA announced the revocation of the 1997 8-hour ozone NAAQS and the anti-backsliding requirements that apply upon revocation, in a rulemaking that established final implementation rules for the 2008 8-hour ozone NAAQS. 80 FR 12264 (March 6, 2015). Consistent with the anti-backsliding provisions in CAA section 172(e), the EPA included anti-backsliding requirements that apply upon revocation of the 1997 8-hour ozone NAAQS. Notwithstanding revocation of the 1997 8-hour ozone NAAQS, areas that were designated as nonattainment for the 1997 8-hour ozone NAAQS at the time the standards were revoked continue to be subject to certain SIP requirements that had previously applied based on area classifications for the standards. *Id.* at 12296; 40 CFR 51.1105 and 51.1100(o). Thus, in general, the Coachella Valley remains subject to the requirements of the 1997 8-hour ozone NAAQS applicable to ''Severe'' nonattainment areas.

We discuss the CAA and regulatory requirements for 1997 8-hour ozone nonattainment plans in more detail below.

III. CARB's SIP Submittals To Address the 1997 8-Hour Ozone Standards in the Coachella Valley Nonattainment Area

A. CARB's SIP Submittals

Designation of an area as nonattainment starts the process for a state to develop and submit to the EPA a SIP providing for attainment of the NAAQS under title 1, part D of the CAA. For areas designated as nonattainment for the 1997 8-hour ozone NAAQS effective June 15, 2004, this attainment SIP was due by June 15, 2007. *See* CAA section 172(b). CARB made the following five SIP submittals to address the CAA planning requirements for attaining the 1997 8-hour ozone NAAQS for the Coachella Valley (and other areas as noted):

- ''Final 2007 Air Quality Management Plan,'' South Coast Air Quality Management District, June 2007 (2007 AQMP);[9]
- ''2007 State Strategy for the California State Implementation Plan,'' Release Date April 26, 2007 and Appendices A—G, CARB, Release Date May 7, 2007 (2007 State Strategy);[10]
- ''Status Report on the State Strategy for California's 2007 State Implementation Plan (SIP) and Proposed Revision to the SIP Reflecting Implementation of the 2007 State Strategy,'' CARB, Release Date: March 24, 2009 (2009 State Strategy Status Report);
- ''Progress Report on Implementation of $PM_{2.5}$ State

[3] Design values for 2000 to 2006 are contained in Figure 8–5 of the 2007 AQMP. Design values for 2005 to 2015 are contained in the Air Quality Subsystem (AQS) Preliminary Design Value Report for the Coachella Valley and Western Mojave Desert (September 7, 2016). These documents are in the docket for today's action.

[4] For more information about ozone design values, *see* 40 CFR 50, Appendix I.

[5] ''Final 2007 Air Quality Management Plan,'' South Coast Air Quality Management District, June 2007, *see* page 8–1.

[6] 2007 AQMP at 8–4 (citing R.W. Keith (SCAQMD) A Climatological/Air Quality Profile, California South Coast Air Basin, 1980; E.K. Kauper (Pollution Res. & Control Corp.), Coachella Valley Air Quality Study, Final Report, (County Contract & U.S. Public Health Service Grant No. 69–A–0610), 1971; P.J. Drivas and F.H. Shair, A Tracer Study of Pollutant Transport in the Los Angeles Area, Atmos. Environ. 8: 1155–1163. 4, 1974; T.B. Smith et al. (ARB Contract to MRI/Caltech), ''The Impact of Transport from the South Coast Air Basin on Ozone Levels in the Southeast Desert Air Basin,'' 1983).

[7] 2007 AQMP at 8–4.

[8] 2007 AQMP at 8–4, Table 8–2.

[9] *See* letter from James N. Goldstene, Executive Officer, CARB, to Wayne Nastri, Regional Administrator, EPA Region 9, November 28, 2007 with enclosures.

[10] *See* letter from James N. Goldstene, Executive Officer, CARB, to Wayne Nastri, Regional Administrator, EPA Region 9, November 16, 2007 with enclosures.

Implementation Plans (SIP) for the South Coast and San Joaquin Valley Air Basins and Proposed SIP Revisions,'' CARB, Release Date March 29, 2011 (2011 State Strategy Progress Report); and

- ''Staff Report, Proposed Updates to the 1997 8-Hour Ozone Standard, State Implementation Plans; Coachella Valley and Western Mojave Desert,'' CARB, Release Date: September 22, 2014 (2014 SIP Update).[11]

Additionally, on March 24, 2008, CARB submitted an Ozone Early Progress Plan[12] for several areas, including the Coachella Valley. The plan consisted of motor vehicle emissions budgets for transportation conformity. The EPA found the Coachella Valley NO_X and VOC budgets adequate for the 1997 ozone standards, effective May 22, 2008. *See* 73 FR 25694 (May 7, 2008).

In today's proposal, we refer to the portions of these documents relevant to the Coachella Valley collectively as the ''Coachella Valley Ozone Plan'' or ''the Plan.'' EPA has already approved portions of these documents in actions for other nonattainment areas.[13] Similarly, in today's proposal, we are evaluating and proposing action on only those portions of the 2007 AQMP that are relevant to attainment of the 1997 8-hour ozone NAAQS in the Coachella Valley. Below is a description of the portions that are relevant to the Coachella Valley.

2007 AQMP

The 2007 AQMP discusses attainment of the 1997 ozone NAAQS for both the South Coast Air Basin and Coachella Valley, and the 1997 p.m.2.5 NAAQS for the South Coast Air Basin. We are only acting on the ozone portions of the 2007 AQMP, and only on the portions applicable to the Coachella Valley, which includes the following sections of the 2007 AQMP: the emissions estimates, RFP demonstrations, and motor vehicle emission budgets for the Coachella Valley in Chapter 8; the detailed base and future emission inventories in Appendix III; the modeling for the attainment demonstration in Chapter 5 and Appendix V; the control strategy in Chapters 4 and 7; and the RACM discussion in Chapter 6 and Appendix VI.

State Strategy

The 2007 State Strategy, as amended by the 2009 State Strategy Status Report and 2011 State Strategy Progress Report, provides a RACM demonstration for mobile sources. The relevant portions of the 2007 State Strategy include Chapter 3, which describes California's SIP commitments, and Chapter 5, which lists individual measures in more detail, as part of the State's submittal. We note, however, that other portions of the 2007 State Strategy contain additional information relevant to Coachella Valley, such as emissions reductions from the Strategy contained in Appendix A. Appendix F of the 2011 State Strategy Progress Report provides revised control measure commitments and a revised rule implementation schedule for the 2007 AQMP.

2014 SIP Update

The 2014 SIP Update, which covers both the Coachella Valley and Western Mojave Desert 1997 8-hour ozone nonattainment areas, updates the following sections of the 2007 AQMP: emissions inventories; RFP demonstration, and vehicle miles travelled (VMT) offset demonstration. The 2014 SIP Update also updates the motor vehicle emissions budgets in the Ozone Early Progress Plan mentioned above. It also revises the attainment targets for NO_X and VOC emissions, using the same percentage reduction from the 2002 baseline as planned in the 2007 AQMP. Finally, the 2014 SIP Update (and 2007 AQMP) also contain contingency measures to be implemented in the event the area fails to meet an RFP milestone or fails to attain by the applicable date, as required by CAA section 172(c)(9). We are not proposing action on these contingency measures at this time. Contingency measures are a distinct provision of the Clean Air Act that we may act on separately from the attainment requirements.

B. CAA Procedural and Administrative Requirements for SIP Submittals

CAA sections 110(a)(1) and (2) and 110(l) require a state to provide reasonable public notice and opportunity for public hearing prior to the adoption and submittal of a SIP or SIP revision. To meet this requirement, every SIP submittal should include evidence that adequate public notice was given and an opportunity for a public hearing was provided consistent with the EPA's implementing regulations in 40 CFR 51.102.

The SCAQMD and CARB provided public notice and an opportunity for public comment through public comment periods, and held public hearings prior to adopting the components of the Coachella Valley Ozone Plan. Hearing and adoption dates are shown in Table 1. The SCAQMD's and CARB's submittals both include proof of publication for notices of the District's and CARB's public hearings, as evidence that all hearings were properly noticed. Therefore, we find the submittals meet the procedural requirements of CAA sections 110(a) and 110(l).

TABLE 1—AGENCIES AND ADOPTION DATES FOR THE COACHELLA VALLEY ATTAINMENT PLAN FOR THE 1997 OZONE STANDARDS

Agency/Submittal	Start of public notice	Hearing and adoption dates	Board resolution
SCAQMD/2007 AQMP	March 2, 2007	June 1, 2007	07–9
CARB/2007 State Strategy	May 7, 2007	June 21 and 22, 2007, and July 27, 2007	07–28
CARB/2007 AQMP	August 10, 2007	September 27, 2007	07–41
CARB/2009 State Strategy Status Report	March 24, 2009	April 23, 2009	09–34
CARB/2011 State Strategy Progress Report	March 29, 2011	April 28, 2011	11–24
CARB/2014 SIP Update	September 22, 2014	October 24, 2014	14–29

[11] *See* letter from Richard Corey, Executive Officer CARB, to Jared Blumenfeld, Regional Administrator, U.S. EPA, dated November 6, 2014 with enclosures.

[12] ''Early Progress Plans Demonstrating Progress Toward Attaining the 8-hour National Air Quality Standards for Ozone and Setting Transportation Conformity Budgets for Ventura County, Antelope Valley—Western Mojave Desert, Coachella Valley, Eastern Kern County, and Imperial County'' (revised), CARB (February 27, 2008).

[13] For example, portions of the 2007 AQMP, 2007 State Strategy, and the 2011 State Strategy Progress Report were approved in EPA actions on the SCAQMD Attainment Plan for the 1997 8-hour Ozone Standards. *See* 77 FR 12674 (March 1, 2012) and 79 FR 52539 (September 3, 2014).

CAA section 110(k)(1)(B) requires that the EPA determine whether a SIP submittal is complete within 60 days of receipt. This section of the CAA also provides that any plan that the EPA has not affirmatively determined to be complete or incomplete will be deemed complete by operation of law six months after the date of submittal. The EPA's SIP completeness criteria are found at 40 CFR part 51, Appendix V. The EPA's completeness determinations for each submittal are shown in Table 2.

TABLE 2—SUBMITTALS AND COMPLETENESS DETERMINATIONS FOR THE COACHELLA VALLEY OZONE PLAN

Submittal	Submittal date	Completeness date
2007 State Strategy	November 16, 2007	May 14, 2008.
2007 AQMP	November 28, 2007	May 26, 2008.
2009 State Strategy Status Report	August 12, 2009	February 8, 2010.
2011 State Strategy Progress Report	July 29, 2011	January 25 2012.
2014 SIP Update	November 6, 2014	May 5, 2015.

IV. Review of the Coachella Valley Ozone Plan

A. Emissions Inventories

1. Requirements for Emissions Inventories

CAA section 182(a)(1) requires each state with an ozone nonattainment area classified under subpart 2 to submit a ''comprehensive, accurate, current inventory of actual emissions from all sources'' of the relevant pollutants in accordance with guidance provided by the Administrator. While this inventory is not a specific requirement under the anti-backsliding provisions at 40 CFR 51.1105 and 51.1100(o), it provides support for demonstrations required under these anti-backsliding rules. Additionally, a baseline emissions inventory is needed for the attainment demonstration and for meeting RFP requirements. EPA's 1997 Ozone Implementation Rule identifies 2002 as the baseline year for the SIP planning emissions inventory. *See* 69 FR 23980 (October 27, 2004). EPA emissions inventory guidance sets specific planning requirements pertaining to future milestone years for reporting RFP and to attainment demonstration years.[14] Key RFP analysis years in the RFP demonstration include 2008 and every subsequent 3 years until the attainment date.

We have evaluated the emissions inventories in the Coachella Valley Ozone Plan to determine if they are consistent with EPA guidance and adequate to support the Plan's RACM, RFP, rate of progress (ROP) and attainment demonstrations.

2. Emissions Inventories in the Coachella Valley Ozone Plan

Appendix A of the 2014 SIP Update contains detailed emissions inventories for the Coachella Valley. A partial summary of this information is contained in Table 3. The average summer weekday emissions typical of the ozone season are used for the 2002 base year planning inventory and the 2018 attainment year.[15] These inventories incorporate reductions from federal, state, and district control measures received by CARB through September 2012.

TABLE 3—COACHELLA VALLEY NO_X AND VOC EMISSIONS INVENTORY SUMMARIES FOR THE 2002 BASE YEAR AND 2018 ATTAINMENT YEAR

[Average summer weekday emissions in tons per day] [a]

Category	NO_X		VOC	
	2002	2018	2002	2018
Stationary Sources	0.875	0.851	3.067	4.182
Area Sources	0.492	0.305	5.061	3.863
On-Road Mobile Sources	33.009	10.558	9.294	2.897
Other Mobile Sources	8.912	5.109	5.287	3.919
Totals [b]	43.287	16.823	22.709	14.861

[a] Source: 2014 SIP Update, Appendix A, Table A–1.
[b] Because of rounding conventions, source categories may not add to the exact emission totals.

The on-road motor vehicles inventory category consists of trucks, automobiles, buses, and motorcycles. California's model for estimating emissions from on-road motor vehicles operating in California is referred to as ''EMFAC'' (short for EMission FACtor). EMFAC has undergone many revisions over the years. At the time the 2014 SIP Update was submitted, EMFAC2011 was the model approved by the EPA for estimating on-road motor source emissions in California.[16] *See* 78 FR 14533 (March 6, 2013). Appendix D of the 2014 SIP Update contains the latest on-road motor vehicle summer planning VOC and NO_X inventories, vehicle population, VMT and trips for each

[14] ''Emission Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations'' (EPA–454/R–05–001, August 2005, updated November 2005) and ''Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standards—Phase 2'' (70 FR 71612).

[15] ''Attainment year'' refers to the ozone season immediately preceding a nonattainment area's attainment date. In the case of the Coachella Valley, the applicable attainment date is June 15, 2019, and the ozone season immediately preceding that date will occur in year 2018.

[16] EMFAC2011's approval is granted in 78 FR 14533. More recently, the EPA approved EMFAC2014 as the model for estimating on-road emissions. That approval allowed the continued use of EMFAC2011 until December 14, 2017. *See* 80 FR 77337.

EMFAC vehicle class category for the Coachella Valley. The motor vehicle emissions in the Plan are based on CARB's EMFAC2011 emission factor model and the latest planning assumptions from Southern California Association of Government's (SCAG's) 2012–2035 Regional Transportation Plan.[17]

The 2014 SIP Update contains off-road VOC and NO_X inventories developed by CARB using category-specific methods and models.[18] The off-road mobile source category includes aircraft, trains, ships, and off-road vehicles and equipment used for construction, farming, commercial, industrial, and recreational activities.

The stationary source category of the emissions inventory includes non-mobile, fixed sources of air pollution comprised of individual industrial, manufacturing, and commercial facilities. Examples of stationary sources (a.k.a., point sources) include fuel combustion (*e.g.,* electric utilities), waste disposal (*e.g.,* landfills), cleaning and surface coatings (*e.g.,* printing), petroleum production and marketing, and industrial processes (*e.g.,* chemical). Stationary source operators report to the District the process and emissions data used to calculate emissions from point sources. The District then enters the information reported by emission sources into the California Emission Inventory Development and Reporting System (CEIDARS) database.[19]

The area sources category includes aggregated emissions data from processes that are individually small and widespread or not well-defined point sources. The area source subcategories include solvent evaporation (*e.g.,* consumer products and architectural coatings) and miscellaneous processes (*e.g.,* residential fuel combustion and farming operations). Emissions from these sources are calculated from product sales, population, employment data, and other parameters for a wide range of activities that generate air pollution in the Coachella Valley.[20]

The emission inventories in the 2014 SIP Update use the California Emission Projection Analysis Model (CEPAM).[21] The CEPAM model used in the 2014 SIP Update is based on a 2008 baseline inventory developed using the methods and databases described above (*e.g.,* EMFAC2011; CEIDARS; and CARB modular off-road equipment updates such as the 2011 In-Use Off-Road Equipment model, Transportation Refrigeration Units model, and Cargo Handling Equipment model.). The inventory was calibrated to 2008 emissions and activity levels, and inventories for other years are back-cast (*e.g.,* 2002) or forecast (*e.g.,* 2018) using CEPAM from that base inventory.[22]

3. Proposed Action on the Emissions Inventories

We have reviewed the emissions inventories in the Coachella Valley Ozone Plan and the inventory methodologies used by the District and CARB for consistency with CAA section 182(a)(1) and EPA guidance. We find that the base year and projected attainment year inventories are comprehensive, accurate, and current inventories of actual and projected emissions of NO_X and VOC in the Coachella Valley as of the date of the submittal. Accordingly, we propose to find that these inventories provide an appropriate basis for the various other elements of the Coachella Valley Ozone Plan, including the RACM, ROP, RFP, and attainment demonstrations.

B. Reasonably Available Control Measures Demonstration and Adopted Control Strategy

1. RACM Requirements

CAA section 172(c)(1) requires that each attainment plan provide for the implementation of all reasonable available control measures as expeditiously as practicable and provide for attainment of the NAAQS. The RACM demonstration requirement is a continuing applicable requirement for the Coachella Valley under the EPA's anti-backsliding rules that apply once a standard has been revoked. *See* 40 CFR 51.1105(a)(1) and 51.1100(o)(17).

The EPA has previously provided guidance interpreting the RACM requirement in the ''General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990'' (''General Preamble'') [23] and in a memorandum entitled ''Guidance on Reasonably Available Control Measures (RACM) Requirements and Attainment Demonstration Submissions for the Ozone NAAQS,'' John Seitz, November 30, 1999 (Seitz memo).[24] In summary, EPA guidance provides that to address the requirement to adopt all RACM, states should consider all potentially reasonable control measures for source categories in the nonattainment area to determine whether they are reasonably available for implementation in that area and whether they would, if implemented individually or collectively, advance the area's attainment date by one year or more.[25]

Any measures that are necessary to meet these requirements that are not already either federally promulgated, part of the state's SIP, or otherwise creditable in SIPs must be submitted in enforceable form as part of a state's attainment plan for the area. CAA section 172(c)(6) requires nonattainment plans to include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standards in such area by the applicable attainment date. *See also* CAA section 110(a)(2)(A).

The purpose of the RACM analysis is to determine whether or not control measures exist that are economically and technically reasonable and that provide emissions reductions that

[17] SCAG's Regional Transportation Plan 2012–2035, including Amendment #1 and #2 and the Air Quality Conformity Analysis. April 2012. Federal Highway Administration approval July 15, 2013.

[18] Detailed information on CARB's off-road motor vehicle emissions inventory methodologies is found at: *http://www.arb.ca.gov/msei/categories.htm#offroad_motor_vehicles.*

[19] The CEIDARS database consists of two categories of information: source information and utility information. Source information includes the basic inventory information generated and collected on all point and area sources. Utility information generally includes auxiliary data, which helps categorize and further define the source information. Used together, CEIDARS is capable of generating complex reports based on a multitude of category and source selection criteria.

[20] Detailed information on the area-wide source category emissions is found on the CARB Web site: *http://www.arb.ca.gov/ei/areasrc/areameth.htm.*

[21] Appendix A of the 2014 SIP Update contains the estimated VOC and NO_X stationary, area-wide and off-road forecast summaries by Emission Inventory Code categories for the Coachella Valley from CEPAM. A CEPAM inventory tool was created to support the development of the 2012 $PM_{2.5}$ SIPs due at that time. The tool was designed to support all of the modeling, planning, and reporting requirements due at that time and includes updates for all the pollutants (*e.g.,* NO_X and VOC). Modeling results, which are summarized in Appendix A, are available separately in electronic file format.

[22] 2014 SIP Update, page A–1

[23] *See* 57 FR 13498, 13560. The General Preamble describes the EPA's preliminary view on how we would interpret various SIP planning provisions in title I of the CAA as amended in 1990, including those planning provisions applicable to the 1-hour ozone standards. The EPA continues to rely on certain guidance in the General Preamble to implement the 8-hour ozone standards under title I.

[24] Available at *www.epa.gov/ttn/oarpg/t1pgm.html.*

[25] *See* Seitz memo and General Preamble at 13560; *see also* ''State Implementation Plans; General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas,'' 44 FR 20372 (April 4, 1979) and Memorandum dated December 14, 2000, from John S. Seitz, Director, Office of Air Quality Planning and Standards, ''Additional Submission on RACM from States with Severe One-Hour Ozone Nonattainment Area SIPs.''

would advance the attainment date for nonattainment areas. The EPA defines RACM as any potential control measure for application to point, area, on-road and non-road emission source categories that: (1) Is technologically feasible; (2) is economically feasible; (3) does not cause ''substantial widespread and long-term adverse impacts''; (4) is not ''absurd, unenforceable, or impracticable''; and (5) can advance the attainment date by at least one year. General Preamble at 13560.

For ozone nonattainment areas classified as moderate or above, CAA section 182(b)(2) also requires implementation of RACT for all major sources of VOC and for each VOC source category for which the EPA has issued a Control Techniques Guidelines (CTG) document. CAA section 182(f) requires that RACT under section 182(b)(2) also apply to major stationary sources of NO_X. In Severe areas, a major source is a stationary source that emits or has the potential to emit at least 25 tons of VOC or NO_X per year. CAA section 182(d). Under the 8-hour ozone implementation rule, states were required to submit SIP revisions meeting the RACT requirements of CAA sections 182(b)(2) and 182(f) no later than 27 months after designation for the 8-hour ozone standards (September 15, 2006, for areas designated in April 2004) and to implement the required RACT measures no later than 30 months after that submittal deadline. *See* 40 CFR 51.912(a). The EPA has approved the RACT SIP for the SCAQMD for the 1997 ozone standards, which included rules applicable to the Coachella Valley. *See* 73 FR 76947 (December 18, 2008).

2. Control Strategy and RACM Demonstration in the Coachella Valley Ozone Plan

a. The District's RACM Demonstration

Appendix VI of the 2007 AQMP includes a RACM demonstration covering both the South Coast Air Basin and the Coachella Valley, which focuses on control measures for stationary and area sources. The process to identify RACM involved public meetings to solicit input, evaluation of the EPA's suggested RACM, and evaluation of air emissions rules in other areas (including the San Joaquin Valley, the San Francisco Bay Area, Sacramento, Ventura, Dallas-Fort Worth, the Houston-Galveston area and the Lake Michigan Air Directors Consortium). The District also reevaluated all 82 of its existing rules and regulations. The RACM evaluation process included a summit where CARB technical experts, local government representatives and the public suggested alternative ways to attain air quality standards. More than 200 potential control measures were identified. The District then screened the identified measures and rejected those that would not individually or collectively advance attainment in the area by at least one year, had already been adopted as rules, or were in the process of being adopted. The remaining measures were evaluated by taking into account baseline inventories, available control technologies, and potential emission reductions as well as whether the measure could be implemented on a schedule that would advance attainment of the 1997 8-hour ozone standards by at least a year.[26]

Based on this analysis, SCAQMD scheduled 16 new or revised stationary source control measures for development and adoption, including revisions to make SCAQMD rules at least as stringent as other California districts' rules and several innovative measures. Since submission of the AQMP in 2007, the SCAQMD has adopted 12 of these rules and submitted them to the EPA for approval into the SIP. Table 4 lists the measures identified in the 2007 AQMP,[27] with citations to the **Federal Register** notice that incorporates each measure into the SIP, where applicable. These rules are part of the District's enforceable commitment to achieve emissions reductions. However, the District acknowledged that its commitment to adopt any given rule might prove to be infeasible, meaning the control technology may not be available or achievement of the emissions reductions may not be cost effective. In adopting the 2007 AQMP, the SCAQMD Board committed to ''substitute any other measures as necessary to make up any emissions reduction shortfall.'' [28]

TABLE 4—STATUS OF RACM RULES IDENTIFIED IN SCAQMD 2007 AQMP

Control measure	Rule No.	Title	Ozone precursor controlled	Federal Register notice adopting rule into the SIP
CTS–01	1144	Metalworking fluids and direct-contact lubricants	VOC	76 FR 70888, 11/16/2011.
CTS–04	1143	Consumer Paint Thinners and Multi-Purpose Solvents	VOC	76 FR 70888, 11/16/2011.
CMB–01	1147	NO_X reductions from miscellaneous sources	NO_X	75 FR 46845, 08/04/2010.
CMB–03	1111	Further NO_X reductions from space heaters	NO_X	75 FR 46845, 08/04/2010.
FUG–02	461	Gasoline transfer and dispensing (VOC)	VOC	78 FR 21543, 04/11/2013.
FUG–04	1149	Storage Tank and Pipeline Cleaning and Degassing	VOC	74 FR 67821, 12/21/2009.
MCS–01	1110.2	Liquid and gaseous fuels—stationary ICEs (NO_X and VOC).	NO_X and VOC	74 FR 18995, April 27, 2009.
MCS–01	1146	NO_X from industrial, institutional, commercial boilers, steam generators, and process heaters.	NO_X	79 FR 57442, 09/25/2014.
MCS–01	1146.1	NO_X from small ind, inst, & commercial boilers, steam gens, and process heaters.	NO_X	79 FR 57442, 09/25/2014.
MCS–05	1127	Livestock waste (VOC)	VOC	78 FR 30768, 05/23/2013.
Measures not yet adopted or not approved in the SIP by EPA				
EGM–01	2301 (proposed)	Emissions reductions from new or redevelopment projects (Indirect Sources).	NO_X and VOC	No rule associated with this measure.[a]
FLX–02	n/a	Refinery pilot program (VOC)	VOC	No rule associated with this measure.
MOB–05	Title 13 Cal. Code of Regulations § 2622.	AB923 LDV high emitter program	NO_X and VOC	n/a.[b]

[26] 2007 AQMP, Appendix VI, page VI–1 and 2.

[27] 2007 AQMP, Tables 4–1, 4–2A and 4–2B.

[28] Attachment A of the 2007 AQMP, SCAQMD Board Resolution 07–9, dated June 1, 2007.

TABLE 4—STATUS OF RACM RULES IDENTIFIED IN SCAQMD 2007 AQMP—Continued

Control measure	Rule No.	Title	Ozone precursor controlled	Federal Register notice adopting rule into the SIP
MOB–06	Title 13 Cal. Code of Regulations § 2622.	AB923 MDV high emitter program	NO_X and VOC	n/a.[b]
n/a	2449	SOON program	NO_X	(proposed approval) 81 FR 12637, 03/10/2016.

[a] The District has not finalized Rule 2301.
[b] SCAQMD implements this program through CARB's Enhanced Fleet Modernization Program.
n/a = not applicable.

The EPA determined that the 2007 AQMP met the RACM requirement for the 1997 8-hour ozone standards in the South Coast Air Basin. *See* 77 FR 12674 (March 1, 2012).[29] CARB submitted a 2012 Air Quality Management Plan (2012 AQMP), developed by the SCAQMD, in February 2013 with additional information about the Coachella Valley, including data and discussion on air quality, pollutant transport, emissions inventories, attainment demonstration, and projections of future air quality.[30] For the 2012 AQMP, the SCAQMD followed a process similar to that used for the 2007 AQMP, which included public meetings to solicit input, evaluation of EPA's suggested RACM, and evaluation of other air agencies' regulations. *See* Appendix VI of the 2012 AQMP. The District states in the 2012 AQMP that ''the 2007 AQMP adequately addressed and satisfied the CAA planning requirements for ozone in the Coachella Valley, and this chapter [Chapter 7: Current & Future Air Quality—Desert Nonattainment Areas] is for information only.'' The 2012 AQMP does, however, include a new RACM demonstration. *See* Appendix VI of the 2012 AQMP. It includes new and revised rules for the District since the adoption of the 2007 AQMP. The EPA approved the RACM demonstration in the 2012 AQMP as a revision to the SIP for both the 1-hour and 1997 8-hour ozone standards for the South Coast Air Basin. *See* 79 FR 52526 (September 3, 2014). Many of the new rules have been incorporated into the SIP,[31] some have been proposed by the District but not incorporated into the SIP,[32] and others have yet to be proposed locally.

c. Local Jurisdiction RACM Demonstration

With respect to on-road mobile sources, we note that SCAG is the designated metropolitan planning organization (MPO) for a large portion of southern California, including Coachella Valley, and SCAG's membership includes local jurisdictions within the Coachella Valley. For the 2007 AQMP, SCAG evaluated a list of possible transportation control measures (TCMs) as one element of the larger RACM evaluation for the plan. TCMs are, in general, measures designed to reduce emissions from on-road motor vehicles through reductions in VMT or traffic congestion. SCAG's TCM development process is described in Appendix IV–C (''Regional Transportation Strategy and Control Measures'') of the 2007 AQMP, pages 49 to 55.

In our final action on the 2007 AQMP for the South Coast Air Basin, we concluded that the evaluation processes undertaken by SCAG were consistent with the EPA's RACM guidance and found that there were no additional RACM, including no additional TCMs that would advance attainment of the 1997 8-hour ozone standards in the South Coast Air Basin. *See* 76 FR 57872, at 57883 (September 16, 2011) (proposed rule); 77 FR 12674 (March 1, 2012) (final rule). More recently, we came to the same conclusion with respect to RACM and TCMs for the South Coast in our action on the ozone portion of the 2012 AQMP. *See* 79 FR 29712, at 29720 (May 23, 2014) (proposed rule); 79 FR 52526 (September 3, 2014) (final rule).

While TCMs are being implemented in the upwind South Coast Air Basin area to meet CAA requirements, neither the SCAQMD nor CARB rely on implementation of any TCMs in the Coachella Valley to demonstrate implementation of RACM in the Coachella Valley Ozone Plan. The SCAQMD and CARB justify the absence of TCMs in the Coachella Valley by reference to the significant influence of pollutant transport from the South Coast Air Basin on ozone conditions in the Coachella Valley. We agree that pollutant transport from the South Coast Air Basin is significant, and find that, given the influence of such transport and the minimal and diminishing emissions benefit generally associated with TCMs, no TCM or combination of TCMs implemented in the Coachella Valley would advance the attainment date in the Coachella Valley, and thus, no TCMs are reasonably available for implementation in the Coachella Valley for the purposes of meeting the RACM requirement. Lastly, we note that, while not required for CAA purposes, SCAG's most recent Regional Transportation Plan/Sustainable Communities Strategy (RTP/SCS) (April 2016) includes a list of projects for the Coachella Valley, some of which represent the types of projects often identified as TCMs, such as traffic signalization projects and bike lane projects. *See* the transportation system project list for Riverside County, attached as an appendix to SCAG's 2016–2014 RTP/SCS (April 2016), available at *http://scagrtpscs.net/Documents/2016/final/f2016RTPSCS_ProjectList.pdf.*

d. The State Strategy RACM Demonstration

CARB has primary responsibility for reducing emissions in California from new and existing on-road and off-road engines and vehicles, motor vehicle fuels, and consumer products. Given the need for significant emissions reductions from mobile sources to meet the ozone standards in California nonattainment areas, CARB has been a leader in the development of stringent control measures for on-road and off-road mobile sources, fuels and

[29] More recently, the EPA determined that the South Coast RECLAIM program did not meet RACM for $PM_{2.5}$ because it allowed facilities to delay installation of selective catalytic reduction (SCR) to control NO_X emissions. *See* 81 FR 22025 (April 14, 2016). Only two facilities in Coachella Valley are part of the RECLAIM program and both facilities have an oxidation catalyst and SCR on each gas turbine. The Title V Permits for these facilities are included in the administrative record for this action. Additionally, SCAQMD Rule 2005 requires all emissions sources at any new or relocated RECLAIM facility to apply the best available control technology.

[30] Final Air Quality Management Plan, February 2013, South Coast Air Quality Management District.

[31] For example, CMB–03: Reductions from Commercial Space Heating (Rule 1111) and FUG–02: Emission Reduction from LPG Transfer and Dispensing—Phase II (Rule 1177).

[32] For example, CMB–01: Further NO_X Reductions from RECLAIM.

consumer products. Because of this role, the 2007 AQMP identifies CARB's 2007 State Strategy as a key component of the control strategy necessary to attain the 1997 ozone standards. The 2007 State Strategy includes measures to reduce emissions from multiple sectors, including in-use heavy duty trucks, smog check improvements, reformulated gasoline, cleaner off-road equipment, cleaner consumer products, ships, harbor craft and port trucks. *See* 2007 State Strategy, Chapter 5.

CARB developed its 2007 State Strategy after an extensive public consultation process to identify potential SIP measures. From this process, CARB identified and committed to propose 15 new defined measures. These measures focus on cleaning up the in-use fleet as well as increasing the stringency of emissions standards for a number of engine categories, fuels, and consumer products. Many, if not most, of these measures have been adopted or are being proposed for adoption for the first time anywhere in the nation. They build on CARB's already comprehensive program described above that addresses emissions from all types of mobile sources and consumer products, through both regulations and incentive programs.

In adopting the 2007 State Strategy, CARB committed to reducing Coachella Valley NO_X emissions by 7 tons per day (tpd) and VOC emissions by 2 tpd through the implementation of measures identified in the 2007 State Strategy.[33] However, this proposed action does not rely on the NO_X and VOC commitments in the 2007 State Strategy, because the 2014 SIP Update shows that the Coachella Valley would meet the NO_X and VOC attainment and RFP goals, under existing rules received through September 2012.[34]

CARB adopted the 2009 State Strategy Status Report in April 2009. This submittal updated the 2007 State Strategy to reflect its implementation during 2007 and 2008, and also to reflect changes resulting from the adoption of the scoping plan mandated by Assembly Bill 32 that will help reduce ozone during SIP implementation.[35] The update also changes assumptions about economic conditions and the availability of incentive funds.[36] Finally, the 2007 State Strategy was revised to address approvability issues brought up by the EPA.[37]

CARB again revised the state strategy in the 2011 State Strategy Progress Report. While the changes primarily address attainment of the 1997 $PM_{2.5}$ standards, the 2011 State Strategy Progress Report also includes an appendix that updates the control measure adoption schedule and revises the emissions estimates to reflect changes made by CARB to the on-road truck and off-road equipment rules in 2010.[38]

We have previously determined that CARB's mobile source control programs constituted RACM for the attainment plan for the 1997 Ozone NAAQS in the South Coast Air Basin. *See* 77 FR 12674 (March 1, 2012). Since then, CARB has adopted additional mobile source control measures including the Advanced Clean Cars program (also known as the Low Emission Vehicle Program III or LEV–III), heavy-duty vehicle idling rules, revisions to CARB's in-use rules for on-road and non-road diesel vehicles, and emissions standards for non-road equipment, cargo handling equipment, and recreational vehicles. *See* 81 FR 39424 (June 18, 2016).

3. The EPA's Evaluation of the Control Strategy and RACM

For the Coachella Valley in 2017 (the year prior to the attainment year), the emissions inventory shows that nearly all of the locally generated NO_X emissions (93%) and nearly half of the VOC emissions (48%) derive from mobile sources.[39] Mobile source emissions are well controlled throughout California because of stringent control measures in place for on-road and off-road mobile sources and fuels. *See, e.g.,* 2007 State Strategy, p. 37. Additionally, as noted above, the EPA has already determined CARB's rules in the 2007 State Strategy, as revised in 2009 and 2011, meet RACM, and CARB continues to adopt new and more stringent mobile source rules. In view of the transport of pollutants into the Coachella Valley from the South Coast Air Basin (see discussion at section I.B above) and the extensive control of mobile sources by CARB, we propose to find that the Coachella Valley Ozone Plan provides for implementation of all RACM necessary to demonstrate expeditious attainment of the 1997 8-hour ozone standards in the Coachella Valley, consistent with the applicable requirements of CAA section 172(c)(1) and 40 CFR 51.1105(a)(1) and 51.1100(o)(17).

C. Attainment Demonstration

1. Requirements for Attainment Demonstrations

CAA section 182(c)(2)(A) requires states with ozone nonattainment areas classified as ''Serious'' or above to submit plans that demonstrate attainment of the ozone NAAQS as expeditiously as practicable but no later than the specified attainment date. For any ozone nonattainment area classified as serious or above, section 182(c)(2)(A) of the CAA specifically requires the State to submit a modeled attainment demonstration based on a photochemical grid modeling evaluation or any other analytical method determined by the Administrator to be at least as effective as photochemical modeling. The attainment demonstration requirement is a continuing applicable requirement for the Coachella Valley under the EPA's anti-backsliding rules that apply once a standard has been revoked. *See* 40 CFR 51.1105(a)(1) and 51.1100(o)(12).

For more detail on the requirements for modeling an 8-hour ozone attainment demonstration, see the Technical Support Document (TSD) for today's proposal. The modeling section of the TSD includes a complete list of applicable modeling guidance documents. These documents describe the components of the attainment demonstration, explain how the modeling and other analyses should be conducted, and provide overall guidance on the technical analyses for attainment demonstrations.

As with any predictive tool, inherent uncertainties are associated with photochemical grid modeling. The EPA's guidance recognizes these limitations and provides recommended approaches for considering other analytical evidence to help assess whether attainment of the NAAQS is likely. This process is called a weight of evidence (WOE) analysis.

The EPA's modeling guidance (updated in 1996, 1999, and 2002) discusses various WOE analyses. This guidance was updated again in 2005 and 2007 for the 1997 8-hour attainment demonstration procedures to include a WOE analysis as an integral part of any attainment demonstration. This guidance strongly recommends that all attainment demonstrations include supplemental analyses beyond the recommended modeling. These supplemental analyses can provide

[33] Board Resolution 07–28, CARB, September 27, 2007, page 7, Attachment B.

[34] 2014 SIP Update, page A–1.

[35] 2009 State Strategy Status Report, page v.

[36] 2009 State Strategy Status Report, page v.

[37] 2009 State Strategy Status Report, page 2.

[38] 2011 State Strategy Progress Report at Appendix F (''Revisions to 2007 $P.M._{2.5}$ and Ozone State Implementation Plan for South Coast Air Basin and Coachella Valley'') (March 2011).

[39] Based on data from Tables A–1 and A–2 of the 2014 SIP Update.

additional information such as data analyses, and emissions and air quality trends, which can help strengthen the conclusion based on the photochemical grid modeling.

2. 8-Hour Attainment Demonstration Modeling and Weight of Evidence Analysis in the South Coast 2007 AQMP

a. Photochemical Grid Modeling Attainment Demonstration Results

i. Photochemical Grid Model

The model selected for the 2007 AQMP attainment demonstrations is the Comprehensive Air Quality Model with Extensions (CAMx), version 4.4 (Environ, 2006), using Statewide Air Pollution Research Center-99 (SAPRC–99) gas phase mechanisms (Carter, 2000).[40] The modeling system (including the photochemical model, meteorological inputs, and chemical mechanism) is consistent with the previous advice of outside peer reviewers. CAMx is a state-of-the-art air quality model that can simulate ozone and $PM_{2.5}$ concentrations together in a ''one-atmosphere'' approach for attainment demonstrations. CAMx is designed to integrate the output from both prognostic and diagnostic meteorological models.

ii. Episode Selection

Six meteorological episodes from three years are used as the basis for the plan. An earlier modeling effort, contained in SCAQMD's 2003 Air Quality Management Plan, benefited from the intensive monitoring conducted under the 1997 Southern California Ozone Study (SCOS 1997) where the August 4–7, 1997, episode was the cornerstone of the modeling analysis. One of the primary modeling episodes used in the earlier modeling from August 5–6, 1997, was also selected for this plan. In addition, five episodes that occurred during the Multiple Air Toxics Exposure Study III (MATES–III) sampling program in 2004 (August 7–8) and 2005 (May 21–22, July 15–19, August 4–6, and August 27–28) were selected.[41] The TSD for today's proposal provides further information.

iii. Model Performance

The modeling for the Coachella Valley attainment demonstration uses the same approach used for the South Coast Air Basin attainment demonstration, which was based on an air quality modeling domain that covers the entire South Coast Air Basin, the Coachella Valley, and much of southern California. Model performance was evaluated in three zones in the South Coast Basin: The San Fernando Valley; the eastern San Gabriel, Riverside and San Bernardino Valleys; and Los Angeles and Orange County. Normalized Gross Bias, Normalized Gross Error, and Peak Prediction Accuracy were determined for each area. Although not a requirement for determining acceptable model performance, the performance statistics were compared to the EPA performance goals presented in guidance documents. The performance goals for Normalized Gross Error and Peak Prediction Accuracy were met in the eastern San Gabriel, Riverside and San Bernardino Valleys. In general, the statistic for bias (Normalized Gross Bias) tends to be negative, indicating that the model tends to slightly under-predict ozone. Based on the analysis, the SCAQMD concludes that model performance is acceptable for this application.

b. Modeling Approaches for the Coachella Valley Attainment Demonstration

CAMx simulations were conducted for the base year 2002, and future-year 2017 baseline and controlled emissions.[42] The ozone attainment demonstration relies on the use of site-specific relative response factors (RRFs) being applied to the 2002 weighted design values. The RRFs are determined from the future year controlled and the 2002 base year simulations. The initial screening for station days to be included in the attainment demonstration included the following criteria: (1) Having an observed concentration equaling or exceeding 85 parts per billion (ppb), and (2) a simulation predicted base year (1997, 2004 or 2005) concentration over 60 ppb. Additional criteria were added to the selection process as the simulations were evaluated. A minimum of five episode days are recommended to determine the site specific RRF. The TSD for today's action has more information regarding the rationale for our proposed approval of the Coachella Valley Ozone Plan modeling.

c. Results of Modeling

The attainment demonstration included in the 2007 AQMP indicates that the Coachella Valley will attain the federal 1997 8-hour ozone standards by the proposed attainment date of June 15, 2019. The 2007 AQMP projects the Coachella Valley air monitoring stations of Palm Springs and Indio to have 8-hour ozone design values of 75.9 ppb and 66.2 ppb respectively in the year 2017.[43] More recent modeling in the 2012 AQMP, as well as recent monitoring data, shows attainment by the 2018 attainment year. See the TSD for this action for more information.

d. Transport From the South Coast Air Basin

The South Coast Air Basin's continued progress toward meeting the 1997 ozone NAAQS is critical to the Coachella Valley's ability to attain the 1997 ozone standards. The Coachella Valley is downwind of the South Coast Air Basin, which is regulated by the SCAQMD. The 2007 AQMP states, ''pollutant transport from the South Coast Air Basin to the Coachella Valley is the primary cause of its ozone nonattainment status.'' The plan cites several studies that confirm the transport between the two air basins.[44]

3. The EPA's Evaluation and Proposed Conclusions on the Modeling Demonstration

We are proposing to approve an attainment date of June 15, 2019, which reflects a 2018 attainment year. This is based on our evaluation of the air quality modeling analyses in the 2007 AQMP and our WOE analysis. The WOE analysis considered the attainment demonstration from the 2012 AQMP and more recent ambient air quality monitoring data that were not available at the time SCAQMD performed the attainment modeling. The basis for our proposed approval is discussed in more detail in the TSD. The modeling shows significant reductions in ozone from the base period. The most recent ambient air quality data that we have reviewed indicate that the area is on track to attain the 1997 8-hour ozone standards by 2018.

Based on the analysis above and in the TSD, the EPA proposes to find that the air quality modeling in the 2007 AQMP provides an adequate basis for the RACM, RFP and attainment demonstrations in the Coachella Valley Ozone Plan, and is consistent with the applicable requirements of CAA section 182(c)(2)(a) and 40 CFR 51.1105(a)(1) and 51.1100(o)(12).

[40] Carter, W.P.L., May 8, 2000a. Documentation of the SAPRC–99 chemical mechanism for VOC reactivity assessment. Report to the California Air Resources Board, Contracts 92–329 and 95–308.

[41] Final Report, Multiple Air Toxics Exposure Study in the South Coast Air Basin (MATES–III), SCAQMD, September 2008.

[42] Future year controlled emissions were estimated from the baseline emissions using the CEPA control factors for the simulations, are given in Table V–4–4 of the 2007 South Coast AQMP, Appendix V.

[43] 2007 AQMP, Appendix V, page V–4–52, Table V–4–17.

[44] See footnote 6.

D. Rate of Progress and Reasonable Further Progress Demonstrations

1. Rate of Progress

a. Requirements

For areas classified as moderate or above, Section 182(b)(1) requires a SIP revision providing for rate of progress (ROP), defined as a one time, 15% actual VOC emission reduction during the six years following the baseline year 1990, or an average of 3% per year. For areas designated serious nonattainment or above, no further action is necessary if the area fulfilled its ROP requirement for the 1-hour standards (from 1990–1996). As the EPA explained in the 1997 Ozone Implementation Rule, 69 FR 23980 (October 27, 2004), for areas that did not meet the 15% ROP reduction for the 1-hour ozone standards, a state may notify the EPA that it wishes to rely on a previously submitted SIP (for the 1-hour ozone standards), or it may elect to submit a new or revised SIP (for the 1997 ozone standards) addressing the 15% ROP reduction. The ROP demonstration requirement is a continuing applicable requirement for the Coachella Valley under the EPA's anti-backsliding rules that apply once a standard has been revoked. *See* 40 CFR 51.1105(a)(1) and 51.1100(o)(4).

The CAA outlines and EPA guidance details the method for calculating the requirements for the 1990–1996 period. Section 182(b)(1) requires that reductions: (1) Be in addition to those needed to offset any growth in emissions between the base year and the milestone year; (2) exclude emission reductions from four prescribed federal programs (*i.e.,* the federal motor vehicle control program, the federal Reid vapor pressure (RVP) requirements, any RACT corrections previously specified by the EPA, and any inspection and maintenance (I/M) program corrections necessary to meet the basic I/M level); and (3) be calculated from an ''adjusted'' baseline relative to the year for which the reduction is applicable.

The adjusted base year inventory excludes the emission reductions from fleet turnover between 1990 and 1996 and from federal RVP regulations promulgated by November 15, 1990, or required under section 211(h) of the Act. The net effect of these adjustments is that states are not able to take credit for emissions reductions that would result from fleet turnover of current federal standard cars and trucks, or from already existing federal fuel regulations. However, the SIP can take full credit for the benefits of any new (*i.e.,* post-1990) vehicle emissions standards, as well as any other new federal or state motor vehicle or fuel program that will be implemented in the nonattainment area, including Tier 1 exhaust standards, new evaporative emissions standards, reformulated gasoline, enhanced I/M, California low emissions vehicle program, transportation control measures, etc.

While a SIP revision for attainment of the 1-hour ozone standards was submitted for the Southeast Desert area (*i.e.,* the Coachella Valley and Western Mojave Desert areas), we have not approved the ROP plan for the reduction of VOCs. We provided notice that the Southeast Desert has attained the 1-hour standards on April 15, 2015. *See* 80 FR 20166 (April 15, 2015). Per 40 CFR 51.1118, the RFP requirement (including the 15% ROP requirement for VOCs) no longer applies to the 1-hour ozone standards for the Southeast Desert area. Although the ROP provision is a one-time requirement, it remains in effect for the 1997 8-hour ozone standards. Therefore, the Coachella Valley SIP must demonstrate a 15% ROP for VOC reductions by 2008, from the 2002 baseline.

b. ROP Demonstration in the State Submittal

The 2014 SIP Update incorporates the ROP demonstration as an element of the RFP demonstration. We note that this approach is valid, but different from the organization of this notice, where we first, and separately, assess the ROP demonstration and then assess the RFP demonstration. *See* section IV.D.2 for the RFP assessment. VOC emissions from the RFP tables for the Coachella Valley (*see* Table C–1 in the 2014 SIP Update), were used to create Table 5 below. The revised 15% ROP VOC demonstration uses a 2002 average summer weekday emissions inventory as the base year inventory and addresses 2002–2008. Based on the progress of the VOC emissions reductions from 2002 to 2008, the State concluded the Coachella Valley met the ROP requirement for the 15% VOC reduction.

TABLE 5—15% RATE-OF-PROGRESS DEMONSTRATION FOR VOC EMISSIONS IN THE COACHELLA VALLEY [a]

VOC Emissions	Coachella (tpsd)
1. 2002 baseline inventory	22.7
2. 2008 remaining emissions	17.6
3. 2008 goal (remaining emissions after 15% ROP Reduction required from 2002 baseline)	19.3
4. ROP reduction achieved by 2008 (Compare Line 2 to Line 7)	Yes

[a] Source: 2014 SIP Update, Table C–1.

2. Reasonable Further Progress

a. Requirements

CAA sections 172(c)(2) and 182(b)(1) require plans for nonattainment areas to provide for RFP. RFP is defined in section 171(1) as ''such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable [NAAQS] by the applicable date.'' CAA section 182(c)(2)(B) requires ozone nonattainment areas classified as serious or higher to submit no later than 3 years after designation for the 8-hour ozone standards an RFP SIP providing for an average of 3% per year of VOC and/or NO_X emissions reductions for (*1*) the 6-year period immediately following the baseline year; and (*2*) all remaining 3-year periods after the first 6-year period out to the area's attainment date. The RFP requirement is a continuing applicable requirement for the Coachella Valley under the EPA's anti-backsliding rules that apply once a standard has been revoked. *See* 40 CFR 51.1105(a)(1) and 51.1100(o)(4).

CAA section 182(c)(2)(C) allows for the substitution of NO_X emission reductions in place of VOC reductions to meet the RFP requirements. According to the EPA's NO_X Substitution Guidance,[45] the substitution of NO_X reductions for VOC reductions must be done on a percentage basis, rather than a straight ton-for-ton exchange. There are two steps for substituting NO_X for VOC. First, an equivalency demonstration

[45] EPA Office of Air Quality Planning and Standards, ''NO_X Substitution Guidance,'' December 1993.

must show that the cumulative RFP emission reductions are consistent with the NO_X and VOC emission reductions determined in the ozone attainment modeling demonstration. Second, specified reductions in NO_X and VOC emissions should be accomplished in the interim period between the 2002 base year and the attainment date, consistent with the continuous RFP emission reduction requirement.

b. RFP Demonstration in the State Submittal

The 2014 SIP Update contains emissions estimates for the baseline, milestone and attainment years, and additional discussion of the RFP demonstration. *See* page 5 and Table C–1 in Appendix C. Table 6 below shows data from the RFP demonstration, with additional rows based on information provided by CARB. The 2014 SIP Update uses NO_X substitution beginning in milestone year 2014 to meet VOC emission targets. For the Coachella Valley, the State concluded that RFP demonstration meets the applicable requirements for each milestone year as well as the attainment year.

TABLE 6—CALCULATION OF RFP DEMONSTRATIONS FOR COACHELLA VALLEY [a]

VOC Emission calculations (tpd)	2002	2008	2011	2014	2017	2018
1. 2002 Baseline VOC	22.7	n/a	n/a	n/a	n/a	n/a
2. Non-creditable CA MVCP/RVP adjustments	n/a	1.1	1.5	1.8	1.9	2.0
3. RACT Corrections	0	0	0	0	0	0
4. Adjusted 2002 baseline VOC inventory (2002 Baseline VOC − Line 2 − Line 3)	n/a	21.6	21.2	20.9	20.8	20.7
5. RFP Commitment for VOC reductions from new measures	n/a	0	0	0	0	0
6. Future Year VOC with existing and proposed measures	n/a	17.6	15.0	15.8	15.8	15.9
7. Required VOC % change since previous milestone year, relative to 2002	n/a	15%	9%	9%	9%	3%
8. Required VOC reduction from 2002 adjusted baseline	n/a	15%	24%	33%	42%	45%
9. Target VOC Levels [b]	n/a	18.4	16.4	14.7	13.3	12.8
10. Apparent VOC Shortfall (Line 6 − Line 9)	n/a	−0.8	−1.3	1.2	2.6	3.2
11. Apparent % VOC shortfall (Line 10 ÷ Line 4	n/a	−3.7%	−6.4%	5.6%	12.7%	15.3%
12. VOC shortfall previously provided by NO_X substitution % (Line 13 of prior milestone year, or 0 if negative)	n/a	0	0	0	5.6%	12.7%
13. Actual VOC shortfall (Line 11 − Line 12)	n/a	−3.7%	−6.4%	5.6%	7.1%	2.5%
NO_X Emission calculations (tpd)	**2002**	**2008**	**2011**	**2014**	**2017**	**2018**
15. Baseline NO_X inventory	43.3	31.0	23.8	[c] 22.0	[c] 18.9	[c] 17.8
16. Non-creditable CA MVCP/RVP adjustments	n/a	1.6	2.0	2.2	2.3	2.3
17. Adjusted 2002 baseline NO_X inventory (Line 15 2002 baseline − Line 16)	n/a	41.7	41.3	41.1	41.0	40.9
18. RFP commitment for NO_X reductions from new measures	n/a	0	0	0	0	0
19. Calculated NO_X creditable reductions since 2002 (Line 17 − Line 18)	n/a	41.7	41.3	41.1	41.0	40.9
20. Change in NO_X since 2002 (Line 19 − Line 15)	n/a	10.6	17.5	19.1	22.1	23.1
21. Calculated % NO_X reductions since 2002 (Line 20 ÷ Line 19)	n/a	25.6%	42.3%	46.5%	53.9%	56.5%
22. NO_X previously used for VOC shortfall by NO_X substitution % (from Line 12)	n/a	0	0	0	5.6%	12.7%
23. NO_X substitution needed for VOC shortfall % (Same as Line 13, or 0 if Line 9 < 0)	n/a	0.0%	0.0%	5.6%	7.1%	2.5%
24. Forecasted % NO_X reduction surplus (Line 21 − Line 22 − Line 23)	n/a	25.6%	42.3%	40.9%	41.2%	41.3%
25. RFP achieved?	n/a	Yes	Yes	Yes	Yes	Yes

[a] Source: 2014 SIP Update, Table C–1.
[b] Target VOC levels for 2008 = (1 − Line 8) × (Line 4). In subsequent years, Target VOC = [(prior year Line 9 + prior year Line 2 − current year line 2) × (1 − current year line 7)].
[c] Estimated emissions include an additional 1 tpd safety margin for transportation conformity budget.
Note: Because of rounding conventions, values in table may not reflect the exact calculated quantity from the underlying numbers.

3. Proposed Action on the ROP and RFP Demonstrations

Based on our review of the ROP calculations in the 2014 SIP Update, summarized in Table 5 above, we conclude that the state has demonstrated that sufficient emission reductions have been achieved to meet the ROP requirements in 2008. And as shown in Table 6, the South Coast 2007 8-hour Ozone SIP provides for RFP in each milestone year, consistent with applicable CAA requirements and EPA guidance. We therefore propose to approve the ROP and RFP demonstrations under sections 182(b)(1) and 182(c)(2) of the CAA and 40 CFR 51.1105(a)(1) and 51.1100(o)(4).

E. Motor Vehicle Emissions Budgets for Transportation Conformity

1. Requirements for Motor Vehicle Emissions Budgets

CAA section 176(c) requires federal actions in nonattainment and maintenance areas to conform to the goals of SIPs. This means that such actions will not: (1) Cause or contribute to violations of a NAAQS, (2) worsen the severity of an existing violation, or (3) delay timely attainment of any NAAQS or any interim milestone.

Actions that involve Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funding or approval are subject to the EPA's transportation conformity rule, which is codified in 40 CFR part 93, subpart A. Under this rule, metropolitan planning organizations (MPOs) in nonattainment and maintenance areas coordinate with state and local air quality and transportation agencies, the EPA, FHWA, and FTA to demonstrate that an area's RTP and transportation improvement programs (TIP) conform to the applicable SIP. This demonstration is typically done by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emissions budgets (MVEBs or budgets) contained in the SIP. An attainment, RFP, or maintenance SIP establishes MVEBs for the attainment year, each required RFP year or last year of the maintenance plan, as appropriate. MVEBs are generally established for specific years and specific pollutants or precursors. Ozone attainment and RFP plans establish MVEBs for NO_X and VOC. *See* 40 CFR 93.102(b)(2)(i).

Before an MPO may use MVEBs in a submitted SIP, the EPA must first either determine that the MVEBs are adequate or approve the MVEBs. In order for us to find the MVEBs adequate and approvable, the submittal must meet the conformity adequacy requirements of 40 CFR 93.118(e)(4) and (5) and be approvable under all pertinent SIP requirements. To meet these requirements, the MVEBs must be consistent with the approvable attainment and RFP demonstrations and reflect all of the motor vehicle control measures contained in the attainment and RFP demonstrations. *See* 40 CFR 93.118(e)(4)(iii), (iv) and (v). For more information on the transportation conformity requirements and applicable policies on MVEBs, please visit our transportation conformity Web site at: *https://www.epa.gov/state-and-local-transportation.*

The EPA's process for determining adequacy of a MVEB consists of four basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the MVEB during a public comment period and responding to any comments that are submitted; (3) reviewing the submitted SIP to determine if it meets the adequacy criteria; and, (4) making a finding of adequacy or inadequacy. *See* 40 CFR 93.118.

2. MVEBs in the Coachella Valley Ozone Plan

The 2007 AQMP did not propose budgets for transportation conformity for the Coachella Valley. CARB submitted the 2008 Early Progress Plan, an amendment to the SIP, to establish MVEBs for many areas of California including the Coachella Valley.[46] Using EMFAC2007 (the 2007 version of the EMissions FACtor model), CARB set the 2012 MVEBs at 7 tpd for VOCs and 26 tpd for NO_X. We found the MVEB in the 2008 Early Progress Plan for the Coachella Valley to be adequate for transportation conformity purposes.[47] *See* 73 FR 25694 (April 16, 2008).

The 2014 SIP Update includes updated MVEBs.[48] As noted in Section IV.B.2 of this notice, the MVEBs were estimated using EMFAC2011, and the latest planning assumptions from SCAG, including *Amendment No. 1 to the 2012–2035 Regional Transportation Plan and Amendment No. 13–4 to the Federal Transportation Improvement Program.*[49] The emissions estimate also includes off-model adjustments to EMFAC2011 to account for the Advanced Clean Car regulations adopted by CARB and included in the SIP. *See* 81 FR 39424 (June 16, 2016).

The MVEBs are the projected on-road mobile source VOC and NO_X emissions in the Coachella Valley for baseline, milestone and attainment years. These budgets, shown in Table 7, include a 1 tpd safety margin, as allowed by the conformity rule. *See* 40 CFR 93.124(a).

TABLE 7—COACHELLA VALLEY MOTOR VEHICLE EMISSIONS BUDGETS IN THE 2014 SIP UPDATE

[tpd, average summer weekday] [a]

	NO_X			VOC		
	2014	2017	2018	2014	2017	2018
On-Road Inventory	14.79	11.39	10.74	3.72	3.07	2.93
Safety Margin	1	1	1	1	1	1
MVEBs [b]	16	13	12	5	5	4

[a] Source: 2014 SIP Update, Appendix D, Table D–1.
[b] Rounded up to the nearest ton.

[46] Early Progress Plans Demonstrating Progress Toward Attaining the 8-hour National Air Quality Standards for Ozone and Setting Transportation Conformity Budgets for Ventura County, Antelope Valley—Western Mojave Desert, Coachella Valley, Eastern Kern County, Imperial County, Revised: February 27, 2008, Release Date: February 27, 2008.

[47] Letter dated April 16, 2008 from Deborah Jordan to James Goldstene, California Air Resources Board, RE: Adequacy Status of Coachella Valley 8-hour Ozone Early Progress Plan Motor Vehicle Emissions Budgets.

[48] 2014 SIP Update, Table D–1.

[49] *See http://rtpscs.scag.ca.gov/Pages/Amendment-1.aspx.*

3. Proposed Action on the Budgets

As part of our review of the budgets' approvability, we have evaluated the revised budgets using our adequacy criteria in 40 CFR 93.318(e)(4) and (5). We found that the 2017 and 2018 budgets meet each adequacy criterion. We have completed our review of the 2014 SIP Update and are proposing to approve the SIP's attainment and RFP demonstrations. We have also reviewed the proposed budgets submitted with the 2014 SIP Update and have found that the 2017 and 2018 budgets are consistent with the attainment and RFP demonstrations, were based on control measures that have already been adopted and implemented, and meet all other applicable statutory and regulatory requirements including the adequacy criteria in 40 CFR 93.118(e)(4) and (5). Therefore, we are proposing to approve the 2017 and 2018 budgets as shown in Table 7.[50] Once these budgets are found adequate or are approved, the budgets for the 2008 early progress plan for 2012 will no longer be used in transportation conformity determinations. If finalized as proposed, the U.S. Department of Transportation and SCAG (the metropolitan planning organization for the area) would be required to use the new budgets in transportation conformity determinations.

F. Vehicle Miles Travelled Emissions Offset Demonstration

1. Requirements for a VMT Emissions Offset Demonstration

CAA section 182(d)(1)(A) requires a state with areas classified as ''Severe'' or ''Extreme'' to ''submit a revision that identifies and adopts specific enforceable transportation control strategies (TCSs) and TCMs to offset any growth in emissions from growth in VMT or numbers of vehicle trips in such area.'' Herein, we refer to the SIP requirement as the ''VMT emissions offset requirement,'' and the SIP revision intended to demonstrate compliance with the VMT emissions offset requirement as the ''VMT emissions offset demonstration.'' The VMT emissions offset requirement is a continuing applicable requirement for the Coachella Valley under the EPA's anti-backsliding rules that apply once a standard has been revoked. *See* 40 CFR 51.1105(a)(1) and 51.1100(o)(10).

CAA section 182(d)(1)(A) also includes two additional elements requiring that the SIP include: (1) TCSs and TCMs as necessary to provide (along with other measures) the reductions needed to meet the applicable RFP requirement, and (2) include strategies and measures to the extent needed to demonstrate attainment. As noted above, the first element of CAA section 182(d)(1)(A) requires that areas classified as ''Severe'' or ''Extreme'' submit a SIP revision that identifies and adopts TCSs and TCMs sufficient to offset any growth in emissions from growth in VMT or the number of vehicle trips.

In response to the Court's decision in *Association of Irritated Residents* v. *EPA,*[51] we issued a memorandum titled *Guidance on Implementing Clean Air Act Section 182(d)(1)(A): Transportation Control Measures and Transportation Control Strategies to Offset Growth in Emissions Due to Growth in Vehicle Miles Travelled* (August 2012 Guidance).[52] The August 2012 Guidance discusses the meaning of the terms TCSs and TCMs, and recommends that both TCSs and TCMs be included in the calculations made for the purpose of determining the degree to which any hypothetical growth in emissions due to growth in VMT should be offset. Generally, TCS is a broad term that encompasses many types of controls including, for example, motor vehicle emission limitations, I/M programs, alternative fuel programs, other technology-based measures, and TCMs, that would fit within the regulatory definition of ''control strategy.'' *See, e.g.,* 40 CFR 51.100(n). TCM is defined at 40 CFR 51.100(r) to mean ''any measure that is directed toward reducing emissions of air pollutants from transportation sources,'' including, but not limited to, measures listed in CAA section 108(f), and generally refers to programs intended to reduce the VMT, the number of vehicle trips, or traffic congestion, such as programs for improved public transit, designation of certain lanes for passenger buses and high-occupancy vehicles, trip reduction ordinances, and similar measures.

The August 2012 guidance also explains how states may demonstrate that the VMT emissions offset requirement is satisfied in conformance with the Court's ruling. It recommends states estimate emissions for the nonattainment area's base year and the attainment year. One emission inventory is developed for the base year, and three different emissions inventory scenarios are developed for the attainment year. Two of these scenarios would represent hypothetical emissions scenarios that would provide the basis to identify the ''growth in emissions'' due solely to the growth in VMT, and one that would represent projected actual motor vehicle emissions after fully accounting for projected VMT growth and offsetting emissions reductions obtained by all creditable TCSs and TCMs. The August 2012 guidance contains specific details on how states might conduct the calculations.

The base year on-road VOC emissions inventory should be based on VMT in that year and it should reflect all enforceable TCSs and TCMs in place in the base year. This would include vehicle emissions standards, state and local control programs such as I/M programs or fuel rules, and any additional implemented TCSs and TCMs that were already required by or credited in the SIP as of the base year.

The first of the emissions calculations for the attainment year would be based on the projected VMT and trips for that year, and assume that no new TCSs or TCMs beyond those already credited in the base year inventory have been put in place since the base year. This calculation demonstrates how emissions would hypothetically change if no new TCSs or TCMs were implemented, and VMT and trips were allowed to grow at the projected rate from the base year. This estimate would show the potential for an increase in emissions due solely to growth in VMT and trips, representing a no-action scenario. Emissions in the attainment year in this scenario may be lower than those in the base year due to fleet turnover to lower-emitting vehicles. Emissions may also be higher if VMT and/or vehicle trips are projected to sufficiently increase in the attainment year.

The second of the attainment year emissions calculations would also assume that no new TCSs or TCMs beyond those already credited have been put in place since the base year, but would also assume no growth in VMT and trips between the base year and attainment year. Like the no-action attainment year estimate described above, emissions in the attainment year may be lower than those in the base year due to fleet turnover, but the emissions would not be influenced by any growth

[50] Although the 2014 SIP Update contained MVEBs for 2014, 2017, and 2018, MVEBs for 2014 are no longer relevant for conformity analyses since that year has passed.

[51] 632 F.3d. 584, at 596–597 (9th Cir. 2011), reprinted as amended on January 27, 2012, 686 F.3d 668, further amended February 13, 2012 (ruling additional TCMs are required whenever vehicle emissions are projected to be higher than they would have been had VMT not increased, even when aggregate vehicle emissions are actually decreasing).

[52] Memorandum dated August 30 2012 from Karl Simon, Director, Transportation and Climate Division, Office of Transportation and Air Quality, to Carl Edlund, Director, Multimedia Planning and Permitting Division, EPA Region 6, and Deborah Jordan, Director, Air Division, EPA Region 9.

in VMT or trips. This emissions estimate, the VMT offset ceiling scenario, would reflect the maximum attainment emissions that should be allowed to occur under the statute as interpreted by the Court because it shows what would happen under a scenario in which no offsetting TCSs or TCMs have yet been put in place and VMT and trips are held constant during the period from the area's base year to its attainment year.

These two hypothetical status quo estimates are necessary steps in identifying target emission levels. These levels determine whether further TCMs or TCSs beyond those that have been adopted and implemented are needed to fully offset any increase in emissions due solely to VMT and vehicle trips identified in the no action scenario.

The third calculation incorporates the emissions that are actually expected to occur in the area's attainment year after taking into account reductions from all enforceable TCSs and TCMs that in reality were put in place after the baseline year. This estimate would be based on the VMT and trip levels expected to occur in the attainment year (*i.e.,* the VMT and trip levels from the first estimate) and all of the TCSs and TCMs expected to be in place and for which the SIP will take credit in the area's attainment year, including any TCMs and TCSs put in place since the base year. This represents the projected actual (attainment year) scenario. If this emissions estimate is less than or equal to the emissions ceiling that was established in the second of the attainment year calculations, the TCSs or TCMs for the attainment year would be sufficient to fully offset the identified hypothetical growth in emissions.

If the projected actual attainment year emissions are greater than the VMT offset ceiling established in the second of the attainment year emissions calculations even after accounting for post-baseline year TCSs and TCMs, the state would need to adopt and implement additional TCSs or TCMs. To meet the VMT offset requirement of section 182(d)(1)(A) as interpreted by the Court, the additional TCSs or TCMs would need to offset the growth in emissions and bring the actual emissions down to at least the same level as the attainment year VMT offset ceiling estimate.

2. The Coachella Valley VMT Emissions Offset Demonstration

The Coachella Valley VMT Offset demonstration is contained in Appendix E of the 2014 SIP Update. The State used EMFAC2011,[53] an EPA-approved motor vehicle emissions model for California, to estimate on-road emissions. The model calculates emissions from two combustion processes (*i.e.,* running exhaust and start exhaust) and four evaporative processes (*i.e.,* hot soak, running losses, diurnal losses, and resting losses). It combines trip-based VMT data from the regional transportation planning agencies (*i.e.,* SCAG), starts data based on household travel surveys, and vehicle population data from the California Department of Motor Vehicles. These sets of data are combined with corresponding emission rates to calculate emissions.

Emissions from running exhaust, start exhaust, hot soak, and running losses are a function of how much a vehicle is driven. As such, emissions from these processes are directly related to VMT and vehicle trips, and the State included emissions from them in the calculations that provide the basis for the revised Coachella Valley VMT emissions offset demonstration. The 2014 SIP Update (*see* page E–3) did not include emissions from resting loss and diurnal loss processes in the analysis because such emissions are related to vehicle population, rather than VMT or vehicle trips, and thus are not part of "any growth in emissions from growth in *vehicle miles traveled or numbers of vehicle trips* in such area" (emphasis added) under CAA section 182(d)(1)(A).

The VMT emissions offset demonstration also includes the previously described three different attainment year scenarios (*i.e.,* no action, VMT offset ceiling, and projected actual) for 2018. The State's selection of 2018 is appropriate given that the 2014 SIP Update demonstrates attainment by the applicable attainment date of June 15, 2019 based on the 2018 controlled emissions inventory. Table 8 summarizes the emissions estimate for the base year and the three scenarios discussed in Section IV.G.1.b.

TABLE 8—VMT EMISSIONS OFFSET INVENTORY SCENARIOS AND RESULTS FOR 1997 8-HOUR OZONE STANDARDS [a]

Scenario	VMT		Starts		Controls	VOC Emissions
	Year	1000 miles/day	Year	1000/day	Year	tpd
Base Year	2002	10,293	2002	1,248	2002	8
No Action	2018	14,329	2018	10,640	2002	4
VMT Offset Ceiling	2002	14,329	2002	7,935	2002	3
Projected Actual	2018	64,709	2018	10,640	2018	2

[a] Source: 2014 SIP Update, Appendix E.

For the base year scenario, CARB ran the EMFAC2011 model for the 2002 base year using VMT and starts data corresponding to those years. As shown in Table 8, the 2014 SIP Update estimates Coachella Valley VOC emissions to be 8 tpd in 2002.

For the no-action scenario, the State first identified the on-road motor vehicle control programs (*i.e.,* TCSs or TCMs) put in place since the base year and incorporated into EMFAC2011. Then, CARB ran EMFAC2011 with the VMT and starts data corresponding to the applicable attainment year (*i.e.,* 2018 for the 1997 8-hour ozone standards) without the emissions reductions from the on-road motor vehicle control programs put in place after the base year. Thus, the no action scenario reflects the hypothetical VOC

[53] More recently, the EPA approved EMFAC2014 as the model for estimating on-road emissions; however, that approval allowed the continued use of EMFAC2011 until December 14, 2017. *See* 80 FR 77337.

emissions that would occur in the attainment year in the nonattainment area if CARB had not put in place any additional TCSs or TCMs after 2002. As shown in Table 8, CARB estimates no action VOC emissions for Coachella Valley to be 4 tpd in 2018.

For the VMT offset ceiling scenario, the State ran the EMFAC2011 model for the attainment year but with VMT and starts data corresponding to base year values. Like the no- action scenario, the EMFAC2011 model was adjusted to reflect VOC emissions levels in the attainment year without the benefits of the on-road motor vehicle control programs implemented after the base year. Thus, the VMT offset ceiling scenario reflects hypothetical VOC emissions if the State had not put in place any TCSs or TCMs after the base year and if there had been no growth in VMT or vehicle trips between the base year and the attainment year. As shown in Table 8, CARB estimates VMT offset ceiling VOC emissions to be 3 tpd in 2018.

The hypothetical growth in emissions due to growth in VMT and trips can be determined from the difference between the VOC emissions estimates under the no action scenario and the corresponding estimate for the VMT offset ceiling scenario. Based on the values in Table 9, the hypothetical growth in emissions due to growth in VMT and trips in the Coachella Valley would have been 1 tpd (*i.e.,* 4 tpd minus 3 tpd) for the purposes of the revised VMT emissions offset demonstration for the 8-hour ozone standards. This hypothetical difference establishes the level of emissions caused by growth in VMT that need to be offset by the combination of post-baseline year TCMs and TCSs and any necessary additional TCMs and TCSs.

For the projected actual scenario calculation, the State included the emissions benefits from TCSs and TCMs [54] put in place since the base year. The most significant State on-road and fuels measures providing reductions during the 2002 to 2018 timeframe and relied upon for the VMT emissions offset demonstration include Low Emission Vehicles II and Zero Emissions Vehicle standards, California Reformulated Gasoline Phase 3, and Cleaner In-Use Heavy-Duty Trucks. Some of these measures were adopted prior to 2002, but all or part of the implementation occurred after 2002.[55] State measures adopted since 2007, as part of the 2009 State Strategy Status Report, and the associated reductions are also described in the IV.B.2.d of this notice. The 2014 SIP Update provides a list of CARB rules for mobile sources, since 1990 through the plan's development, in Table E–4.

3. The EPA's Evaluation of the VMT Emissions Offset Demonstration

The Coachella Valley VMT emissions offset demonstrations established 2002 as the base year for the purpose of the VMT emissions offset demonstration for the 1997 8-hour ozone standards. The base year for VMT emissions offset demonstration purposes should generally be the same base year used for nonattainment planning purposes. In today's action, the EPA is proposing to approve the 2002 base year inventory for Coachella Valley for the purposes of the 1997 8-hour ozone standards. Thus, CARB's selection of 2002 as the base year for the VMT emissions offset demonstration for the 1997 8-hour ozone standards is appropriate.

As shown in Table 8, the results from these calculations establish projected actual attainment-year VOC emissions of 2 tpd in the Coachella Valley for the 1997 8-hour standards demonstration. By comparing these values against the corresponding VMT offset ceiling value, we can determine whether additional TCMs or TCSs would need to be adopted and implemented to offset any increase in emissions due solely to VMT and trips. Because the projected actual emissions are less than the corresponding VMT offset ceiling emissions, the State's demonstration shows compliance with the VMT emissions offset requirement. This means that the adopted TCSs and TCMs are sufficient to offset the growth in emissions from the growth in VMT and vehicle trips in Coachella Valley for the 1997 8-hour ozone standards. Taking into account the creditable post-baseline year TCMs and TCSs, the demonstration shows Coachella Valley offset hypothetical growth in emissions due to growth in VMT by 2 tpd of VOC, which is more than the required 1 tpd offset.[56]

Based on our review of the 2014 SIP Update, we find the State's analysis to be acceptable and agree that the State has adopted sufficient TCSs and TCMs to offset the growth in emissions from growth in VMT and vehicle trips in the Coachella Valley for the purposes of the 1997 8-hour ozone standards. Thus we find that the VMT emissions offset demonstration for this area complies with the VMT emissions offset requirement in CAA section 182(d)(1)(A), consistent with 40 CFR 40 CFR 51.1105(a)(1) and 51.1100(o)(10). Therefore, we propose approval of the revised VMT emissions offset demonstration for the 1997 8-hour ozone standards, contained in the 2014 SIP Update, as a revision to the California SIP.

V. The EPA's Proposed Actions

A. The EPA's Proposed Approvals

For the reasons discussed above, the EPA is proposing to approve the Coachella Valley Ozone Plan for the 1997 8-hour ozone NAAQS. The Plan includes the relevant portions of the following documents: (1) ''Final 2007 Air Quality Management Plan,'' South Coast Air Quality Management District, June 2007; (2) CARB's ''2007 State Strategy for the California State Implementation Plan,'' Release Date April 26, 2007 and Appendices A–G, Release Date May 7, 2007; (3) CARB's ''Status Report on the State Strategy for California's 2007 State Implementation Plan (SIP) and Proposed Revision to the SIP Reflecting Implementation of the 2007 State Strategy,'' Release Date: March 24, 2009; (4) CARB's ''Progress Report on Implementation of $PM_{2.5}$ State Implementation Plans (SIP) for the South Coast and San Joaquin Valley Air Basins and Proposed SIP Revisions,'' Release Date March 29, 2011; and (5) CARB's ''Staff Report, Proposed Updates to the 1997 8-Hour Ozone Standard, State Implementation Plans; Coachella Valley and Western Mojave Desert,'' Release Date: September 22, 2014.

The EPA is proposing to approve the following elements of the Coachella Valley Ozone Plan under CAA section 110(k)(3):

1. The RACM demonstration as meeting the requirements of CAA section 172(c)(1) and 40 CFR 51.1105(a)(1) and 51.1100(o)(17);

2. The ROP and RFP demonstrations as meeting the requirements of CAA sections 172(c)(2) and 182(c)(2)(B) and 40 CFR 51.1105(a)(1) and 51.1100(o)(4);

3. The attainment demonstration as meeting the requirements of CAA section 182(c)(2)(A) and 40 CFR 51.1105(a)(1) and 51.1100(o)(12);

[54] The 2014 SIP Update states, ''there are no TCMs in the SIP for the Coachella Valley and Western Mojave Desert because upwind emissions from the South Coast Air Basin and Ventura County largely influence air quality in both the Coachella Valley and Western Mojave Desert. TCMs have been implemented by the SCAG in those upwind areas.'' (Appendix E, p. E–3)

[55] Appendix E of the SIP Update contains a full list of the TCSs adopted by the state since 1990.

[56] The offsetting VOC emissions reductions from the TCSs and TCMs put in place after the base year can be determined by subtracting the ''projected actual'' emissions estimates from the ''no action'' emissions estimates in table 8. For the purposes of the 8-hour ozone demonstration, the offsetting emissions reductions, 2 tpd (4 tpd minus 2 tpd), exceed the growth in emissions from growth in VMT and vehicle trips (1 tpd).

4. The demonstration that the SIP provides for transportation control strategies and measures sufficient to offset any growth in emissions from growth in VMT or the number of vehicle trips, and to provide for RFP and attainment, as meeting the requirements of CAA section 182(d)(1)(A) and 40 CFR 51.1105(a)(1) and 51.1100(o)(10).

We are also approving the revised MVEBs for RFP for 2017 and for the attainment year of 2018, because they are derived from approvable RFP and attainment demonstrations and meet the requirements of CAA sections 176(c) and 40 CFR part 93, subpart A.

B. Request for Public Comments

The EPA is soliciting public comments on the issues discussed in this document or on other relevant matters. We will accept comments from the public on this proposal for the next 30 days. We will consider these comments before taking final action.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities beyond those imposed by state law.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, will result from this action.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not impose additional requirements beyond those imposed by state law.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

List of Subjects in 40 CFR Part 52

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

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

Dated: October 19, 2016.

Alexis Strauss,

Acting Regional Administrator, EPA Region IX.

[FR Doc. 2016–26376 Filed 10–31–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R02–OAR–2016–0161; FRL–9954–59-Region 2]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; New York, New Jersey and Commonwealth of Puerto Rico; Other Solid Wsate Incineration Units (OSWIs)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to approve the Clean Air Act (CAA) section 111(d)/129 negative declaration for the States of New York and New Jersey and the Commonwealth of Puerto Rico,for other solid waste incineration units(OSWIs) units. Other solid waste incineration (OSWI) unit means either a very small municipal waste combustion unit or an institutional waste incineration unit within our regulations. This negative declaration certifies that existing OSWI units subject to sections 111(d) and 129 of the CAA do not exist within the jurisdiction of the Sates of New York and New Jersey or the Commonwealth of Puerto Rico. The EPA is accepting the negative declaration in accordance with the requirements of the CAA.

DATES: Comments must be received on or before December 1, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R02–OAR–2016—to *http://*

www.regulations.gov. Follow the online instructions for submitting comments.

Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Edward J. Linky, Environmental Protection Agency, Air Programs Branch, 290 Broadway New York, New York 1007–1866 at 212–637–3764 or by email at *linky.edward@epa.gov.*

SUPPLEMENTARY INFORMATION: In the final rules section of this **Federal Register**, the EPA is approving the State of New York's negative declaration submitted November 13, 2006, the State of New Jersey's negative declaration submitted April 5, 2006 and the Commonwealth of Puerto Rico's negative declaration submitted September 25, 2006 as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments to this action.

A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated in relation to this action. If the EPA receives adverse comments,the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed action. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

For additional information, see the direct final rule which is located in the rules section of this **Federal Register**.

List of Subjects in 40 CFR Part 62

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

Dated: October 3, 2016.

Judith A. Enck,

Regional Administrator, Region 2.

[FR Doc. 2016–26172 Filed 10–31–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 241

[EPA–HQ–OLEM–2016–0248; FRL–9953–38–OLEM]

RIN 2050–AG83

Additions to List of Section 241.4 Categorical Non-Waste Fuels: Other Treated Railroad Ties

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is proposing to issue amendments to the Non-Hazardous Secondary Materials rule, initially promulgated on March 21, 2011, and amended on February 7, 2013 and February 8, 2016, under the Resource Conservation and Recovery Act. The Non-Hazardous Secondary Materials rule generally established standards and procedures for identifying whether non-hazardous secondary materials are solid wastes when used as fuels or ingredients in combustion units. In the February 7, 2013 amendments, the EPA listed particular non-hazardous secondary materials as ''categorical non-waste fuels'' provided certain conditions are met. Persons burning these non-hazardous secondary materials do not need to evaluate them under the general self-implementing case-by-case standards and procedures that would otherwise apply to non-hazardous secondary materials used in combustion units. The February 8, 2016 amendments added three materials including creosote treated railroad ties to the list of categorical non-waste fuels. This action proposes to add other treated railroad ties to the list, which are processed creosote-borate, copper naphthenate and copper naphthenate-borate treated railroad ties, under certain conditions depending on the chemical treatment.

DATES: Comments must be received on or before January 3, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OLEM–2016–0248, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: George Faison, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, MC 5304P, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (703) 305–7652; email: *faison.george@epa.gov.*

SUPPLEMENTARY INFORMATION:

The following outline is provided to aid in locating information in this preamble.

I. General Information

A. List of Abbreviations and Acronyms Used in This Proposed Rule

Btu British thermal unit
C&D Construction and demolition
CAA Clean Air Act
CBI Confidential business information
CFR Code of Federal Regulations
CISWI Commercial and Industrial Solid Waste Incinerator
CTRT Cresosote-treated railroad ties
EPA U.S. Environmental Protection Agency
FR Federal Register
HAP Hazardous air pollutant
MACT Maximum achievable control technology
NAICS North American Industrial Classification System
ND Non-detect
NESHAP National emission standards for hazardous air pollutants
NHSM Non-hazardous secondary material
OMB Office of Management and Budget
PAH Polycyclic aromatic hydrocarbons
ppm Parts per million
RCRA Resource Conservation and Recovery Act
RIN Regulatory information number
RL Reporting Limits
SBA Small Business Administration
SO_2 Sulfur dioxide
SVOC Semi-volatile organic compound
TCLP Toxicity characteristic leaching procedure
UPL Upper prediction limit
U.S.C. United States Code
VOC Volatile organic compound

B. What is the statutory authority for this proposed rule?

The EPA is proposing that additional non-hazardous secondary materials (NHSMs) be categorically listed as non-waste fuels in 40 CFR 241.4(a) under the authority of sections 2002(a)(1) and 1004(27) of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. 6912(a)(1) and 6903(27). Section 129(a)(1)(D) of the Clean Air Act (CAA) directs the EPA to establish standards for Commercial and Industrial Solid Waste Incinerators (CISWI), which burn solid waste. Section 129(g)(6) of the CAA provides that the term ''solid waste'' is to be established by the EPA under RCRA (42 U.S.C. 7429(g)(6)). Section 2002(a)(1) of RCRA authorizes the Agency to promulgate regulations as are necessary to carry out its functions under the Act. The statutory definition of ''solid waste'' is stated in RCRA section 1004(27).

C. Does this proposed rule apply to me?

Categories and entities potentially affected by this action, either directly or indirectly, include, but may not be limited to the following:

GENERATORS AND POTENTIAL USERS [a] OF THE NEW MATERIALS PROPOSED TO BE ADDED TO THE LIST OF CATEGORICAL NON-WASTE FUELS

Primary industry category or sub category	*NAICS* [b]
Utilities	221
Construction of Buildings	236
Site Preparation Contractors	238910
Manufacturing	31, 32, 33
Wood Product Manufacturing	321
Sawmills	321113
Wood Preservation (includes crosstie creosote treating)	321114
Pulp, Paper, and Paper Products	322
Cement manufacturing	32731
Railroads (includes line haul and short line)	482
Scenic and Sightseeing Transportation, Land (Includes: railroad, scenic and sightseeing)	487110
Port and Harbor Operations (Used railroad ties)	488310
Landscaping Services	561730
Solid Waste Collection	562111
Solid Waste Landfill	562212
Solid Waste Combustors and Incinerators	562213
Marinas	713930

[a] Includes: Major Source Boilers, Area Source Boilers, and Solid Waste Incinerators.
[b] NAICS—North American Industrial Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities potentially impacted by this action. This table lists examples of the types of entities of which EPA is aware that could potentially be affected by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is affected by this action, you should examine the applicability criteria in this rule. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

D. What is the purpose of this proposed rule?

The RCRA statute defines ''solid waste'' as ''any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material* . . . resulting from industrial, commercial, mining, and agricultural operations, and from community activities.'' (RCRA section 1004(27) (emphasis added)). The key concept is that of ''discard'' and, in fact, this definition turns on the meaning of the phrase, ''other discarded material,'' since this term encompasses all other examples provided in the definition.

The meaning of ''solid waste,'' as defined under RCRA, is of particular importance as it relates to section 129 of the CAA. If material is a solid waste under RCRA, a combustion unit burning it is required to meet the CAA section 129 emission standards for solid waste incineration units. If the material is not a solid waste, combustion units are required to meet the CAA section 112 emission standards for commercial, industrial, and institutional boilers. Under CAA section 129, the term ''solid waste incineration unit'' is defined, in pertinent part, to mean ''a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments.'' 42 U.S.C. 7429(g)(1). CAA section 129 further states that the term ''solid waste'' shall have the meaning ''established by the Administrator pursuant to the Solid Waste Disposal Act.'' *Id* at 7429(g)(6). The Solid Waste Disposal Act, as amended, is commonly referred to as the Resource Conservation and Recovery Act or RCRA.

Regulations concerning NHSMs used as fuels or ingredients in combustion units are codified in 40 CFR part 241.[1] This action proposes to amend the Part 241 regulations by adding three NHSMs to the list of categorical non-waste fuels codified in § 241.4(a). These new proposed categorical listings are for:

- Creosote-borate railroad ties (and mixtures of creosote, copper naphthenate and copper naphthenate-borate railroad ties) that are processed and then combusted in units designed to burn both biomass and fuel oil. Such combustion must be part of normal operations and not solely as part of start-up or shut-down operations. Also included are units at major source pulp and paper mills or power producers[2] subject to 40 CFR part 63, subpart DDDDD that combust these types of treated railroad ties and had been designed to burn biomass and fuel oil, but are modified (*e.g.,* oil delivery mechanisms were removed) in order to use natural gas instead of fuel oil. Again, such combustion must be part of normal operations and not solely as part of start-up or shut-down operations. These treated railroad ties may continue to be combusted as product fuel in units that have been modified to use natural gas only if the following conditions are met, which are intended to ensure that these materials are not being discarded:
  - Must be burned in existing (*i.e.,* commenced construction prior to April 14, 2014) stoker, bubbling bed, fluidized bed, or hybrid suspension grate boilers; and
  - Can comprise no more than 40 percent of the fuel that is used on an annual heat input basis.
- Copper naphthenate railroad ties combusted in units designed to burn biomass, or biomass and fuel oil.
- Copper naphthenate-borate railroad ties combusted in units designed to burn biomass, or biomass and fuel oil.

II. Background

A. History of the NHSM Rulemakings

The Agency first solicited comments on how the RCRA definition of solid waste should apply to NHSMs when used as fuels or ingredients in combustion units in an advanced notice of proposed rulemaking (ANPRM), which was published in the **Federal Register** on January 2, 2009 (74 FR 41). We then published an NHSM proposed rule on June 4, 2010 (75 FR 31844), which the EPA made final on March 21, 2011 (76 FR 15456).

In the March 21, 2011 rule, the EPA finalized standards and procedures to be used to identify whether NHSMs are solid wastes when used as fuels or ingredients in combustion units. ''Secondary material'' was defined for the purposes of that rulemaking as any material that is not the primary product of a manufacturing or commercial process, and can include post-consumer material, off-specification commercial chemical products or manufacturing chemical intermediates, post-industrial material, and scrap (codified in 40 CFR 241.2). ''Non-hazardous secondary material'' is a secondary material that, when discarded, would not be identified as a hazardous waste under 40 CFR part 261 (codified in 40 CFR 241.2). Traditional fuels, including historically managed traditional fuels (*e.g.,* coal, oil, natural gas) and ''alternative'' traditional fuels (*e.g.,* clean cellulosic biomass) are not secondary materials and thus, are not solid wastes under the rule unless discarded (codified in 40 CFR 241.2).

A key concept under the March 21, 2011 rule is that NHSMs used as non-waste fuels in combustion units must meet the legitimacy criteria specified in 40 CFR 241.3(d)(1). Application of the legitimacy criteria helps ensure that the fuel product is being legitimately and beneficially used and not simply being discarded through combustion (*i.e.,* via sham recycling). To meet the legitimacy criteria, the NHSM must be managed as a valuable commodity, have a meaningful heating value and be used as a fuel in a combustion unit that recovers energy, and contain contaminants or groups of contaminants at concentrations comparable to (or lower than) those in traditional fuels which the combustion unit is designed to burn.

Based on these criteria, the March 21, 2011 rule identified the following NHSMs as not being solid wastes:

- The NHSM is used as a fuel and remains under the control of the generator (whether at the site of generation or another site the generator has control over) that meets the legitimacy criteria (40 CFR 241.3(b)(1));
- The NHSM is used as an ingredient in a manufacturing process (whether by the generator or outside the control of the generator) that meets the legitimacy criteria (40 CFR 241.3(b)(3));
- Discarded NHSM has been sufficiently processed to produce a fuel or ingredient that meets the legitimacy criteria (40 CFR 241.3(b)(4)); or
- Through a case-by-case petition process, it has been determined that the NHSM handled outside the control of the generator has not been discarded and is indistinguishable in all relevant aspects from a fuel product, and meets the legitimacy criteria (40 CFR 241.3(c)).

In October 2011, the Agency announced it would be initiating a new rulemaking proceeding to revise certain aspects of the NHSM rule.[3] On February 7, 2013, the EPA published a final rule, which addressed specific targeted amendments and clarifications to the 40 CFR part 241 regulations (78 FR 9112). These revisions and clarifications were limited to certain issues on which the Agency had received new information, as well as targeted revisions that the Agency believed were appropriate in order to allow implementation of the rule as the EPA originally intended. The amendments modified 40 CFR 241.2 and 241.3, added 40 CFR 241.4, and included the following:[4]

- *Revised Definitions:* The EPA revised three definitions discussed in the proposed rule: (1) ''clean cellulosic

[1] *See* 40 CFR 241.2 for the definition of non-hazardous secondary material.

[2] 40 CFR 241.2 defines power producer as a boiler unit producing electricity for sale to the grid. The term does not include units meeting the definition of electricity generating unit under 40 CFR 63.10042 of the Utility Mercury and Air Toxics Standards rule.

[3] *See* October 14, 2011, Letter from Administrator Lisa P. Jackson to Senator Olympia Snowe. A copy of this letter is in the docket for the February 7, 2013 final rule (EPA–HQ–RCRA–2008–1873).

[4] *See* 78 FR 9112 (February 7, 2013) for a discussion of the rule and the Agency's basis for its decisions.

biomass,'' (2) ''contaminants,'' and (3) ''established tire collection programs.'' In addition, based on comments received on the proposed rule, the Agency revised the definition of ''resinated wood.''

• *Contaminant Legitimacy Criterion for NHSMs Used as Fuels:* The EPA issued revised contaminant legitimacy criterion for NHSMs used as fuels to provide additional details on how contaminant-specific comparisons between NHSMs and traditional fuels may be made.

• *Categorical Non-Waste Determinations for Specific NHSMs Used as Fuels.* The EPA codified determinations that certain NHSMs are non-wastes when used as fuels. If a material is categorically listed as a non-waste fuel, persons that generate or burn these NHSMs will not need to make individual determinations, as required under the existing rules, that these NHSMs meet the legitimacy criteria. Except where otherwise noted, combustors of these materials will not be required to provide further information demonstrating their non-waste status. Based on all available information, the EPA determined the following NHSMs are not solid wastes when burned as a fuel in combustion units and has categorically listed them in 40 CFR 241.4(a).[5]

—Scrap tires that are not discarded and are managed under the oversight of established tire collection programs, including tires removed from vehicles and off-specification tires;
—Resinated wood;
—Coal refuse that has been recovered from legacy piles and processed in the same manner as currently-generated coal that would have been refuse if mined in the past;
—Dewatered pulp and paper sludges that are not discarded and are generated and burned on-site by pulp and paper mills that burn a significant portion of such materials where such dewatered residuals are managed in a manner that preserves the meaningful heating value of the materials.

• *Rulemaking Petition Process for Other Categorical Non-Waste Determinations:* EPA made final a process in 40 CFR 241.4(b) that provides persons an opportunity to submit a rulemaking petition to the Administrator, seeking a determination for additional NHSMs to be categorically listed in 40 CFR 241.4(a) as non-waste fuels, if they can demonstrate that the NHSM meets the legitimacy criteria or, after balancing the legitimacy criteria with other relevant factors, EPA determines that the NHSM is not a solid waste when used as a fuel.

The February 8, 2016 amendments (81 FR 6688) added the following to the list of categorical non-waste fuels:

• Construction and demolition (C&D) wood processed from C&D debris according to best management practices. Under this listing, combustors of C&D wood must obtain a written certification from C&D processing facilities that the C&D wood has been processed by trained operators in accordance with best management practices. Best management practices must include sorting by trained operators that excludes or removes the following materials from the final product fuel: Non-wood materials (*e.g.,* polyvinyl chloride and other plastics, drywall, concrete, aggregates, dirt, and asbestos), and wood treated with creosote, pentachlorophenol, chromated copper arsenate, or other copper, chromium, or arsenical preservatives. Additional required best management practices address removal of lead-painted wood.

• Paper recycling residuals generated from the recycling of recovered paper, paperboard and corrugated containers and combusted by paper recycling mills whose boilers are designed to burn solid fuel.

• Creosote-treated railroad ties (CTRT) that are processed (which includes metal removal and shredding or grinding at a minimum) and then combusted in the following types of units:

◦ Units designed to burn both biomass and fuel oil as part of normal operations and not solely as part of start-up or shut-down operations, and

◦ Units at major source pulp and paper mills or power producers subject to 40 CFR part 63, subpart DDDDD, that combust CTRTs and had been designed to burn biomass and fuel oil, but are modified (*e.g.,* oil delivery mechanisms are removed) in order to use natural gas instead of fuel oil, as part of normal operations and not solely as part of start-up or shut-down operations. The CTRTs may continue to be combusted as product fuel only if the following conditions are met, which are intended to ensure that the CTRTs are not being discarded: CTRTs must be burned in existing (*i.e.,* commenced construction prior to April 14, 2014) stoker, bubbling bed, fluidized bed, or hybrid suspension grate boilers; and, CTRTs can comprise no more than 40 percent of the fuel that is used on an annual heat input basis.

Based on these non-waste categorical determinations, as discussed previously, facilities burning NHSMs that meet the categorical listing description will not need to make individual determinations that the NHSM meets the legitimacy criteria or provide further information demonstrating their non-waste status on a site-by-site basis, provided they meet the conditions of the categorical listing.

B. Background to This Proposed Rule

The Agency received a petition from the Treated Wood Council (TWC) in April 2013 requesting that nonhazardous treated wood (including borate and copper naphthenate) be categorically listed as non-waste fuels in 40 CFR 241.4(a). Under the April 2013 petition, nonhazardous treated wood would include: Waterborne borate based preservatives; waterborne organic based preservatives; waterborne copper based wood preservatives (ammoniacal/alkaline copper quat, copper azole, copper HDO, alkaline copper betaine, or copper naphthenate); creosote; oilborne copper naphthenate; pentachlorophenol; or dual-treated with any of the above.

In the course of EPA's review of the April 2013 petition, additional data was requested and received, and meetings were held between TWC and EPA representatives. Overall, the EPA review determined that there were limited data points available and the analytical techniques for some contaminants were not appropriate to provide information on the entire preserved wood sample as it would be combusted. EPA also questioned the representativeness of the samples being analyzed and the repeatability of the analyses.

In the subsequent August 21, 2015 letter from TWC to Barnes Johnson,[6] TWC requested that the Agency move forward on a subset of materials that were identified in the original April 2013 petition which are creosote borate, copper naphthenate, and copper naphthenate-borate treated railroad ties. In the letter, TWC indicated that these types of ties are increasingly being used as alternatives to CTRT, due, in part, to lower overall contaminant levels and that the ability to reuse the ties is an important consideration in rail tie purchasing decisions. Information from industry also claimed that these

[5] In the March 21, 2011 NHSM rule (76 FR 15456), EPA identified two NHSMs as not being solid wastes, although persons would still need to make individual determinations that these NHSMs meet the legitimacy criteria: (1) Scrap tires used in a combustion unit that are removed from vehicles and managed under the oversight of established tire collection programs and (2) resinated wood used in a combustion unit. However, in the February 2013 NHSM rule, the Agency amended the regulations and listed these NHSMs as categorical non-waste fuels.

[6] Included in the docket for the February 2016 final rule. Follow-up meetings were also held with TWC on September 14, 2015 and December 17, 2015 summaries of which are also included in that docket.

treatments have proven to increase decay resistance for ties in severe decay environments and for species that are difficult to treat with creosote alone.[7] The letter stated that TWC will discuss the remaining treated wood materials with EPA as a separate matter.

The Agency reviewed TWC's information on the three treated railroad ties, creosote borate, copper naphthenate, and copper naphthenate-borate, submitted on September 11, 2015 and requested additional contaminant data, which was submitted on October 5, 2015 and October 19, 2015.[8] Based on that information, we stated in the February 2016 final rule that we believe these three treated railroad ties are candidates for categorical non-waste listings and expected to begin development of a proposed rule under 40 CFR 241.4(a) regarding those listings in the near future. The result is this proposal.

C. How will EPA make categorical non-waste determinations?

The February 7, 2013 revisions to the NHSM rule discuss the process and decision criteria whereby the Agency would make additional categorical non-waste determinations (78 FR 9158). While the categorical non-waste determinations in this action are not based on rulemaking petitions, the criteria the EPA used to assess these NHSMs as categorical non-wastes match the criteria to be used by the Administrator to determine whether to grant or deny the categorical non-waste petitions.[9] [10] These determinations follow the criteria set out in 40 CFR 241.4(b)(5) to assess additional categorical non-waste petitions and follow the statutory standards as interpreted by the EPA in the NHSM rule for deciding whether secondary materials are wastes. Those criteria include: (1) Whether each NHSM has not been discarded in the first instance (*i.e.*, was not initially abandoned or thrown away) and is legitimately used as a fuel in a combustion unit or, if discarded, has been sufficiently processed into a material that is legitimately used as a fuel; and, (2) if the NHSM does not meet the legitimacy criteria described in 40 CFR 241.3(d)(1), whether the NHSM is integrally tied to the industrial production process, the NHSM is functionally the same as the comparable traditional fuel, or other relevant factors as appropriate.

Based on the information in the rulemaking record, the Agency is proposing to amend 40 CFR 241.4(a) by listing in addition to CTRT, three other types of treated railroad ties as categorical non-wastes. Specific determinations regarding these other treated railroad ties (OTRT), *i.e.*, creosote-borate, copper naphthenate, copper naphthenate-borate and mixtures of creosote, borate and copper naphthenate treated railroad ties, as categorical non-wastes, and how the information was assessed by EPA according to the criteria in 40 CFR 241.4(b)(5), are discussed in detail in section III of this preamble.

The rulemaking record for this rule (*i.e.*, EPA–HQ–RCRA–2016–0248) includes those documents and information submitted specifically to support the categorical listings discussed in this rule. However, the principles on which the categorical listings are determined are based on the NHSM rules promulgated over the past few years, as discussed previously. While EPA is not formally including in the record for this rule materials supporting the earlier NHSM rulemaking proceedings, the Agency is nevertheless issuing this rule consistent with the NHSM rule and its supporting documents. This rulemaking proceeding in no way reopens any issues resolved in previous NHSM rulemaking proceedings. It simply responds to a petition in accordance with the standards outlined in the existing NHSM rule.

III. Proposed Categorical Non-Waste Listing Determination for OTRTs

The following sections describe the OTRTs that EPA is proposing to list in section 241.4(a) as categorical non-wastes when burned as a fuel in combustion units.

A. Detailed Description of OTRTs

1. Processing

Industry representatives stated that the removal of OTRTs from service and processing of those ties into a product fuel is analogous to that of CTRTs described in the February 2016 rule.[11] OTRTs are typically comprised of North American hardwoods that have been treated with a wood preservative. Most of the energy recovery with OTRTs is conducted through three parties: The generator of the crossties (railroad or utility); the reclamation company that sorts the crossties, and in some cases processes the material received from the generator; and the combustor as third party energy producers. Typically, ownership of the OTRTs are generally transferred directly from the generator to the reclamation company that sorts materials for highest value secondary uses, and then sells the products to end-users, including those combusting the material as fuel. Some reclamation companies sell OTRTs to processors who remove metal contaminants and grind the ties into chipped wood. Other reclamation companies have their own grinders, do their own contaminant removal, and can sell directly to the combusting facilities. Information submitted to the Agency indicates there are approximately 15 OTRT recovery companies in North America with industry wide revenues of $65–75 million.

After crossties are removed from service, they are transferred for sorting/processing, but in some cases, they may be temporarily stored in the railroad rights-of-way or at another location selected by the reclamation company. One information source[12] indicated that when the crossties are temporarily stored, they are stored until their value as an alternative fuel can be realized, generally through a contract completed for transferal of ownership to the reclamation contractor or combustor. This means that not all OTRTs originate from crossties removed from service in the same year; some OTRTs are processed from crossties removed from service in prior years and stored by railroads or removal/reclamation companies until their value as a landscaping element or fuel could be realized.

Typically, reclamation companies receive OTRTs by rail. The processing of the crossties into fuel by the reclamation/processing companies involves several steps. Contaminant metals (spikes, nails, plates, etc.) undergo initial separation and removal by the user organization (railroad company) during inspection. At the reclamation company, metal is further removed by magnets and may occur in multiple stages. After removal of contaminant metals, the crossties are then ground or shredded to a specified size depending on the particular needs of the end-use combustor, with chip size typically between 1–2 inches. Such

[7] Railway Tie Association ''Frequently Asked Questions'' available on *http://www.rta.org/faqs.* Assessed on August 26, 2016.

[8] These data submissions and the letter from TWC on August 21, 2015 are included in the docket for this proposed rule.

[9] For a full discussion regarding the petition process for receiving a categorical non-waste determination, *see* 78 FR 9112, February 7, 2013 (page 9158–9159).

[10] Supplementary information received from by M.A. Energy Resources (February 2013) in support of the crosstie derived fuel was submitted as a categorical petition in accordance 40 CFR 241.4(b).

[11] 81 FR 6688.

[12] M.A. Energy Resources LLC, Petition submitted to Administrator, EPA, February 2013.

grinding and shredding facilitates handling, storage and metering to the combustion chamber. By achieving a uniform particle size, combustion efficiency will be improved due to the uniform and controlled fuel feed rate and the ability to regulate the air supply. Additionally, the reduction process exposes a greater surface area of the particle to the heated gases, thus releasing any moisture more rapidly, and thereby enhancing its heating value.[13] This step may occur in several phases, including primary and secondary grinding, or in a single phase.

Once the crossties are ground to a specific size, there is further screening based on the particular needs of the end-use combustor. Depending on the configuration of the facility and equipment, screening may occur concurrently with grinding or at a subsequent stage. Once the processing of OTRTs is complete, the OTRTs are sold directly to the end-use combustor for energy recovery. Processed OTRTs are delivered to the buyers by railcar or truck. The OTRTs are then stockpiled prior to combustion, with a typical storage timeframe ranging from a day to a week. When the OTRTs are to be burned for energy recovery, the material is then transferred from the storage location using a conveyor belt or front-end loader. The OTRTs may be combined with other biomass fuels, including hog fuel and bark. OTRTs are commonly used to provide the high Btu fuel to supplement low (and sometimes wet) Btu biomass to ensure proper combustion, often in lieu of coal or other fossil fuels.[14] The combined fuel may be further hammered and screened prior to combustion.

In general, contracts for the purchase and combustion of OTRTs include fuel specifications limiting contaminants, such as metals, and prohibiting the receipt of wood treated with other preservatives such as pentachlorophenol.

2. Treatment Descriptions

i. Copper Naphthenate

Copper naphthenate's effectiveness as a preservative has been known since the early 1900s, and various formulations have been used commercially since the 1940s. It is an organometallic compound formed as a reaction product of copper salts and naphthenic acids derived from petroleum. Unlike other commercially applied wood preservatives, small quantities of copper naphthenate can be purchased at retail hardware stores and lumberyards. Cuts or holes in treated wood can be treated in the field with copper naphthenate. Wood treated with copper naphthenate has a distinctive bright green color that weathers to light brown. The treated wood also has an odor that dissipates somewhat over time. Oil borne copper naphthenate is used for treatment of railroad ties since that treatment results in the ties being more resistant to cracks and checking. Waterborne copper naphthenate is used only for interior millwork and exterior residential dimensional lumber applications such as decking, fencing, lattice, recreational equipment, and other structures. Thus, this proposal does not address waterborne copper naphthenate.

Copper naphthenate can be dissolved in a variety of solvents. The heavy oil solvent (specified in American Wood Protection Association (AWPA) Standard P9, Type A) or the lighter solvent (AWPA Standard P9, Type C) are the most commonly used. Copper naphthenate is listed in AWPA standards for treatment of major softwood species that are used for a variety of wood products. It is not listed for treatment of any hardwood species, except when the wood is used for railroad ties. The minimum copper naphthenate retentions (as elemental copper) range from 0.04 pounds per cubic foot (0.6 kilograms per cubic meter) for wood used aboveground, to 0.06 pounds per cubic foot (1 kilograms per cubic meter) for wood that will contact the ground and 0.075 pounds per cubic foot (1.2 kilograms per cubic meter) for wood used in critical structural applications.

When dissolved in No. 2 fuel oil, copper naphthenate can penetrate wood that is difficult to treat. Copper naphthenate loses some of its ability to penetrate wood when it is dissolved in heavier oils. Copper naphthenate treatments do not significantly increase the corrosion of metal fasteners relative to untreated wood.

Copper naphthenate is commonly used to treat utility poles, although fewer facilities treat utility poles with copper naphthenate than with creosote or pentachlorophenol. Unlike creosote and pentachlorophenol, copper naphthenate is not listed as a Restricted Use Pesticide (RUP) by the EPA. Even though human health concerns do not require copper naphthenate to be listed as an RUP, precautions such as the use of dust masks and gloves are used when working with wood treated with copper naphthenate.

ii. Borates

Borates is the name for a large number of compounds containing the element boron. Borate compounds are the most commonly used unfixed waterborne preservatives. Unfixed preservatives can leach from treated wood. They are used for pressure treatment of framing lumber used in areas with high termite hazard and as surface treatments for a wide range of wood products, such as cabin logs and the interiors of wood structures. They are also applied as internal treatments using rods or pastes. At higher rates of retention, borates also are used as fire-retardant treatments for wood.

Performance characteristics include activity against fungi and insects, with low mammalian toxicity. Another advantage of boron is its ability to diffuse with water into wood that normally resists traditional pressure treatment. Wood treated with borates has no added color, no odor, and can be finished (primed and painted).

Inorganic boron is listed as a wood preservative in the AWPA standards, which include formulations prepared from sodium octaborate, sodium tetraborate, sodium pentaborate, and boric acid. Inorganic boron is also standardized as a pressure treatment for a variety of species of softwood lumber used out of contact with the ground and continuously protected from water. The minimum borate (B_2O_3) retention is 0.17 pounds per cubic foot (2.7 kilograms per cubic meter). A retention of 0.28 pounds per cubic foot (4.5 kilograms per cubic meter) is specified for areas with Formosan subterranean termites.

Borate preservatives are available in several forms, but the most common is disodium octaborate tetrahydrate (DOT). DOT has higher water solubility than many other forms of borate, allowing more concentrated solutions to be used and increasing the mobility of the borate through the wood. With the use of heated solutions, extended pressure periods, and diffusion periods after treatment, DOT can penetrate species that are relatively difficult to treat, such as spruce. Several pressure treatment facilities in the United States use borate solutions. For refractory species destined for high decay areas, it has now become relatively common practice to use borates as a pre-treatment to protect the wood prior to processing with creosote.

iii. Creosote

Creosote was introduced as a wood preservative in the late 1800's to prolong the life of railroad ties. CTRTs remain the material of choice by

[13] Forest and Agriculture Organization of the United Nations. The Potential Use of Wood Residues for Energy Generation, 2016.

[14] American Forest & Paper Association, American Wood Council—Letter to EPA Administrator, December 6, 2012.

railroads due to their long life, durability, cost effectiveness, and sustainability. As creosote is a by-product of coal tar distillation, and coal tar is a by-product of making coke from coal, creosote is considered a derivative of coal. The creosote component of CTRTs is also governed by the standards established by AWPA. AWPA has established two blends of creosote, P1/13 and P2. Railroad ties are typically manufactured using the P2 blend that is more viscous than other blends.

B. OTRTs Under Current NHSM Rules

1. March 2011 NHSM Final Rule

The March 2011 NHSM final rule stated that most creosote-treated wood is non-hazardous. However, the presence of hexachlorobenzene, a CAA section 112 HAP, as well as other HAP suggested that creosote-treated wood, including CTRTs, contained contaminants at levels that are not comparable to or lower than those found in wood or coal, the fuel that creosote-treated wood would replace. In making the assessment, the Agency did not consider fuel oil [15] as a traditional fuel that CTRTs would replace, and concluded at the time that combustion of creosote-treated wood may result in destruction of contaminants contained in those materials. Such destruction is an indication of incineration, a waste activity. Accordingly, creosote-treated wood, including CTRTs when burned, seemed more like a waste than a commodity, and did not meet the contaminant legitimacy criterion. This material, therefore, was considered a solid waste when burned, and units' combusting it would be subject to the CAA section 129 emission standards (40 CFR part 60, subparts CCCC and DDDD).

Regarding borate treated wood, after reviewing data from one commenter which shows that the levels of contaminants in this material are comparable to those found in unadulterated wood for the seven contaminants for which data was presented, the Agency stated in the March 2011 rule that such treated-wood meets the legitimacy criterion on the level of contaminants and comparability to traditional fuels. Therefore, under that rule, borate-treated wood could be classified as a non-waste fuel, provided they met the other two legitimacy criteria and provided that the contaminant levels for any other HAP that may be present in this material are also comparable to or less than those in traditional fuels. The rule noted that such borate-treated wood would need to be burned as a fuel for energy recovery within the control of the generator. Finally, the rule indicated that some borate-treated wood is subsequently treated with creosote, to provide an insoluble barrier to prevent the borate compounds from leaching out of the wood. The Agency did not receive data on the contaminant levels of the resulting material, but data presented on creosote treated lumber when combusted in units designed to burn biomass indicated that this NHSM would likely no longer meet the legitimacy criteria and would be considered a solid waste when burned as a fuel.

The rule did not have information generally about the transfer of borate-treated wood to other companies to make a broad determination about its use as a fuel outside the control of the generator. Thus, under the March 2011 rule, borate-treated wood would need to be burned as a fuel for energy recovery within the control of the generator (76 FR 15484).

With regard to wood treated with copper naphthenate, no additional contaminant data was provided for the March 2011 rule that would reverse the position in the January 2010 proposed rule, which considered wood treated with copper naphthenate a solid waste because of concerns of elevated levels of contaminants (76 FR 15484). The rule acknowledged, as in the proposed rule, that the Agency did not have sufficient information on the contaminant levels in wood treated with copper naphthenate. Thus, if a person could demonstrate that copper naphthenate treated-wood is burned in a combustion unit as a fuel for energy recovery within the control of the generator and meets the legitimacy criteria or, if discarded, can demonstrate that they have sufficiently processed the material, that person can handle its copper naphthenate treated-wood as a non-waste fuel.

2. February 2013 NHSM Final Rule

In the February 2013 NHSM final rule, EPA noted that the American Forest and Paper Association (AF&PA) and the American Wood Council submitted a letter with supporting information on December 6, 2012, seeking a categorical listing for CTRTs combusted in any unit.[16] The letter included information regarding the amounts of railroad ties combusted each year and the value of the ties as fuel. The letter also discussed how CTRTs satisfy the legitimacy criteria, including its high Btu value.

While this information was useful, it was not sufficient for the EPA to propose that CTRTs be listed categorically as a non-waste fuel at that time. Therefore, to further inform the Agency as to whether to list CTRTs categorically as a non-waste fuel, EPA requested that additional information be provided, and indicated that if this additional information supported and supplemented the representations made in the December 2012 letter, EPA would expect to propose a categorical listing for CTRTs. The requested information included:

- A list of industry sectors, in addition to forest product mills, that burn railroad ties for energy recovery.
- The types of boilers (*e.g.*, kilns, stoker boilers, circulating fluidized bed, etc.) that burn railroad ties for energy recovery.
- The traditional fuels and relative amounts (*e.g.*, startup, 30 percent, 100 percent) of these traditional fuels that could otherwise generally be burned in these types of units. The extent to which non-industrial boilers (*e.g.*, commercial or residential boilers) burn CTRTs for energy recover.
- Laboratory analyses for contaminants known or reasonably suspected to be present in creosote-treated railroad ties, and contaminants known to be significant components of creosote, specifically polycyclic aromatic hydrocarbons (*i.e.*, PAH–16), dibenzofuran, cresols, hexachlorobenzene, 2,4-dinitrotoluene, biphenyl, quinoline, and dioxins.[17] *See* 81 FR 6723 for detailed responses to those questions.

3. February 2016 NHSM Final Rule

As discussed in section II.B of this preamble, EPA stated in the February 2016 final rule that it had reviewed the information submitted from stakeholders regarding CTRTs and determined that the information received supported a categorical determination for those materials under certain conditions (see 40 CFR

[15] For the purposes of this proposed rule, fuel oil means oils 1–6, including distillate, residual, kerosene, diesel, and other petroleum based oils. It does not include gasoline or unrefined crude oil.

[16] American Forest & Paper Association, American Wood Council—Letter to EPA Administrator, December 6, 2012.

[17] The Agency requested these analyses based on the limited information previously available concerning the chemical makeup of CTRTs. That limited information included one well-studied sample from 1990 (showing the presence of both PAHs and dibenzofuran), past TCLP results (which showing the presence of cresols, hexachlorobenzene and 2,4-dinitrotoluene), Material Safety Data Sheets for coal tar creosote (which showing the potential presence of biphenyl and quinoline), and the absence of dioxin analyses prior to combustion despite extensive dioxin analyses of post-combustion emissions.

241.4(a)(7)). That rule also indicated that, based on an August 21, 2015 letter to Barnes Johnson, TWC requested that the Agency move forward on a subset of materials that were identified in a previous April 2013 petition. EPA stated in the February 2016 rule, the Agency had reviewed the TWC information on the three treated railroad ties, creosote borate, copper naphthenate, submitted on September 11, 2015 and had requested additional contaminant data. Based on information provided to the Agency at the time, we believed these three treated railroad ties were candidates for categorical non-waste listings and expected to begin development of a proposed rule under 40 CFR 241.4(a) regarding those listings in the near future.

C. Scope of the Proposed Categorical Non-Waste Listing for OTRTs

As discussed previously in section II.B of this preamble, TWC submitted letters and supporting documents to EPA seeking a categorical listing for OTRTs. The contaminants found in OTRTs are not materially different from the traditional fuels (fuel oil and/or biomass) that these facilities are designed to burn as fuel. Therefore, the Agency is proposing to list, as categorical non-wastes, processed OTRTs when used as fuels. The rationale for this proposal is discussed in detail in the following sections.

D. Rationale for Proposed Listing

1. Discard

When deciding whether an NHSM should be listed as a categorical non-waste fuel in accordance with 40 CFR 241.4(b)(5), EPA first evaluates whether or not the NHSM has been discarded, and if not discarded, whether or not the material is legitimately used as a product fuel in a combustion unit. If the material has been discarded, EPA evaluates the NHSM as to whether it has been sufficiently processed into a material that is legitimately used as a product fuel.

Data submitted by petitioners regarding OTRTs removed from service and processed was analogous to that for CTRTs. Specifically, OTRTs removed from service are sometimes temporarily stored in the railroad right-of-way or at another location selected by the reclamation company. This means that not all OTRTs originate from crossties removed from service in the same year; some OTRTs are processed from crossties removed from service in prior years and stored by railroads or removal/reclamation companies until a contract for reclamation is in place.

EPA is reiterating its statement from the February 8, 2016 final rule regarding cases where a railroad or reclamation company waits for more than a year to realize the value of OTRTs as a fuel. The Agency again concludes that OTRTs are removed from service and stored in a railroad right-of-way or location for long periods of time—that is, a year or longer, without a determination regarding their final end use (*e.g.*, landscaping, as a fuel or landfilled) thus indicating that the material has been discarded and is a solid waste (see also the general discussion of discard at 76 FR 15463 in the March 2011 rule). Regarding any assertion that OTRTs are a valuable commodity in a robust market, the Agency would like to remind persons that NHSMs may have value in the marketplace and still be considered solid wastes.

2. Processing

Since the OTRTs removed from service are considered discarded because they can be stored for long periods of time without a final determination regarding their final end use, in order for them to be considered a non-waste fuel, they must be processed, thus transforming the OTRTs into a product fuel that meets the legitimacy criteria.[18] The Agency concludes that the processing of OTRTs described previously in section III.A.1 of this preamble meets the definition of processing in 40 CFR 241.2. As discussed in that section, processing includes operations that transform discarded NHSM into a non-waste fuel or non-waste ingredient, including operations necessary to: remove or destroy contaminants; significantly improve the fuel characteristics (*e.g.*, sizing or drying of the material, in combination with other operations); chemically improve the as-fired energy content; or improve the ingredient characteristics. Minimal operations that result only in modifying the size of the material by shredding do not constitute processing for the purposes of the definition. The Agency concludes that OTRTs meet the definition of processing in 40 CFR 241.3 because contaminant metals are removed in several steps and the fuel characteristics are significantly improved; specifically:

- Contaminants (*e.g.*, spikes, plates, transmission wire and insulator bulbs) are removed during initial inspection by the user organization.
- Removal of contaminant metals occurs again at the reclamation facility using magnets; such removal may occur in multiple stages.
- The fuel characteristics of the material are improved when the crossties are ground or shredded to a specified size (typically 1–2 inches) depending on the particular needs of the end-use combustor. The grinding may occur in one or more phases.
- Once the contaminant metals are removed and the OTRTs are ground, there may be additional screening to bring the material to a specified size.

3. Legitimacy Criteria

EPA can list a discarded NHSM categorically as a non-waste fuel if it has been ''sufficiently processed,'' and meets the legitimacy criteria. The three legitimacy criteria to be evaluated are: (1) The NHSM must be managed as a valuable commodity, (2) the NHSM must have a meaningful heating value and be used as a fuel in a combustion unit to recover energy, and (3) the NHSM must have contaminants or groups of contaminants at levels comparable to or less than those in the traditional fuel the unit is designed to burn.[19]

i. Managed as a Valuable Commodity

Data submitted [20] indicates that OTRT processing and subsequent management is analogous to the processing of CTRTs outlined in the February 8, 2016 final categorical rule. The processing of OTRTs is correlated to the particular needs of the end-use combustor.

The process begins when the railroad or utility company removes the old OTRTs from service. An initial inspection is conducted where non-combustible materials are sorted out. OTRTs are stored in staging areas until shippable quantities are collected. Shippable quantities are transported via truck or rail to a reprocessing center.

At the reprocessing center, pieces are again inspected, sorted, and non-combustible materials are removed. Combustible pieces then undergo size reduction and possible blending with compatible combustibles. Once the OTRTs meet the end use specification, they are then sold directly to the end-use combustor for energy recovery.

[18] Persons who concluded that their OTRTs are not discarded and thus are not subject to this categorical determination may submit an application to the EPA Regional Administrator that the material has not been discarded when transferred to a third party and is indistinguishable from a product fuel (76 FR 15551).

[19] We note that even if the NHSM does not meet one or more of the legitimacy criteria, the Agency could still propose to list an NHSM categorically by balancing the legitimacy criteria with other relevant factors (see 40 CFR 241.4(b)(2).

[20] See section III.D.4. for a description of EPA's review of all data submitted regarding meeting legitimacy criteria.

OTRTs are delivered to the end-use combustors via railcar and/or truck similar to delivery of traditional biomass fuels.

After receipt, OTRTs are stockpiled similar to analogous biomass fuels (*e.g.*, in fuel silos) to maximize dryness and minimize dust. While awaiting combustion at the end-user, which usually occurs within one day to a week of arrival, the OTRTs are also transferred and/or handled from storage in a manner consistent with the transfer and handling of biomass fuels. Procedures include screening by the end-use combustor, combining with other biomass fuels, and transferring to the combustor via conveyor belt or front-end loader.

Since the storage of the processed material clearly does not exceed reasonable time frames and the processed ties are handled/treated similar to analogous biomass fuels by end-use combustors, OTRTs meet the criterion for being managed as a valuable commodity.

ii. Meaningful Heating Value and Used as a Fuel To Recover Energy

EPA received the following information for the heating values of processed OTRTs: 6,867 Btu/lb for creosote-borate; 7,333 Btu/lb for copper naphthenate; 5,967 Btu/lb for copper naphthenate-borate; 5,232 Btu/lb for mixed railroad ties containing 56% creosote, 41% creosote-borate, 1% copper naphthenate, 2% copper naphthenate-borate; and 7,967 Btu/lb for mixed ties containing 25% creosote, 25% creosote borate, 25% copper naphthenate and 25% copper naphthenate-borate.[21] [22] In the March 2011 NHSM final rule, the Agency indicated that NHSMs with an energy value greater than 5,000 Btu/lb, as fired, are considered to have a meaningful heating value.[23] Thus, OTRTs meet the criterion for meaningful heating value and used as a fuel to recover energy.

iii. Contaminants Comparable to or Lower Than Traditional Fuels

For each type of OTRT, EPA has compared the September 2015 data submitted on contaminant levels by petitioners to contaminant data for two traditional fuels: Biomass, including untreated clean wood, and fuel oil (petitioners did not provide data or request that contaminant comparisons be made to coal). The petitioner's data included samples taken from 15 different used creosote-borate ties, 15 different copper naphthenate-borate ties, 15 creosote ties, and 15 copper naphthenate ties. Each type of tie sample was divided into three groups of five tie samples each. This resulted in 12 total groups corresponding to the four different types ties. Each group was then isolated, mixed together, processed into a fuel-type consistency, and shipped to the laboratory for analysis.

As noted previously, use of these types of ties are relatively new compared to creosote, so few have transitioned to fuel use at this time. To simulate that transition over time, three samples of unevenly-blended tie material (56% creosote, 41% creosote-borate, 1% copper naphthenate, 2% copper naphthenate-borate) and three samples of equally blended tie material (25% creosote, 25% creosote-borate, 25% copper naphthenate, 25% copper naphthenate-borate) were analyzed. The lab analyzed three samples of each of tie-derived boiler fuel treated with creosote, creosote-borate, copper naphthenate and copper naphthenate-borate. In addition, the lab analyzed three samples of equally-blended tie material, three samples of unevenly-blended tie material, and three samples of untreated wood for a total of 21 samples.

In addition to September 2015 data, copper naphthenate-borate, and copper naphthenate test data had also been submitted in conjunction with TWC's earlier December 4, 2013 petition and are included in the following tables. As noted in section II.B of this preamble, the data did not have details on the number of samples collected. In addition, sulfur was measured using leachable anion techniques that do not provide results of the total contaminant content, and heat content was not measured. The results of the analysis of the 2015 and 2013 data are shown in the following tables.[24]

Copper Naphthenate

COPPER NAPHTHENATE

Contaminant	Copper naphthenate railroad ties contaminant levels [a f]	Biomass/ Untreated wood [b]	Fuel Oil [b]
Metal Elements (ppm—dry basis)			
Antimony	<1.4	ND–26	ND–15.7
Arsenic	0.53–0.93	ND–298	ND–13
Beryllium	<0.60–0.05	ND–10	ND–19
Cadmium	<0.28–0.20	ND–17	ND–1.4
Chromium	0.22–0.50	ND–340	ND–37
Cobalt	<6.0–0.81	ND–213	ND–8.5
Lead	<0.36–3.5	ND–340	ND–56.8
Manganese	7.1–166	ND–15,800	ND–3,200
Mercury	<0.20	ND–1.1	ND–0.2
Nickel	0.79–1.1	ND–540	ND–270
Selenium	0.41–0.84	ND–9.0	ND–4
Non-Metal Elements (ppm–dry basis)			
Chlorine	<100	ND–5,400	ND–1,260

[21] Letter from Jeff Miller to Barnes Johnson, September 11, 2015; *see* docket for this proposed rule.

[22] These values reflect averages from 2013 and 2015 data. Relevant lab data on Btu/lb for each types of processed OTRT can be viewed in the September and October 2015 letters from Jeff Miller to Barnes Johnson included in the docket.

[23] *See* 76 FR 15541.

[24] Note for contaminant analyses, when making contaminant comparisons for purposes of meeting the legitimacy criterion, it would be appropriate in this circumstance to find that grouping of contaminants would not result in discard. For example, under the grouping concept, individual SVOC levels may be elevated above that of the traditional fuel, but the contaminant legitimacy criterion will be met as long as total SVOCs is comparable to or less than that of the traditional fuel. Such an approach is standard practice employed by the Agency in developing regulations and is consistent with monitoring standards under CAA sections 112 and 129. *See* 78 FR 9146, February 7, 2013, for further findings that relate to the issue of grouping contaminants for purposes of determining discard.

COPPER NAPHTHENATE—Continued

Contaminant	Copper naphthenate railroad ties contaminant levels [a f]	Biomass/ Untreated wood [b]	Fuel Oil [b]
Fluorine	<100	ND–300	ND–14
Nitrogen	<500	200–39,500	42–8,950
Sulfur	190–240	ND–8,700	ND–57,000
Semivolatile Hazardous Pollutants (ppm–dry basis)			
Acenaphthene	3.0–95	ND–50	111
Acenaphthylene	<1.3	ND–4	4.1
Anthracene	<1.3–6.3	0.4–87	96
Benzo[a]anthracene	<1.3	ND–62	41–1,900
Benzo[a]pyrene	<1.3	ND–28	0.60–960
Benzo[b]fluoranthene	<1.3	ND–42	11–540
Benzo[ghi]perylene	<1.3	ND–9	11.4
Benzo[k]fluoranthene	<1.3	ND–16	0.6
Chrysene	<1.3	ND–53	2.2–2,700
Dibenz[a,h]anthracene	<1.3	ND–3	4.0
Fluoranthene	<1.3–6.5	0.6–160	31.6–240
Fluorene	4.5–53	ND–40	3,600
Indeno[1,2,3-cd]pyrene	<1.3	ND–12	2.3
Naphthalene	8.2–80	ND–38	34.3–4,000
Phenanthrene	8.2–77	0.9–190	0–116,000
Pyrene	<1.3–15	0.2–160	23–178
16–PAH	49–298	5–921	3,900–54,700
Pentachlorophenol	<30 [g]	ND–1	—
Biphenyl	— [e]	—	1,000–1,200
Total SVOC [c]	77–328	5–922	4,900–54,700
Volatile Organic Compound (VOC) Hazardous Air Pollutants (ppm—dry basis)			
Benzene	<0.69 —	—	ND–75
Phenol	— [e]	—	ND–7,700
Styrene	<0.69	—	ND–320
Toluene	<0.69	—	ND–380
Xylenes	<0.69	—	ND–3,100
Cumene	— [e]	—	6,000–8,000
Ethyl benzene	<0.69	—	22–1,270
Formaldehyde	— [e]	1.6–27	—
Hexane	— [e]	—	50–10,000
Total VOC [d]	<3.4	1.6–27	6,072–19,810

[a] Data provided by Treated Wood Council on April 3, 2013, September 11, 2015 and October 19, 2015.

[b] Contaminant Concentrations in Traditional Fuels: Tables for Comparison, November 29, 2011, available at *http://www.epa.gov/epawaste/nonhaz/define/pdfs/nhsm_cont_tf.pdf.* Contaminant data drawn from various literature sources and from data submitted to USEPA, Office of Air Quality Planning and Standards (OAQPS). SVOC values from 2013 IEc data that will be available in the rule docket.

[c] Total SVOC ranges do not represent a simple sum of the minimum and maximum values for each contaminant. This is because minimum and maximum concentrations for individual VOCs and SVOCs do not always come from the same sample.

[d] Naphthalene was the only analyte detected in Oct 2015 VOC testing, but this analyte is included in the SVOC group, so is not reflected here.

[e] Cells with the "—" indicate analytes not tested for in treated wood, but these are not expected to be present in treated wood formulation being analyzed based on preservative chemistry and results from previous CTRT testing (*i.e.*, not present in CTRT ties).

[f] Non-detects are indicated by "<" preceding the method reporting limit, not the method detection limit. Therefore, there are many cases where the non-detect value may be greater than another test's detected value due to analysis-specific RLs being different between individual tests (*i.e.*, differences in tested amount or analyzer calibration range adjustments). If result is less than the method detection limit (MDL), the method reporting limit (MRL), which is always greater than MDL, was used by the lab.

[g] Not expected in the treated wood formulation being tested based on preservative chemistry.

As indicated, railroad ties treated with copper naphthenate have contaminants that are comparable to or less than those in biomass or fuel oil. Given that these railroad ties are a type of treated wood biomass, such ties can be combusted in units designed to burn biomass or biomass and fuel oil.

Copper Naphthenate-Borate

COPPER NAPHTHENATE-BORATE

Contaminant	Copper naphthenate-borate railroad ties contaminant levels [a] [f]	Biomass/ Untreated wood [b]	Fuel oil [b]
Metal Elements (ppm—dry basis)			
Antimony	<1.4	ND–26	ND–15.7
Arsenic	0.52–0.72	ND–298	ND–13
Beryllium	<0.67	ND–10	ND–19
Cadmium	<0.31–0.078	ND–17	ND–1.4
Chromium	0.11–0.78	ND–340	ND–37
Cobalt	<7.5–0.74	ND–213	ND–8.5
Lead	<0.38–4.0	ND–340	ND–56.8
Manganese	14–170	ND–15,800	ND–3,200
Mercury	<0.15	ND–1.1	ND–0.2
Nickel	0.46–2.0	ND–540	ND–270
Selenium	<0.64–0.52	ND–9.0	ND–4
Non-Metal Elements (ppm—dry basis)			
Chlorine	<100	ND–5,400	ND–1,260
Fluorine	<100	ND–300	ND–14
Nitrogen	<500	200–39,500	42–8,950
Sulfur	140–170	ND–8,700	ND–57,000
Semivolatile Hazardous Pollutants (ppm—dry basis)			
Acenaphthene	4.8–17	ND–50	111
Acenaphthylene	<1.2–0.9	ND–4	4.1
Anthracene	<1.2–7.2	0.4–87	96
Benzo[a]anthracene	<1.2–3.7	ND–62	41–1,900
Benzo[a]pyrene	<1.2–1.4	ND–28	0.60–960
Benzo[b]fluoranthene	<1.2–3.9	ND–42	11–540
Benzo[ghi]perylene	<1.2	ND–9	11.4
Benzo[k]fluoranthene	<1.2–20	ND–16	0.6
Chrysene	<1.2–6.6	ND–53	2.2–2,700
Dibenz[a,h]anthracene	<1.2	ND–3	4.0
Fluoranthene	<1.2–20	0.6–160	31.6–240
Fluorene	2.2–16	ND–40	3,600
Indeno[1,2,3-cd]pyrene	<1.2	ND–12	2.3
Naphthalene	5.2–82	ND–38	34.3–4,000
Phenanthrene	3.6–43	0.9–190	0–116,000
Pyrene	<1.3–19	0.2–160	23–178
16–PAH	39–145	5–921	3,900–54,700
Pentachlorophenol	<28 [g]	ND–1	—
Biphenyl	— [e]	—	1,000–1,200
Total SVOC [c]	66–173	5–922	4,900–54,700
Volatile Organic Compound (VOC) Hazardous Air Pollutants (ppm—dry basis)			
Benzene	<0.77	—	ND–75
	—	—	
Phenol	— [e]	—	ND–7,700
Styrene	<0.77	—	ND–320
Toluene	<0.77	—	ND–380
Xylenes	<0.77	—	ND–3,100
Cumene	— [e]	—	6,000–8,000
Ethyl benzene	<0.77	—	22–1,270
Formaldehyde	— [e]	1.6–27	—
Hexane	— [e]	—	50–10,000
Total VOC [d]	<3.8	1.6–27	6,072–19,810

[a] Data provided by Treated Wood Council on April 3, 2013, September 11, 2015 and October 19, 2015.

[b] Contaminant Concentrations in Traditional Fuels: Tables for Comparison, November 29, 2011, available at *http://www.epa.gov/epawaste/nonhaz/define/pdfs/nhsm_cont_tf.pdf.* Contaminant data drawn from various literature sources and from data submitted to USEPA, Office of Air Quality Planning and Standards (OAQPS). SVOC values from 2013 IEc data that will be available in the rule docket.

[c] Total SVOC ranges do not represent a simple sum of the minimum and maximum values for each contaminant. This is because minimum and maximum concentrations for individual VOCs and SVOCs do not always come from the same sample.

[d] Naphthalene was the only analyte detected in Oct 2015 VOC testing, but this analyte is included in the SVOC group, so is not reflected here.

[e] Cells with the "—" indicate analytes not tested for in treated wood, but these are not expected to be present in treated wood formulation being analyzed based on preservative chemistry and results from previous CTRT testing (*i.e.*, not present in CTRT ties).

[f] Non-detects are indicated by "<" preceding the method reporting limit, not the method detection limit. Therefore, there are many cases where the non-detect value may be greater than another test's detected value due to analysis-specific RLs being different between individual tests (*i.e.*, differences in tested amount or analyzer calibration range adjustments). If result is less than the method detection limit (MDL), the method reporting limit (MRL), which is always greater than MDL, was used by the lab.

[g] Not expected in the treated wood formulation being tested based on preservative chemistry.

As indicated, railroad ties treated with copper naphthenate-borate have contaminants that are comparable to or less than those in biomass or fuel oil. Given that these railroad ties are a type of treated wood biomass, such ties can be combusted in units designed to burn biomass or biomass and fuel oil.

Creosote-Borate

CREOSOTE-BORATE

Contaminant	Creosote-borate railroad ties contaminant levels [a,f]	Biomass/untreated wood [b]	Fuel oil [b]
Metal Elements (ppm—dry basis)			
Antimony	<1.3	ND–26	ND–15.7
Arsenic	<1.3–0.80	ND–298	ND–13
Beryllium	<0.60–0.032	ND–10	ND–19
Cadmium	0.059–0.25	ND–17	ND–1.4
Chromium	0.10–1.1	ND–340	ND–37
Cobalt	<6.0–0.22	ND–213	ND–8.5
Lead	<0.37–1.8	ND–340	ND–56.8
Manganese	22–140	ND–15,800	ND–3,200
Mercury	<0.15–0.066	ND–1.1	ND–0.2
Nickel	0.71–1.8	ND–540	ND–270
Selenium	0.59–1.4	ND–9.0	ND–4
Non-Metal Elements (ppm—dry basis)			
Chlorine	<100	ND–5,400	ND–1,260
Fluorine	<100	ND–300	ND–14
Nitrogen	<500	200–39,500	42–8,950
Sulfur	170–180	ND–8,700	ND–57,000
Semivolatile Hazardous Pollutants (ppm—dry basis)			
Acenaphthene	600–2,200	ND–50	111
Acenaphthylene	17–96	ND–4	4.1
Anthracene	350–2,000	0.4–87	96
Benzo[a]anthracene	200–1,500	ND–62	41–1,900
Benzo[a]pyrene	62–500	ND–28	0.60–960
Benzo[b]fluoranthene	110–960	ND–42	11–540
Benzo[ghi]perylene	13–170	ND–9	11.4
Benzo[k]fluoranthene	40–320	ND–16	0.6
Chrysene	210–1,300	ND–53	2.2–2,700
Dibenz[a,h]anthracene	<21–58	ND–3	4.0
Fluoranthene	1,100–8,400	0.6–160	31.6–240
Fluorene	500–2,200	ND–40	3,600
Indeno[1,2,3-cd]pyrene	14–170	ND–12	2.3
Naphthalene	660–2,900	ND–38	34.3–4,000
Phenanthrene	2,000–12,000	0.9–190	0–116,000
Pyrene	780–5,200	0.2–160	23–178
16–PAH	6,600–38,000	5–921	3,900–54,700
Pentachlorophenol	<790 [g]	ND–1	—
Biphenyl	137–330 [h]	—	1,000–1,200
Total SVOC [c]	7,200–39,000	5–922	4,900–54,700
Volatile Organic Compound (VOC) Hazardous Air Pollutants (ppm—dry basis)			
Benzene	<3.9 —	—	ND–75
Phenol	— [e]	—	ND–7,700
Styrene	<3.9	—	ND–320
Toluene	<3.9	—	ND–380
Xylenes	<3.9	—	ND–3,100
Cumene	— [e]	—	6,000–8,000
Ethyl benzene	<3.9	—	22–1,270
Formaldehyde	— [e]	1.6–27	—
Hexane	— [e]	—	50–10,000
Total VOC [d]	<20	1.6–27	6,072–19,810

[a] Data provided by Treated Wood Council on September 11, 2015 and October 19, 2015.

[b] Contaminant Concentrations in Traditional Fuels: Tables for Comparison, November 29, 2011, available at *http://www.epa.gov/epawaste/nonhaz/define/pdfs/nhsm_cont_tf.pdf*. Contaminant data drawn from various literature sources and from data submitted to USEPA, Office of Air Quality Planning and Standards (OAQPS). SVOC values from 2013 IEc data that will be available in the rule docket.

[c] Total SVOC ranges do not represent a simple sum of the minimum and maximum values for each contaminant. This is because minimum and maximum concentrations for individual VOCs and SVOCs do not always come from the same sample.
[d] Naphthalene was the only analyte detected in Oct 2015 VOC testing, but this analyte is included in the SVOC group, so is not reflected here.
[e] Cells with the "—" indicate analytes not tested for in treated wood, but these are not expected to be present in treated wood formulation being analyzed based on preservative chemistry and results from previous CTRT testing (*i.e.,* not present in CTRT ties).
[f] Non-detects are indicated by "<" preceding the method reporting limit, not the method detection limit. Therefore, there are many cases where the non-detect value may be greater than another test's detected value due to analysis-specific RLs being different between individual tests (*i.e.,* differences in tested amount or analyzer calibration range adjustments). If result is less than the method detection limit (MDL), the method reporting limit (MRL), which is always greater than MDL, was used by the lab.
[g] Not expected in the treated wood formulation being tested based on preservative chemistry.
[h] Not tested for, but presumptive worst-case value is presented for treated wood type based on data from previous CTRT testing.

Semi-volatile organic compound (SVOC) levels in creosote-borate processed railroad ties are not comparable to biomass. Given that creosote-borate railroad ties are a type of treated wood biomass, and any unit burning these ties typically burns untreated wood, the EPA considered two scenarios.

In the first scenario, where a combustion unit is designed to only burn biomass, EPA compared contaminant levels in creosote-borate to contaminant levels in biomass. In this scenario, the total SVOC levels can reach 39,000 ppm, driven by high levels of polycyclic aromatic hydrocarbons (PAHs).[25] These compounds are very low levels in clean wood and biomass, and the contaminants are therefore not comparable in this instance. In fact, they are present at orders of magnitude higher than found in clean wood and biomass.

In the second scenario, a combustion unit is designed to burn biomass and fuel oil. As previously mentioned, SVOCs are present in CTRTs (up to 39,000 ppm) at levels well within the range observed in fuel oil (up to 54,700 ppm). Therefore, creosote-borate railroad ties have comparable contaminant levels to other fuels combusted in units designed to burn both biomass and fuel oil, and as such, meet this criterion if used in facilities that are designed to burn both biomass and fuel oil.[26]

As stated in the preamble to the February 7, 2013, NHSM final rule, combustors may burn NHSMs as a product fuel if they compare appropriately to any traditional fuel the unit can or does burn (78 FR 9149). Combustion units are often designed to burn multiple traditional fuels, and some units can and do rely on different fuel types at different times based on availability of fuel supplies, market conditions, power demands, and other factors. Under these circumstances, it is arbitrary to restrict the combustion for energy recovery of NHSMs based on contaminant comparison to only one traditional fuel if the unit could burn a second traditional fuel chosen due to such changes in fuel supplies, market conditions, power demands or other factors. If a unit can burn both a solid and liquid fuel, then comparison to either fuel would be appropriate.

In order to make comparisons to multiple traditional fuels, units must be designed to burn those fuels. If a facility compares contaminants in an NHSM to a traditional fuel a unit is not designed to burn, and that material is highly contaminated, a facility would then be able to burn excessive levels of waste components in the NHSM as a means of discard. Such NHSMs would be considered wastes regardless of any fuel value (78 FR 9149).[27] Accordingly, the ability to burn a fuel in a combustion unit does have a basic set of requirements, the most basic of which is the ability to feed the material into the combustion unit. The unit must also be able to ensure the material is well-mixed and maintain temperatures within unit specifications.

Mixed Treatments-Creosote, Borate, Copper Naphthenate

MIX 1–1–1–1

Contaminant	Mixed railroad ties (25%C–25%CB–25%CuN–25%CuNB) contaminant levels [a f]	Biomass/untreated wood [b]	Fuel oil [b]
Metal Elements (ppm—dry basis)			
Antimony	<1.4	ND–26	ND–15.7
Arsenic	<1.5–0.81	ND–298	ND–13
Beryllium	<0.70	ND–10	ND–19
Cadmium	0.15–0.38	ND–17	ND–1.4
Chromium	0.15–0.17	ND–340	ND–37
Cobalt	<7.0–0.07	ND–213	ND–8.5
Lead	0.50–0.81	ND–340	ND–56.8
Manganese	110–190	ND–15,800	ND–3,200
Mercury	<0.15–0.06	ND–1.1	ND–0.2
Nickel	0.75–1.4	ND–540	ND–270

[25] We note that for several SVOCs—cresols, hexachlorobenzene, and 2,4-dinitrotoluene, which were expected to be in creosote, and for which information was specifically requested in the February 7, 2013 NHSM final rule (78 FR 9111), the data demonstrate that they were not detectable, or were present at levels so low to be considered comparable.

[26] As discussed previously, the March 21, 2011 NHSM final rule (76 FR 15456), noting the presence of hexachlorobenzene and dinitrotoluene, suggested that creosote-treated lumber include contaminants at levels that are not comparable to those found in wood or coal, the fuel that creosote-treated wood would replace, and would thus be considered solid wastes. The February 2016 final rule differs in several respects from the conclusions in the March 2011 rule. The February 2016 final rule concludes that CTRTs are a categorical non-waste when combusted in units designed to burn both fuel oil and biomass. The March 2011 rule, using 1990 data on railroad cross ties, was based on contaminant comparisons to coal and biomass and not fuel oil. As discussed above, when compared to fuel oil, total SVOC contaminant concentrations (which would include dinitrotoluene and hexachlorobenzene) in CTRTs would be less that those found in fuel oil, and in fact, the 2012 data referenced in this final rule showed non-detects for those two contaminants.

[27] 78 FR 9149 states "If a NHSM does not contain contaminants at levels comparable to or lower than those found in *any* [emphasis added] traditional fuel that a combustion unit could burn, then it follows that discard could be occurring if the NHSM were combusted. Whether contaminants in these cases would be destroyed or discarded through releases to the air, they could not be considered a normal part of a legitimate fuel and the NHSM would be considered a solid waste when used as a fuel in that combustion unit."

MIX 1–1–1–1—Continued

Contaminant	Mixed railroad ties (25%C–25%CB–25%CuN–25%CuNB) contaminant levels [a f]	Biomass/untreated wood [b]	Fuel oil [b]
Selenium	<0.66–0.50	ND–9.0	ND–4
Non-Metal Elements (ppm—dry basis)			
Chlorine	<100	ND–5,400	ND–1,260
Fluorine	<100	ND–300	ND–14
Nitrogen	<500	200–39,500	42–8,950
Sulfur	140–210	ND–8,700	ND–57,000
Semivolatile Hazardous Pollutants (ppm—dry basis)			
Acenaphthene	500–1,100	ND–50	111
Acenaphthylene	12–25	ND–4	4.1
Anthracene	290–1,100	0.4 –87	96
Benzo[a]anthracene	140–350	ND–62	41–1,900
Benzo[a]pyrene	47–120	ND–28	0.60–960
Benzo[b]fluoranthene	83–210	ND–42	11–540
Benzo[ghi]perylene	9.4–23	ND–9	11.4
Benzo[k]fluoranthene	30–64	ND–16	0.6
Chrysene	160–360	ND–53	2.2–2,700
Dibenz[a,h]anthracene	<7.2–4.7	ND–3	4.0
Fluoranthene	800–2,100	0.6–160	31.6–240
Fluorene	350–1,000	ND–40	3,600
Indeno[1,2,3-cd]pyrene	10–28	ND–12	2.3
Naphthalene	320–580	ND–38	34.3–4,000
Phenanthrene	1,300–3,800	0.9–190	0–116,000
Pyrene	520–1,400	0.2–160	23–178
16–PAH	4,500–12,000	5–921	3,900–54,700
Pentachlorophenol	<330 [g]	ND–1	
Biphenyl	137–330 [h]		1,000–1,200
Total SVOC [c]	4,800–13,000	5–922	4,900–54,700
Volatile Organic Compound (VOC) Hazardous Air Pollutants (ppm—dry basis)			
Benzene	<1.1 —	—	ND–75
Phenol	— [e]	—	ND–7,700
Styrene	<1.1	—	ND–320
Toluene	<1.1	—	ND–380
Xylenes	<1.1	—	ND–3,100
Cumene	— [e]	—	6,000–8,000
Ethyl benzene	<1.1	—	22–1,270
Formaldehyde	— [e]	1.6–27	—
Hexane	— [e]	—	50–10,000
Total VOC [d]	<5.3	1.6–27	6,072–19,810

[a] Data provided by Treated Wood Council on September 11, 2015 and October 19, 2015.

[b] Contaminant Concentrations in Traditional Fuels: Tables for Comparison, November 29, 2011, available at *http://www.epa.gov/epawaste/nonhaz/define/pdfs/nhsm_cont_tf.pdf.* Contaminant data drawn from various literature sources and from data submitted to USEPA, Office of Air Quality Planning and Standards (OAQPS). SVOC values from 2013 IEc data that will be available in the rule docket.

[c] Total SVOC ranges do not represent a simple sum of the minimum and maximum values for each contaminant. This is because minimum and maximum concentrations for individual VOCs and SVOCs do not always come from the same sample.

[d] Naphthalene was the only analyte detected in Oct 2015 VOC testing, but this analyte is included in the SVOC group, so is not reflected here.

[e] Cells with the "—" indicate analytes not tested for in treated wood, but these are not expected to be present in treated wood formulation being analyzed based on preservative chemistry and results from previous CTRT testing (*i.e.,* not present in CTRT ties).

[f] Non-detects are indicated by "<" preceding the method reporting limit, not the method detection limit. Therefore, there are many cases where the non-detect value may be greater than another test's detected value due to analysis-specific RLs being different between individual tests (*i.e.,* differences in tested amount or analyzer calibration range adjustments). If result is less than the method detection limit (MDL), the method reporting limit (MRL), which is always greater than MDL, was used by the lab.

[g] Not expected in the treated wood formulation being tested based on preservative chemistry.

[h] Not tested for, but presumptive worst-case value is presented for treated wood type based on data from previous CTRT testing.

MIX 56–41–1–2

Contaminant	Mixed railroad ties (56%C–41%CB–1%CuN–2%CuNB) contaminant levels [a f]	Biomass/untreated wood [b]	Fuel oil [b]
Metal Elements (ppm—dry basis)			
Antimony	<1.4	ND–26	ND–15.7
Arsenic	<1.4–0.65	ND–298	ND–13
Beryllium	<0.68	ND–10	ND–19
Cadmium	0.08–0.09	ND–17	ND–1.4
Chromium	0.12–0.78	ND–340	ND–37
Cobalt	<6.8–0.18	ND–213	ND–8.5
Lead	<0.44–0.93	ND–340	ND–56.8
Manganese	47–77	ND–15,800	ND–3,200
Mercury	<0.13–0.03	ND–1.1	ND–0.2
Nickel	0.50–0.99	ND–540	ND–270
Selenium	0.56–0.68	ND–9.0	ND–4
Non-Metal Elements (ppm—dry basis)			
Chlorine	<100	ND–5,400	ND–1,260
Fluorine	<100	ND–300	ND–14
Nitrogen	<500	200–39,500	42–8,950
Sulfur	230–280	ND–8,700	ND–57,000
Semivolatile Hazardous Pollutants (ppm—dry basis)			
Acenaphthene	1,500–1,800	ND–50	111
Acenaphthylene	31–40	ND–4	4.1
Anthracene	760–1,100	0.4–87	96
Benzo[a]anthracene	390–490	ND–62	41–1,900
Benzo[a]pyrene	150–200	ND–28	0.60–960
Benzo[b]fluoranthene	230–310	ND–42	11–540
Benzo[ghi]perylene	28–56	ND–9	11.4
Benzo[k]fluoranthene	93–130	ND–16	0.6
Chrysene	390–520	ND–53	2.2–2,700
Dibenz[a,h]anthracene	<28	ND–3	4.0
Fluoranthene	2,000–2,700	0.6–160	31.6–240
Fluorene	1,100–1,300	ND–40	3,600
Indeno[1,2,3-cd]pyrene	32–52	ND–12	2.3
Naphthalene	890–1,200	ND–38	34.3–4,000
Phenanthrene	3,600–4,500	0.9–190	0–116,000
Pyrene	1,300–1,800	0.2–160	23–178
16–PAH	13,000–16,000	5–921	3,900–54,700
Pentachlorophenol	<630 [g]	ND–1	
Biphenyl	137–330 [h]		1,000–1,200
Total SVOC [c]	13,000–17,000	5–922	4,900–54,700
Volatile Organic Compound (VOC) Hazardous Air Pollutants (ppm—dry basis)			
Benzene	<2.3 —		ND–75
Phenol	— [e]	—	ND–7,700
Styrene	<2.3	—	ND–320
Toluene	<2.3	—	ND–380
Xylenes	<2.3	—	ND–3,100
Cumene	— [e]	—	6,000–8,000
Ethyl benzene	<2.3	—	22–1,270
Formaldehyde	— [e]	1.6–27	—
Hexane	— [e]	—	50–10,000
Total VOC [d]	<12	1.6–27	6,072–19,810

[a] Data provided by Treated Wood Council on September 11, 2015 and October 19, 2015.

[b] Contaminant Concentrations in Traditional Fuels: Tables for Comparison, November 29, 2011, available at *http://www.epa.gov/epawaste/nonhaz/define/pdfs/nhsm_cont_tf.pdf.* Contaminant data drawn from various literature sources and from data submitted to USEPA, Office of Air Quality Planning and Standards (OAQPS). SVOC values from 2013 IEc data that will be available in the rule docket.

[c] Total SVOC ranges do not represent a simple sum of the minimum and maximum values for each contaminant. This is because minimum and maximum concentrations for individual VOCs and SVOCs do not always come from the same sample.

[d] Naphthalene was the only analyte detected in Oct 2015 VOC testing, but this analyte is included in the SVOC group, so is not reflected here.

[e] Cells with the "—" indicate analytes not tested for in treated wood, but these are not expected to be present in treated wood formulation being analyzed based on preservative chemistry and results from previous CTRT testing (*i.e.,* not present in CTRT ties).

[f] Non-detects are indicated by "<" preceding the method reporting limit, not the method detection limit. Therefore, there are many cases where the non-detect value may be greater than another test's detected value due to analysis-specific RLs being different between individual tests (*i.e.,* differences in tested amount or analyzer calibration range adjustments). If result is less than the method detection limit (MDL), the method reporting limit (MRL), which is always greater than MDL, was used by the lab.

[g] Not expected in the treated wood formulation being tested based on preservative chemistry.

[h] Not tested for, but presumptive worst-case value is presented for treated wood type based on data from previous CTRT testing.

In the mixed treated wood scenarios above, as previously discussed, SVOCs are present (up to 17,000 ppm) at levels well within the range observed in fuel oil (up to 54,700 ppm). Therefore, mixed railroad ties with creosote, borate and copper naphthenate have comparable contaminant levels to other fuels combusted in units designed to burn both biomass and fuel oil, and as such, meet this criterion if used in facilities that are designed to burn both biomass and fuel oil.

4. OTRT Sampling and Analysis Data History

The data collection supporting the OTRT non-waste determination has been based on several rounds of data submittals by TWC followed by EPA questions and comments on the data provided. We have described the process of forming the OTRT data set, and all materials provided by TWC are available in the docket to this rulemaking.

The TWC submitted data on various wood preservative types, including those referred to as OTRTs, in their April 3, 2013 petition letter requesting a categorical determination that all preserved wood types were non-waste fuels. However, the contaminant comparison data presented in the petition were incomplete and not based on established analytical data. The EPA response to TWC requested submittal of analytical data to determine contaminant concentrations in the OTRT wood.

In November 2013, TWC responded to EPA's request, submitting laboratory reports on analyses of the various preservative wood types, including OTRTs. The EPA reviewed the laboratory reports and techniques, and determined that there were limited data points available (*i.e.,* one per preservative type) and that the analytical techniques for several contaminants (chlorine, nitrogen, sulfur, and fluorine) were not appropriate to provide information on the entire preserved wood sample as combusted, reflecting only a leachable component. Furthermore, EPA questioned the representativeness of the samples being analyzed and the repeatability of the analyses.

In August, 2015, TWC performed additional sampling and analyses to address these deficiencies in the data. In response to EPA's concerns on previous data, and as described previously, TWC developed a sampling program in which 15 OTRT railroad ties of each preservative type were collected from various geographical areas. These 15 ties were then separated into three 5 tie groups, then processed into a boiler-fuel consistency using commercial processing techniques. A sample of each 5-tie group was then shipped to an independent laboratory for analysis, thereby producing 3 data points for each preservative type. TWC also prepared two blends: One with equal portions of creosote, creosote-borate, copper naphthenate, and copper naphthenate-borate; and the second a weighted blend of these tie types in proportion to current usage ratios of each preservative chemistry. These blends samples were analyzed in triplicate, for a total of 18 samples being analyzed (*i.e.,* three from each tie sample group). Two laboratories were used by TWC to perform the analysis: One laboratory analyzed metals, mercury, semivolatiles, and heat of combustion; and the other laboratory analyzed volatiles, chlorine, fluorine, and nitrogen. All methods used were EPA or ASTM methods, and were appropriate for the materials being tested. No specific sampling methodology was employed in taking the samples from the 5-ties group.

The EPA reviewed the 2015 test data, which was provided by TWC on September 11, 2015, and provided TWC with additional follow-up questions and clarifications, including the specific sources of the ties. TWC's response noted the sources of ties for each chemistry and indicated that the ties generally originated in the southeast, but there are also ties from Pennsylvania, South Dakota, and Kentucky represented within the TWC data set. The EPA also noted some exceptions and flags within the analytical report, such as sample coolers upon receipt at the lab were outside the required temperature criterion; surrogate recoveries for semivolatile samples (which represent extraction efficiency within a sample matrix) were sometimes lower or higher than those for samples containing creosote-treated wood; and dilution factors (dilution is used when the sample is higher in concentration than can be analyzed) for creosote-treated wood samples were high (up to 800). The laboratory noted these issues in the report narrative, but concluded that there were no corrective actions necessary.

Finally, EPA requested further information on these issues noted in the report narrative, as well as supporting quality assurance documentation from the laboratories. With respect to surrogate recoveries and dilutions, the lab indicated that the high dilutions were required for the creosote-containing matrix to avoid saturation of the detector instrument.[28] Also, the shipping cooler temperature criterion of 4 degrees Celsius, which EPA views as standard practice, is not wholly applicable in this case due to the nature of the samples. Since the ties were used and stored after being taken out of service in ambient atmosphere and are not biologically active, the 4 degree Celsius receipt condition is not necessary, but was noted in the report as part of laboratory standard operating procedure.

E. Summary and Request for Comment

EPA believes it has sufficient information to propose to list OTRTs categorically as non-waste fuels. For units combusting copper-naphthenate-borate and/or copper naphthenate railroad ties, such materials could be combusted in units designed to burn biomass or biomass and fuel oil. For units combusting railroad ties containing cresosote, including creosote-borate or any mixtures of ties containing cresosote, borate and copper naphthenate, such materials must be burned in combustion units that are designed to burn both biomass and fuel oil. The Agency would consider units to meet this requirement if the unit combusts fuel oil as part of normal operations and not solely as part of start up or shut down operations.

Consistent with the approach for CTRTs outlined in the February 2016 rule, the Agency is also proposing that units combusting railroad ties treated

[28] Samples with concentrations exceeding the calibration range must be diluted to fall within the calibration range. The more a sample is diluted, the higher the reporting limit. Sample dilution is required when the concentration of a compound exceeds the amount that produces a full-scale response. At that point the detector becomes saturated and fails to respond to additional target compound(s). Diluting samples to accommodate the high-concentrations can reduce the concentration of the target analytes to levels where they can no longer be detected.

with cresosote-borate (or other mixtures of treated railroad ties containing creosote, borate and copper naphthenate) in units designed to burn biomass and fuel oil, could also combust those materials in units at major pulp and paper mills or units at power production facilities subject to 40 CFR part 63, subpart DDDDD (Boiler MACT) that combust such ties and had been designed to burn biomass and fuel oil, but are modified (*e.g.,* oil delivery mechanisms are removed) in order to use natural gas instead of fuel oil as part of normal operations and not solely as part of start-up or shut-down operations. These ties may continue to be combusted as a product fuel only if certain conditions are met, which are intended to ensure that they are not being discarded:

- Must be combusted in existing (*i.e.,* commenced construction prior to April 14, 2014) stoker, bubbling bed, fluidized bed or hybrid suspension grate boilers; and
- Must comprise no more than 40 percent of the fuel that is used on an annual heat input basis.

The standard would be applicable to existing units burning creosote-borate, and mixtures of creosote, copper naphthenate and borate treated railroad ties that had been designed to burn fuel oil and biomass and have been modified to burn natural gas. The standard will also apply if an existing unit designed to burn fuel oil and biomass is modified at some point in the future.

The approach addresses only the circumstance where contaminants in these railroad ties are comparable to or less than the traditional fuels the unit was originally designed to burn (both fuel oil and biomass) but that design was modified in order to combust natural gas. The approach is not a general means to circumvent the contaminant legitimacy criterion by allowing combustion of any NHSM with elevated contaminant levels, *i.e.,* levels not comparable to the traditional fuel the unit is currently designed to burn. The particular facilities in this case had used these ties and would clearly be in compliance with the legitimacy criteria if they did not switch to the cleaner natural gas fuel. Information indicating that these ties are an important part of the fuel mix due to the consistently lower moisture content and higher Btu value, as well as the benefits of drier more consistent fuel to combustion units with significant swings in steam demand, further suggest that discard is not occurring. Therefore, EPA believes it appropriate to balance other relevant factors in this categorical non-waste determination and for the Agency to decide that the switching to the cleaner natural gas would not render these materials a waste fuel.

This case is no different from the Agency's determination in the February 2016 rule with respect to CTRTs. This determination is accepted Agency policy and is appropriately applied to the case of other treated railway ties in this proceeding. This determination, as discussed in the February 2016 rule, is based on the historical usage as a product fuel in stoker, bubbling bed, fluidized bed and hybrid suspension grate boilers (*i.e.,* boiler designs used to combust used railroad ties, see 81 FR 6732).

The Agency solicits comments on the proposed non-waste categorical determination as described previously. The Agency is also specifically requesting comment on the following:

- Whether railroad ties with de minimis levels of creosote should be allowed to be combusted in biomass only units;
- Should a particular de minimus level should be designated and on what should this level be based;
- Whether these OTRTs are combusted in units designed to burn coal in lieu of, or in addition to biomass and fuel oil, and whether the contaminant comparisons to meet legitimacy criteria should include comparisons to coal;
- In light of the data and sampling history described above, whether the quality of data is adequate to support the proposed determination;
- Additional data that should be considered in making the comparability determinations for OTRTs.

F. Copper and Borates Literature Review and Other EPA Program Review Summary

Neither copper nor borate are hazardous air pollutants (HAP), and thus are not contaminants under NHSM standards.[29] [30] To determine whether those compounds pose health risk concerns not directly covered by the NHSM standards, and how those concerns may be addressed under other Agency programs, we conducted a literature review on copper and borate and the rules these constituents and their compounds.

Under the Clean Water Act, EPA's Office of Water developed the Lead and Copper Rule which became effective in 1991 (56 FR 26460). This rule set a limit of 1.3 ppm copper concentration in 10% of tap action level for public water. Exceedances of this limit require additional treatment steps in order to reduce waste corrosivity and prevent leaching of these metals (including copper) from plumbing and distribution systems. EPA's Office of Water also issued a fact sheet for copper under the Clean Water Act section 304(a) titled the Aquatic Life Ambient Freshwater Quality Criteria.[31] This fact sheet explains that copper is an essential nutrient at low concentrations, but is toxic to aquatic organisms at higher concentrations. The fact sheet listed the following industries that contribute to manmade discharges of copper to surface waters: Mining, leather and leather products, fabricated metal products, and electric equipment. No mention was made of deposition from combustion sources, such as area source boilers that may not have robust particulate matter control devices installed on them. By comparison, there are no National Recommended Aquatic Life Criteria for boron or borates.

EPA also investigated whether there were any concerns that copper and borate can react to form polychlorinated dibenzodioxin and dibenzofurans (PCDD/PCDF) during the combustion process. Specific studies evaluating copper involvement in dioxins and furans formation in municipal or medical waste incinerator flue gas have been conducted.[32] While the exact mechanism and effects of other combustion parameters on PCDD and PCDF formation are still unknown, increased copper chloride (CuCl) and/or cupric chloride ($CuCl_2$) on fly ash particles has been shown to increase concentrations of PCDD and PCDF in fly ash. Various researchers conclude that CuCl and/or $CuCl_2$ are serving either roles as catalysts in dioxin formation or as chlorine sources for subsequent PCDD/PCDF formation reactions (*i.e.,* the CuCl and/or $CuCl_2$ serve as dechlorination/chlorination catalysts).

[29] CAA Section 112 requires EPA to promulgate regulations to control emissions of 187 HAP from sources in source categories listed by EPA under section 112(c), while CAA section 129 CISWI standards include numeric emission limitations for the nine pollutants, plus opacity (as appropriate), that are specified in CAA section 129(a)(4). For the purpose of NHSM standards, the definition of contaminants is limited to HAP under CAA 112 and CAA 129.

[30] We note also under the CAA standards for smaller area sources, emission limits are not required for copper, borate (or for HAPs). Standards for area sources focus on tune-ups of the boiler unit (see 40 CFR 40 CFR part 63, subpart JJJJJJ.

[31] Aquatic life criteria for toxic chemicals are the highest concentration of specific pollutants or parameters in water that are not expected to pose a significant risk to the majority of species in a given environment or a narrative description of the desired conditions of a water body being ''free from'' certain negative conditions.

[32] See technical memorandum on copper-related programs and emission studies available in the docket to this rulemaking.

Copper emissions from fly ash are reduced with good particulate matter controls. A high performance fabric filter may be the best control device, although some portion of fine particulate matter may pass through. Cyclone separators and electro-static precipitators have not been shown to be effective in controlling these emissions, and these types of controls may be more prevalent amongst smaller, area source boilers. Overall, results from many studies indicate that most of the copper ends up in the bottom ash.

Generally, borates have a low toxicity, and should not be a concern from a health risk perspective. As indicated previously, neither boron nor borates are listed as HAP under CAA section 112, nor are they considered to be criteria air pollutants subject to any emissions limitations. However, elemental boron has been identified by EPA in the coal combustion residuals (CCR) risk analysis [33] to present some potential risks for ecological receptors. As a result of this risk, and boron's ability to move through the subsurface,[34] boron has been included as a monitored constituent in CCR monitoring provisions for coal ash impoundments.

Copper has some acute toxicity, but these exposures appear to be the result of direct drinking water or cooking-related intake. We anticipate the only routes that copper releases to the environment could result from burning copper naphthenate treated ties would be stormwater runoff from the ties and deposition from boiler emissions. The amount of copper remaining in the tie after its useful life, however, may be greatly reduced from the original content, and facilities manage the shredded tie material in covered areas to prevent significant moisture swings, therefore, we do not expect impacts from copper-containing runoff. Due to the high vaporization temperature, copper will exist in solid phase after it leaves the furnace, and would therefore be controlled in the air pollution control device operated to control particulate emissions from the boiler.

EPA solicits comment and seeks any additional information (*e.g.* preservative leaching rates) that would help further inform the determinations outlined above regarding management and combustion of borate and copper treated railroad ties and impacts to surface water, drinking water or air not addressed under the NHSM standards.

[33] Human and Ecological Risk Assessment of Coal Combustion Residuals, EPA, December 2014.

[34] See 80 FR 21302, April 17, 2015.

IV. Effect of This Proposal on Other Programs

Beyond expanding the list of NHSMs that categorically qualify as non-waste fuels, this rule does not change the effect of the NHSM regulations on other programs as described in the March 21, 2011 NHSM final rule, as amended on February 7, 2013 (78 FR 9138) and February 8, 2016 (81 FR 6688). Refer to section VIII of the preamble to the March 21, 2011 NHSM final rule [35] for the discussion on the effect of the NHSM rule on other programs.

V. State Authority

A. Relationship to State Programs

This proposal does not change the relationship to state programs as described in the March 21, 2011 NHSM final rule. Refer to section IX of the preamble to the March 21, 2011 NHSM final rule [36] for the discussion on state authority including, ''Applicability of State Solid Waste Definitions and Beneficial Use Determinations'' and ''Clarifications on the Relationship to State Programs.'' The Agency, however, would like to reiterate that this proposed rule (like the March 21, 2011 and the February 7, 2013 final rules) is not intended to interfere with a state's program authority over the general management of solid waste.

B. State Adoption of the Rulemaking

No federal approval procedures for state adoption of this proposed rule are included in this rulemaking action under RCRA subtitle D. Although the EPA does promulgate criteria for solid waste landfills and approves state municipal solid waste landfill permitting programs, RCRA does not provide the EPA with authority to approve state programs beyond those landfill permitting programs. While states are not required to adopt regulations promulgated under RCRA subtitle D, some states incorporate federal regulations by reference or have specific state statutory requirements that their state program can be no more stringent than the federal regulations. In those cases, the EPA anticipates that, if required by state law, the changes being proposed in this document, if finalized, will be incorporated (or possibly adopted by authorized state air programs) consistent with the state's laws and administrative procedures.

VI. Cost and Benefits

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. This rulemaking, as proposed, establishes a categorical non-waste listing for selected NHSMs under RCRA. This categorical non-waste determination allows these materials to be combusted as a product fuel in units, subject to the CAA section 112 emission standards, without being subject to a detailed case-by-case analysis of the material(s) by individual combustion facilities, provided they meet the conditions of the categorical listing. The proposal establishes no direct standards or requirements relative to how these materials are managed or combusted. As a result, this action alone does not directly invoke any costs [37] or benefits. Rather, this RCRA proposal is being developed to simplify the rules for identifying which NHSMs are not solid wastes and to provide additional clarity and direction for owners or operators of combustion facilities. In this regard, this proposal provides a procedural benefit to the regulated community, as well as the states through the establishment of regulatory clarity and enhanced materials management certainty.

Because this RCRA action is definitional only, any costs or benefits indirectly associated with this action would not occur without the corresponding implementation of the relevant CAA rules. However, in an effort to ensure rulemaking transparency, the EPA prepared an assessment in support of this action that examines the scope and direction of these indirect impacts, for both costs and benefits.[38] This document is available in the docket for review and comment. Finally, we recognize that this action would indirectly affect various materials management programs and policies, and we are sensitive to these concerns. The Agency encourages comment on these effects.

The assessment document, as mentioned previously, finds that facilities operating under CAA section 129 standards that are currently burning CTRTs, and no other solid wastes, and who had planned to continue burning these materials, may experience cost savings associated with the potential modification and operational adjustments of their affected units. In this case, the unit-level cost savings are

[35] 76 FR 15456, March 21, 2011 (page 15545).

[36] 76 FR 15456, March 21, 2011 (page 15546).

[37] Excluding minor administrative burden/cost (*e.g.,* rule familiarization).

[38] U.S. EPA, Office of Resource Conservation and Recovery, ''Assessment of the Potential Costs, Benefits, and Other Impacts *for the Proposed* Rule: Categorical Non-Waste Determination for Selected Non Hazardous Secondary Materials (NHSMs): Creosote-Borate Treated Railroad Ties, Copper Naphthenate Treated Railroad Ties, and Copper Naphthenate-Borate Treated Railroad Ties'' EPA Docket Number: EPA–HQ–OLEM–2016–0248.

estimated, on average, to be approximately $266,000 per year. In addition, the increased regulatory clarity and certainty associated with this action may stimulate increased product fuel use for one or more of these NHSMs, potentially resulting in upstream life cycle benefits associated with reduced extraction of selected virgin materials.

VII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action. The Office of Management and Budget (OMB) waived review. The EPA prepared an economic analysis of the potential costs and benefits associated with this action. This analysis, ''Assessment of the Potential Costs, Benefits, and Other Impacts for the Proposed Rule—Categorical Non-Waste Determination for Selected Non-Hazardous Secondary Materials (NHSMs): Creosote-Borate Treated Railroad Ties, Copper Naphthenate Treated Railroad Ties, and Copper Naphthenate-Borate Treated Railroad Ties'', is available in the docket. Interested persons are encouraged to read and comment on this document.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA as this action only proposes to add three new categorical non-waste fuels to the NHSM regulations. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2050–0205.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. The proposed addition of three NHSMs to the list of categorical non-waste fuels is expected to indirectly reduce materials management costs. In addition, this action will reduce regulatory uncertainty associated with these materials and help increase management efficiency. We have therefore concluded that this action will relieve regulatory burden for all directly regulated small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act (UMRA)

This action contains no Federal mandates as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. UMRA generally excludes from the definition of ''Federal intergovernmental mandate'' duties that arise from participation in a voluntary Federal program. Affected entities are not required to manage the proposed additional NHSMs as non-waste fuels. As a result, this action may be considered voluntary under UMRA. Therefore, this action is not subject to the requirements of section 202 or 205 of the UMRA

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, this proposal will not impose direct compliance costs on small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. It will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. Potential aspects associated with the categorical non-waste fuel determinations under this proposed rule may invoke minor indirect tribal implications to the extent that entities generating or consolidating these NHSMs on tribal lands could be affected. However, any impacts are expected to be negligible. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in the Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. Based on the following discussion, the Agency found that populations of children near potentially affected boilers are either not significantly greater than national averages, or in the case of landfills, may potentially result in reduced discharges near such populations.

The proposed rule, in conjunction with the corresponding CAA rules, may indirectly stimulate the increased fuel use of one of more the three NHSMs by providing enhanced regulatory clarity and certainty. This increased fuel use may result in the diversion of a certain quantity of these NHSMs away from current baseline management practices. Any corresponding disproportionate impacts among children would depend upon whether children make up a disproportionate share of the population living near the affected units. Therefore, to assess the potential an indirect disproportionate effect on children, we conducted a demographic analysis for this population group surrounding CAA section 112 major source boilers, municipal solid waste landfills, and construction and demolition (C&D) landfills for the Major and Area Source Boilers rules and the CISWI rule.[39] We assessed the share of the population under the age of 18 living within a three-mile (approximately five kilometers) radius of these facilities. Three miles has been used often in other demographic analyses focused on areas around industrial sources.[40]

[39] The extremely large number of area source boilers and the absence of site-specific coordinates prevented us from assessing the demographics of populations located near these sources. In addition, we did not assess child population percentages surrounding cement kilns that may use some out-of-service railroad crossties for their thermal value.

[40] The following publications which have provided demographic information using a 3-mile or 5-kilometer circle around a facility:

* U.S. GAO (Government Accountability Office). Demographics of People Living Near Waste Facilities. Washington DC: Government Printing Office 1995.

* Mohai P, Saha R. ''Reassessing Racial and Socio-economic Disparities in Environmental Justice Research''. Demography. 2006;43(2): 383–399.

* Mennis, Jeremy ''Using Geographic Information Systems to Create and Analyze Statistical Surfaces

Continued

For major source boilers, our findings indicate that the percentage of the population in these areas under age 18 years is generally the same as the national average.[41] In addition, while the fuel source and corresponding emission mix for some of these boilers may change as an indirect response to this rule, emissions from these sources would remain subject to the protective CAA section 112 standards. For municipal solid waste and C&D landfills, we do not have demographic results specific to children. However, using the population below the poverty level as a rough surrogate for children, we found that within three miles of facilities that may experience diversions of one or more of these NHSMs, low-income populations, as a percent of the total population, are disproportionately high relative to the national average. Thus, to the extent that these NHSMs are diverted away from municipal solid waste or C&D landfills, any landfill-related emissions, discharges, or other negative activity potentially affecting low-income (children) populations living near these units are likely to be reduced. Finally, transportation emissions associated with the diversion of some of this material away from landfills to boilers are likely to be generally unchanged, while these emissions are likely to be reduced for on-site generators of paper recycling residuals that would reduce off-site shipments.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that it is not feasible to determine whether this action has disproportionately high and adverse effects on minority populations, low-income populations, and/or indigenous peoples as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). However, the overall level of emissions, or the emissions mix from affected boilers are not expected to change significantly because the three NHSMs proposed to be categorically listed as non-waste fuels are generally comparable to the types of fuels that these combustors would otherwise burn. Furthermore, these units remain subject to the protective standards established under CAA section 112.

Our environmental justice demographics assessment conducted for the prior rulemaking[42] remains relevant to this action. This assessment reviewed the distributions of minority and low-income groups living near potentially affected sources using U.S. Census blocks. A three-mile radius (approximately five kilometers) was examined in order to determine the demographic composition (*e.g.,* race, income, etc.) of these blocks for comparison to the corresponding national compositions. Findings from this analysis indicated that populations living within three miles of major source boilers represent areas with minority and low-income populations that are higher than the national averages. In these areas, the minority share[43] of the population was 33 percent, compared to the national average of 25 percent. For these same areas, the percent of the population below the poverty line (16 percent) was higher than the national average (13 percent).

In addition to the demographics assessment described previously, we also considered the potential for non-combustion environmental justice concerns related to the potential incremental increase in NHSMs diversions from current baseline management practices. These may include the following:

- *Reduced upstream emissions resulting from the reduced production of virgin fuel:* Any reduced upstream emissions that may indirectly occur in response to reduced virgin fuel mining or extraction may result in a human health and/or environmental benefit to minority and low-income populations living near these projects.
- *Alternative materials transport patterns:* Transportation emissions associated with NHSMs diverted from landfills to boilers are likely to be similar, except for on-site paper recycling residuals, where the potential for less off-site transport to landfills may result in reduced truck traffic and emissions where such transport patterns may pass through minority or low-income communities.
- *Change in emissions from baseline management units:* The diversion of some of these NHSMs away from disposal in landfills may result in a marginal decrease in activity at these facilities. This may include non-adverse impacts, such as marginally reduced emissions, odors, groundwater and surface water impacts, noise pollution, and reduced maintenance cost to local infrastructure. Because municipal solid waste and C&D landfills were found to be located in areas where minority and low-income populations are disproportionately high relative to the national average, any reduction in activity and emissions around these facilities is likely to benefit the citizens living near these facilities.

Finally, this rule, in conjunction with the corresponding CAA rules, may help accelerate the abatement of any existing stockpiles of the targeted NHSMs. To the extent that these stockpiles may represent negative human health or environmental implications, minority and/or low-income populations that live near such stockpiles may experience marginal health or environmental improvements. Aesthetics may also be improved in such areas.

As previously discussed, this RCRA proposed action alone does not directly require any change in the management of these materials. Thus, any potential materials management changes stimulated by this action, and corresponding impacts to minority and low-income communities, are considered to be indirect impacts, and would only occur in conjunction with the corresponding CAA rules.

List of Subjects in 40 CFR part 241

Environmental protection, Air pollution control, Waste treatment and disposal.

---

of Population and Risk for Environmental Justice Analysis'' Social Science Quarterly, 2002, 83(1):281–297.

* Bullard RD, Mohai P, Wright B, Saha R et al. Toxic Wastes and Race at Twenty, 1987–2007, March 2007. 5 CICWI Rule and Major Source Boilers Rule.

[41] U.S. EPA, Office of Resource Conservation and Recovery. *Summary of Environmental Justice Impacts for the Non-Hazardous Secondary Material (NHSM) Rule, the 2010 Commercial and Industrial Solid Waste Incinerator (CISWI) Standards, the 2010 Major Source Boiler NESHAP and the 2010 Area Source Boiler NESHAP.* February 2011.

[42] U.S. EPA, Office of Resource Conservation and Recovery. *Summary of Environmental Justice Impacts for the Non-Hazardous Secondary Material (NHSM) Rule, the 2010 Commercial and Industrial Solid Waste Incinerator (CISWI) Standards, the 2010 Major Source Boiler NESHAP and the 2010 Area Source Boiler NESHAP.* February 2011.

[43] This figure is for overall population minus white population and does not include the Census group defined as ''White Hispanic.''

Dated: October 19, 2016.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, EPA proposes to amend 40,CFR chapter I as set forth below:

PART 241—SOLID WASTES USED AS FUELS OR INGREDIENTS IN COMBUSTION UNITS

■ 1. The authority citation for Part 241 continues to read as follows:

Authority: 42 U.S.C. 6903, 6912, 7429.

■ 2. Section 241.2 is amended by adding in alphabetical order the definitions ''Copper naphthenate treated railroad ties'', ''Copper naphthenate-borate treated railroad ties'' and ''Creosote-borate treated railroad ties'' to read as follows:

§ 241.2 Definitions.

* * * * *

Copper naphthenate treated railroad ties means railroad ties treated with copper naphthenate made from naphthenic acid and copper salt.

Copper naphthenate-borate treated railroad ties means railroad ties treated with copper naphthenate and borate made from disodium octaborate tetrahydrate.

Creosote-borate treated railroad ties means railroad ties treated with a wood preservative containing creosols and phenols and made from coal tar oil and borate made from disodium octaborate tetrahydrate.

* * * * *

■ 3. Section 241.4 is amended by adding paragraphs (a)(8) through (10) to read as follows:

§ 241.4 Non-waste Determinations for Specific Non-Hazardous Secondary Materials When Used as a Fuel.

* * * * *

(a) * * *

(8) Creosote-borate treated railroad ties, and mixtures of creosote, borate and copper naphthenate treated railroad ties that are processed (which must include at a minimum, metal removal and shredding or grinding) and then combusted in the following types of units:

(i) Units designed to burn both biomass and fuel oil as part of normal operations and not solely as part of start-up or shut-down operations, and

(ii) Units at major source pulp and paper mills or power producers subject to 40 CFR part 63, subpart DDDDD that combust creosote-borate treated railroad ties and mixed creosote, borate and copper naphthenate treated railroad ties, and had been designed to burn biomass and fuel oil, but are modified (*e.g.,* oil delivery mechanisms are removed) in order to use natural gas instead of fuel oil, as part of normal operations and not solely as part of start-up or shut-down operations. The creosote-borate and mixed creosote, borate and copper naphthenate treated railroad ties may continue to be combusted as product fuel under this subparagraph only if the following conditions are met, which are intended to ensure that such railroad ties are not being discarded:

(A) Creosote-borate and mixed creosote, borate and copper naphthenate treated railroad ties must be burned in existing (*i.e.,* commenced construction prior to April 14, 2014) stoker, bubbling bed, fluidized bed, or hybrid suspension grate boilers; and

(B) Creosote-borate and mixed creosote, borate and copper naphthenate treated railroad ties can comprise no more than 40 percent of the fuel that is used on an annual heat input basis.

(9) Copper naphthenate treated railroad ties that are processed (which must include at a minimum, metal removal and shredding or grinding) and then combusted in units designed to burn biomass or units designed to burn both biomass and fuel oil.

(10) Copper naphthenate-borate treated railroad ties that are processed (which must include at a minimum, metal removal and shredding or grinding) and then combusted in units designed to burn biomass or units designed to burn both biomass and fuel oil.

* * * * *

[FR Doc. 2016–26381 Filed 10–31–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2015–0148; 4500030113]

RIN 1018–BA86

Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Headwater Chub and a Distinct Population Segment of the Roundtail Chub

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of the comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the comment period reopening on our proposed rules to add the headwater chub (*Gila nigra*) and the roundtail chub (*Gila robusta*) distinct population segment (DPS) as threatened species to the List of Endangered and Threatened Wildlife. We are taking this action based on significant new information regarding the species' taxonomic status as presented by the American Fisheries Society and the American Society of Ichthyologists and Herpetologists (AFS/ASIH) Joint Committee on the Names of Fishes. We are reopening the comment period for 45 days to provide the public additional time to review and consider our proposed rulemakings in light of this new information.

DATES: The comment period end date for the proposed rule that published at 80 FR 60754 on October 7, 2015, is December 16, 2016. We request that comments be submitted by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES: *Comment submission:* You may submit comments by one of the following methods:

(1) Electronically: Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter the appropriate Docket No.: FWS–R2–ES–2015–0148 for the proposed threatened status for headwater chub and the roundtail chub distinct population segment. You may submit a comment by clicking on ''Comment Now!''

(2) By hard copy: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2015–0148; U.S. Fish and Wildlife Service Headquarters, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information). Comments previously submitted need not be resubmitted as they are already incorporated into the public record and will be fully considered in the final determinations.

Document availability: The new scientific information described in this document is available at *http://www.regulations.gov* in Docket No. FWS–R2–ES–2015–0148.

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office; telephone 602–242–0210; facsimile 602–242–2513. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800–877–8339).

SUPPLEMENTARY INFORMATION:

Previous Federal Actions

On October 7, 2015 (80 FR 60754), we published a proposed rule that the headwater chub and the lower Colorado River basin roundtail chub DPS are threatened species under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*). Section 4(b)(6)(A) of the Act requires that we make final listing determinations within 1 year of the proposed rule, except where, as in this instance, there is substantial disagreement regarding the sufficiency or accuracy of the available data, which allows for an additional 6 months. On August 15, 2016 (81 FR 54018), we announced a 6-month extension on the proposed rule's final determination due to substantial disagreement regarding the available data's sufficiency or accuracy, and reopened the comment period for 30 days. Accordingly, the deadline to finalize or withdraw the proposed rule is April 7, 2017. For a description of additional previous Federal actions concerning these species, please refer to the proposed listing rule (October 7, 2015; 80 FR 60754).

Background

In the proposed rule (October 7, 2015; 80 FR 60754), we evaluated headwater and roundtail chubs as separate species. However, commenters raised questions regarding the headwater and roundtail chubs' taxonomic distinctness, as related to one another and to the Gila chub (*Gila intermedia*). The Gila chub is listed as an endangered species (November 2, 2005; 70 FR 66664). Some scientists knowledgeable about the species contend that the three entities are not separate species.

For this reason, the Arizona Game and Fish Department requested that the AFS/ASIH evaluate the most recent literature associated with roundtail chub, headwater chub, and Gila chub taxonomy. The AFS/ASIH is recognized as the authority in establishing the taxonomic status of fish. The panel met in April 2016 and again in August 2016, and presented their conclusions in a final report to the Arizona Game and Fish Department on September 1, 2016 (Page *et al.* 2016; see Docket No. FWS–R2–ES–2015–0148 at *http://www.regulations.gov*). The AFS/ASIH review (Page *et al.* 2016) included published and unpublished studies and reports presented to them in April 2016, and a more recent, unpublished report by Copus *et al.* (2016), which was included as an appendix to Page *et al.* (2016). Based on the information reviewed, the AFS/ASIH panel concluded that ''no morphological or genetic data define populations of *Gila* in the lower Colorado River basin (which includes the Little Colorado River, Bill Williams River, Gila River, Verde River, and Salt River drainages) as members of more than one species'' and ''that the data available support recognition of only one species of *Gila,* the roundtail chub, *Gila robusta*'' (Page *et al.* 2016). This new information could be of significant consequence in our final listing determination because our proposed rule reviewed these entities as separate species. Given the new information, we must now review the proposed entities' validity as recognized species. Further, this information was not previously included or considered in our proposed rulemaking or made available to the public. Therefore, we are reopening the comment period for 45 days to allow consideration of this new information, as well as any other aspect of the proposed rule, prior to finalizing our decision.

Public Comments

We will accept written comments and information during this reopened comment period on our proposed headwater chub and roundtail chub DPS listing published in the **Federal Register** on October 7, 2015 (80 FR 60754). We will consider information and recommendations from all interested parties. We intend that any final action resulting from these proposals be as accurate as possible and based on the best available scientific and commercial data.

In considering the new information received from the AFS/ASIH, as well as the information provided in the proposed rule, we are particularly seeking comments considering:

(a) Roundtail, headwater, and Gila chub genetics and taxonomy;

(b) Roundtail, headwater, and Gila chubs' morphological characteristics;

(c) Those topics previously noted in the October 7, 2015, proposed rule (see 80 FR 60754).

If you previously submitted comments or information on the proposed rule, please do not resubmit them. We have incorporated them into the public record, and we will fully consider them in preparing our final determinations. Our final determinations will take into consideration all written comments and any additional information we received.

You may submit your comments and materials concerning this proposed rule by one of the methods listed above in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule on the Internet at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2015–0148. Copies of the proposed rule are also available at *http://www.fws.gov/southwest/es/arizona.*

References Cited

Copus, J.M., Z. Foresman, W.L. Montgomery, B.W. Bowen, and R.J. Toonen. 2016. Revision of the *Gila robusta* (Teleostei, Cyprinidae) species complex: Morphological examination and molecular phylogenetics reveal a single species. *Report to the Joint ASIH–AFS Committee on Names of Fishes.*

Page, L.M., C.C. Baldwin, H. Espinosa-Perez, C.R. Gilbert, K.E. Hartel, R.N. Lea, NE. Mandrak, J.J. Schmitter-Soto, and H.J. Walker. 2016. Final report of the AFS/ASIH Joint Committee on the Names of Fishes on the taxonomy of *Gila* in the Lower Colorado River basin of Arizona and New Mexico. Report to the Arizona Game and Fish Department. 4 pp.

Author(s)

The primary author(s) of this notice are the Arizona Ecological Services Field Office staff members.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: October 20, 2016.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–26125 Filed 10–31–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 160811726–6987–01]

RIN 0648–XE809

Pacific Island Fisheries; 2016–17 Annual Catch Limit and Accountability Measures; Main Hawaiian Islands Deep 7 Bottomfish

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

ACTION: Proposed specifications; request for comments.

SUMMARY: NMFS proposes to specify an annual catch limit (ACL) of 318,000 lb for Deep 7 bottomfish in the main Hawaiian Islands (MHI) for the 2016–17 fishing year, which began on September 1, 2016, and ends on August 31, 2017. If the ACL is projected to be reached, NMFS would close the commercial and non-commercial fisheries for MHI Deep 7 bottomfish for the remainder of the fishing year as an accountability measure (AM). The proposed ACL and AM support the long-term sustainability of Hawaii bottomfish.

DATES: NMFS must receive comments by November 16, 2016.

ADDRESSES: You may submit comments on the 2016–2107 annual catch limit (ACL), identified by NOAA–NMF–2016–0112, by either of the following methods:

• *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0112,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

• *Mail:* Send written comments to Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1845 Wasp Blvd. Bldg. 176, Honolulu, HI 96818.

Instructions: NMFS may not consider comments sent by any other method, to any other address or individual, or received after the end of the comment period. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

NMFS prepared an environmental analysis that describes the potential impacts on the human environment that could result from the proposed specification. The environmental analysis and other supporting documents are available at *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Sarah Ellgen, NMFS PIR Sustainable Fisheries, 808–725–5173.

SUPPLEMENTARY INFORMATION: NMFS and the Western Pacific Fishery Management Council (Council) manage the bottomfish fishery in Federal waters around Hawaii under the Fishery Ecosystem Plan for the Hawaiian Archipelago (FEP), as authorized by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Title 50, Code of Federal Regulations, part 665 (50 CFR 665.4) requires NMFS to specify an ACL for MHI Deep 7 bottomfish each fishing year, based on a recommendation from the Council. The Deep 7 bottomfish are onaga (*Etelis coruscans*), ehu (*E. carbunculus*), gindai (*Pristipomoides zonatus*), kalekale (*P. sieboldii*), opakapaka (*P. filamentosus*), lehi (*Aphareus rutilans*), and hapuupuu (*Hyporthodus quernus*).

NMFS proposes to specify an ACL of 318,000 lb of Deep 7 bottomfish in the MHI for the 2016–17 fishing year. The Council recommended the proposed ACL, based on a 2011 bottomfish stock assessment updated with three additional years of data, and in consideration of the risk of overfishing, past fishery performance, the acceptable biological catch recommendation from its Scientific and Statistical Committee, and input from the public. An update to the 2011 NMFS bottomfish stock assessment estimated the overfishing limit for the MHI Deep 7 bottomfish stock complex to be 352,000 lb, which is 31,000 lb less than the estimated overfishing limit in the 2011 stock assessment. Based on this update, the Council recommended a three-year phased reduction of the ACL. NMFS prepared an environmental assessment dated March 17, 2016, of the Council's three-year phased reduction of the ACL (''Specification of Annual Catch Limits and Accountability Measures for Main Hawaiian Islands Deep 7 Bottomfish Fisheries in Fishing Years 2015–16, 2016–17, and 2017–18''), which is available from *www.regulations.gov*. The proposed ACL of 318,000 lb for 2016–17 is the second annual reduction in this phased approach, and is 8,000 lb less than the ACL that NMFS specified last year.

The ACL is associated with a 42 percent probability of overfishing, and is more conservative than the 50 percent risk threshold allowed under NMFS guidelines for National Standard 1 of the Magnuson-Stevens Act. NMFS monitors Deep 7 bottomfish catches based on data provided by commercial fishermen to the State of Hawaii. If NMFS projects the fishery will reach this limit, NMFS would close the commercial and non-commercial fisheries for MHI Deep 7 bottomfish for the remainder of the fishing year, as an accountability measure (AM). In addition, if NMFS and the Council determine that the final 2016–17 Deep 7 bottomfish catch exceeds the ACL, NMFS would reduce the Deep 7 bottomfish ACL for the 2017–18 fishing year by the amount of the overage.

The fishery has not caught the specified limit in any year since 2011. NMFS does not expect the proposed ACL and AM specifications for 2016–17 to result in a change in fishing operations, or other changes to the conduct of the fishery that would result in significant environmental impacts. After considering public comments on the proposed ACL and AMs, NMFS will publish the final specifications.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator for Fisheries has determined that this proposed specification is consistent with the Hawaii FEP, other provisions of the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

This action is exempt from review under Executive Order 12866.

Certification of Finding of No Significant Impact on Substantial Number of Small Entities

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that these proposed specifications, if adopted, would not have a significant economic impact on a substantial number of small entities. A description of the action, why it is being considered, and the legal basis for it are contained in the preamble to these proposed specifications.

NMFS proposes to specify an annual catch limit (ACL) of 318,000 lb for Main Hawaiian Islands (MHI) Deep 7 bottomfish for the 2016–17 fishing year, as recommended by the Western Pacific

Fishery Management Council (Council). NMFS monitors MHI Deep 7 bottomfish catches based on data provided by commercial fishermen to the State of Hawaii. If and when the fishery is projected to reach this limit, NMFS, as an accountability measure (AM), would close the commercial and non-commercial fisheries for MHI Deep 7 bottomfish for the remainder of the fishing year. The proposed ACL is 8,000 lb less than the ACL NMFS implemented for the 2015–16 fishing year, and 28,000 lb less than the ACL that NMFS implemented for 2011–12, 2012–13, 2013–14, and 2014–15. The AM will remain the same. Over the past five fishing seasons, highest reported annual landings, 309,485 lb, occurred during the 2013–2014 fishing year. NMFS does not expect the fishery to reach the limit during the 2016–17 fishing year, which began September 1, 2016, and ends August 31, 2017.

This rule would affect participants in the commercial and non-commercial fisheries for MHI Deep 7 bottomfish. During the 2015–16 fishing year, 368 fishermen reported landing 259,530 lb of MHI Deep 7 bottomfish. Based on available information, NMFS has determined that all vessels in the commercial and non-commercial fisheries for MHI Deep 7 bottomfish are small entities under the Small Business Administration's definition of a small entity. That is, they are engaged in the business of fish harvesting, independently owned or operated, not dominant in their field of operation, and have annual gross receipts not in excess of $11 million, the small business size standard for commercial fishing (NAICS Code: 11411). Therefore, there would be no disproportionate economic impacts between large and small entities. Furthermore, there would be no disproportionate economic impacts among the universe of vessels based on gear, home port, or vessel length.

As for revenues earned by fishermen from MHI Deep 7 bottomfish, State of Hawaii records report 328 of the 368 fishermen sold their MHI Deep 7 bottomfish catch. These 328 individuals sold a combined total of 240,183 lb (92.5 percent of reported catch) at a value of $1,716,313. Based on these revenues, the average price for MHI Deep 7 bottomfish in 2015–16 was approximately $7.15/lb. NMFS assumes that the remaining 40 commercial fishermen either sold no Deep 7 bottomfish or the State of Hawaii reporting program did not capture their sales.

Assuming the fishery attains the ACL of 318,000 in 2016–17, and using the 2015–16 average price of $7.15/lb, the potential fleet wide revenue during 2016–17 is expected to be $2,273,700 (or approximately $2,103,173 under the assumption that 92.5 percent of catch is sold). If the same number of fishermen sell MHI Deep 7 bottomfish in 2016–17 as in 2015–16, each of these 328 commercial fishermen could potentially sell an average of 970 lb of Deep 7 bottomfish valued at $6,932, if all Deep 7 bottomfish caught were sold. If 92.5 percent of all Deep 7 bottomfish that had been caught had been sold, then these 328 commercial fishermen could potentially sell an average of 897 lb of Deep 7 bottomfish valued at about $6,412.

In general, the relative importance of MHI bottomfish to commercial participants as a percentage of overall fishing or household income is unknown, as the total suite of fishing and other income-generating activities by individual operations across the year has not been examined.

In terms of scenarios immediately beyond the 2016–17 fishing year, three possible outcomes may occur. First, in the event that 2016–17 catch does not reach 318,000 lb, the ACL will decrease by 12,000 lb for the 2017–2018 fishing year, as set by the multi-year specification. Second, if the fishery exceeds the ACL for the 2016–17 fishing year, NMFS would reduce the MHI Deep 7 bottomfish ACL for the 2017–18 fishing year by the amount of the overage, in addition to the 12,000 lb reduction for the 2017–18 fishing year. The last possible scenario is one where NMFS would prepare a new stock assessment or update that NMFS and the Council would use to set a new 2017–2018 ACL (without inclusion of any overage, even if catch exceeds ACL for the 2016–17 fishing year), although this is unlikely, since NMFS plans to undertake the next stock assessment in 2018.

Even though this proposed specification would apply to a substantial number of vessels, *i.e.,* 100 percent of the bottomfish fleet, NMFS does not expect the rule will have a significantly adverse economic impact to individual vessels. Landings information from the past five fishing years, suggest that Deep 7 bottomfish landings are not likely to exceed the ACL proposed for 2016–17. Therefore, pursuant to the Regulatory Flexibility Act, this proposed action would not have a significant economic impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

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

Dated: October 26, 2016.

Samuel D. Rauch III,

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

[FR Doc. 2016–26323 Filed 10–31–16; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 81, No. 211
Tuesday, November 1, 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 27, 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 December 1, 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: Tuberculosis.

OMB Control Number: 0579–0146.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The AHPA is contained in Title X, Subtitle E, Sections 10401–18 of Public Law 107–171, May 13 2002, the Farm Security and Rural Investment Act of 2002. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. Disease prevention is the most effective method for maintaining a healthy animal population and enhancing the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), Veterinary Services' ability to allow U.S. animal producers to compete in the world market of animal and animal product trade. The APHIS TB regulations in Title 9 Code of Federal Regulation, Part 77, provide for the assignment of State TB risk classifications, the creation of TB risk status zones within the same State, and for the conduct of test before regulated animals are permitted to move interstate.

Need and Use of the Information: APHIS will collect reports, requests, forms, certificates, plans, MOUs, permits, and records for zoning, testing, and animal movement. Without the information, APHIS would not be able to operate an effective bovine tuberculosis surveillance, containment, and eradication program.

Description of Respondents: Business or other for-profit; State, Local or Tribal Government.

Number of Respondents: 4,574.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 29,515.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2016–26309 Filed 10–31–16; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2016–0031]

National Advisory Committee on Meat and Poultry Inspection

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of the re-establishment of the U.S. Department of Agriculture National Advisory Committee on Meat and Poultry Inspection.

SUMMARY: The U.S. Department of Agriculture (USDA) intends to re-establish the National Advisory Committee on Meat and Poultry Inspection (NACMPI). The purpose of the Committee is to provide advice to the Secretary of Agriculture concerning State and Federal programs with respect to meat, poultry and processed egg products inspection, food safety, and other matters that fall within the scope of the Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (PPIA), and the Egg Products Inspection Act (EPIA).

FOR FURTHER INFORMATION CONTACT: Ms. Natasha Williams, Program Specialist, Designated Federal Officer, Office of Outreach, Employee Education and Training, Outreach and Partnership Staff, FSIS, Patriot Plaza III Building, 355 E Street SW., Washington, DC 20024, Telephone: (202)-690–6531, Fax: (202) 690–6519; Email: *Natasha.Williams@fsis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

In accordance with the Federal Advisory Committee Act (5 U.S.C. App.), notice is hereby given that the Secretary of Agriculture intends to re-establish the National Advisory Committee on Meat and Poultry Inspection (NACMPI) for two years. The Committee provides advice and recommendations to the Secretary on meat and poultry inspection programs, pursuant to sections 7(c), 24, 301(a)(3), and 301(c) of the Federal Meat Inspection Act, 21 U.S.C. 607(c), 624, 645, 661(a)(3), and 661(c), and to sections 5(a)(3), 5(c), 8(b), and 11(e) of the Poultry Products Inspection Act, 21 U.S.C. 454(a)(3), 454(c), 457(b), and 460(e).

A copy of the current charter and other information about the committee can be found at *http://www.fsis.usda.gov/wps/portal/fsis/topics/regulations/advisory-committees/nacmpi.*

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS Web page located at: *http://www.fsis.usda.gov/federal-register.*

FSIS also will make copies of this publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The Update is available on the FSIS Web page. Through the Web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How To File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250–9410, Fax: (202) 690–7442, Email: *program.intake@usda.gov.*

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC, October 25, 2016.

Alfred V. Almanza,

Acting Administrator.

[FR Doc. 2016–26273 Filed 10–31–16; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–886]

Ferrovanadium From the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') preliminarily determines that imports of ferrovanadium from the Republic of Korea (''Korea'') are being, or are likely to be, sold in the United States at less than fair value (''LTFV''). The period of investigation (''POI'') is January 1, 2015, through December 31, 2015. The estimated weighted-average dumping margins of sales at LTFV are shown in the ''Preliminary Determination'' section of this notice. Interested parties are invited to comment on this preliminary determination.

DATES: Effective November 1, 2016.

FOR FURTHER INFORMATION CONTACT: Karine Gziryan at (202) 482–4081 or Eli Lovely at (202) 482–1593; AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

The Department published the notice of initiation of this investigation on April 18, 2016.[1] For a complete description of the events that followed the initiation of this investigation, see the Preliminary Decision Memorandum that is dated concurrently with this determination and is hereby adopted by this notice.[2] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (''ACCESS''). ACCESS is available to registered users at *https://access.trade.gov,* and to all parties in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be found at *http://enforcement.trade.gov/frn/.* The signed Preliminary Decision Memorandum and the electronic version of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The product covered by this investigation is ferrovanadium from Korea. For a full description of the scope of this investigation, *see* the ''Scope of the Investigation,'' in Appendix I of this notice.

Scope Comments

The *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* ''scope'').[3] No interested parties commented on the scope of the investigation, as it appeared in the *Initiation Notice.*

Methodology

The Department is conducting this investigation in accordance with section 731 of the Tariff Act of 1930 (''the Act''). For, Korvan, export prices have been calculated in accordance with section 772(a) of the Act. Normal value (''NV'') has been calculated in accordance with section 773 of the Act. The other two mandatory respondents in this investigation,[4] Woojin and Fortune, failed to respond to the Department's questionnaire or otherwise participate in the investigation. Thus, we preliminarily determine to apply facts otherwise available with an adverse inference to these respondents pursuant

---

[1] *See Ferrovanadium from the Republic of Korea: Initiation of Less-Than-Fair-Value Investigation,* 81 FR 24059 (April 18, 2016) (''*Initiation Notice*'').

[2] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair Value Investigation of Ferrovanadium from the Republic of Korea'' (''Preliminary Decision Memorandum''), dated concurrently with this notice.

[3] *See Initiation Notice,* 81 FR 24060.

[4] Korvan Ind. Co., Ltd. (''Korvan''), Woojin Ind. Co., Ltd. (''Woojin''), and Fortune Metallurgical Group Co., Ltd. (''Fortune'') are the mandatory respondents in this investigation.

to sections 776(a) and (b) of the Act. For a full description of the methodology underlying our preliminary determination, see the Preliminary Decision Memorandum.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated all-others rate shall be equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* dumping margins, and any dumping margins determined entirely under section 776 of the Act. Korvan is the only participating mandatory respondent in this investigation. The Department calculated a company-specific dumping margin for Korvan which is not zero, *de minimis* or based entirely on facts available. Therefore, for purposes of determining the ''all-others'' rate and pursuant to section 735(c)(5)(A) of the Act, we are assigning the weighted-average dumping margin calculated for Korvan to all other producers and exporters of the merchandise under consideration.

Preliminary Determination

The Department preliminarily determines that the following weighted-average dumping margins exist:

Exporter/Producer	Weighted-average margin %
Fortune Metallurgical Group Co., Ltd.	54.69
Korvan Ind. Co., Ltd.	4.48
Woojin Ind. Co., Ltd.	54.69
All-Others	4.48

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we will direct U.S. Customs and Border Protection (''CBP'') to suspend liquidation of all entries of ferrovanadium from the Republic of Korea, as described in the scope of the investigation, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. These suspension of liquidation instructions will remain in effect until further notice.

Pursuant to section 733(d) of the Act and 19 CFR 351.205(d), we will instruct CBP to require cash deposits equal to the weighted-average amount by which the NV exceeds U.S. price, as indicated in the table above, as follows: (1) The cash deposit for the mandatory respondents listed above will be the respondent-specific weighted-average dumping margin listed for the respondent in the table above; (2) if the exporter is not a mandatory respondent identified above, but the producer is, the cash deposit rate will be the weighted-average dumping margin established for the producer of the subject merchandise; and (3) the rate for all other producers or exporters will be the all others rate listed in the table above.[5]

Disclosure and Public Comment

We intend to disclose the calculations that we performed in this investigation to interested parties in this proceeding within five days after the date of public announcement of the preliminary determination in accordance with 19 CFR 351.224(b). Interested parties are invited to comment on this preliminary determination. Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the final verification report is issued in this proceeding, and rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than five days after the deadline for case briefs.[6] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. All documents must be filed electronically by the due date using ACCESS.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request for a hearing to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce. An electronically-filed request for a hearing must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time, within 30 days after the date of publication of this notice.[7] Hearing requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, the Department intends to hold the hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230, at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Verification

As provided in section 782(i) of the Act, we intend to verify the information that will be relied upon in making our final determination.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by petitioners. 19 CFR 351.210(e)(2) requires that requests by respondents for postponement of a final antidumping determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On September 23, 2016, pursuant to 19 CFR 351.210(e) and (e)(2), Korvan requested that the Department postpone the final determination and that provisional measures be extended to a period not to exceed six months.[8] Therefore, in accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) Our preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, we are postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, we will make our final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.[9]

International Trade Commission (''ITC'') Notification

In accordance with section 733(f) of the Act, we will notify the ITC of our affirmative preliminary determination of

[5] *See Modification of Regulations Regarding the Practice of Accepting Bonds During the Provisional Measures Period in Antidumping and Countervailing Duty Investigations,* 76 FR 61042 (October 3, 2011).

[6] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[7] *See* 19 CFR 351.310(c).

[8] *See* Letter to the Secretary of Commerce from Korvan ''Ferrovanadium from the Republic of Korea: Korvan's Request to Extend the Final Determination,'' dated September 23, 2016.

[9] *See also* 19 CFR 351.210(e).

sales at LTFV. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: October 25, 2016.

Ronald K. Lorentzen,

Acting Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The product covered by this investigation is all ferrovanadium regardless of grade (*i.e.,* percentage of contained vanadium), chemistry, form, shape, or size. Ferrovanadium is an alloy of iron and vanadium. Ferrovanadium is classified under Harmonized Tariff Schedule of the United States (HTSUS) item number 7202.92.0000. Although this HTSUS item number is provided for convenience and Customs purposes, the written description of the scope of the investigation is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum:

I. Summary
II. Background
III. Period of Investigation
IV. Postponement of Preliminary Determination
V. Postponement of Final Determination and Extension of Provisional Measures
VI. Scope of the Investigation
VII. Scope Comments
VIII. Selection of Respondents
IX. Discussion of Methodology
A. Application of Facts Available
B. Corroboration of Secondary Information
C. All Others Rate
D. Fair Value Comparisons
1. Determination of the Comparison Method
2. Results of the Differential Pricing Analysis
E. Date of Sale
F. U.S. Price
G. Normal Value
1. Comparison-Market Viability
2. Level of Trade
3. Calculation of Normal Value Based on Comparison Market Prices
4. Calculation of NV Based on CV
H. Cost of Production
1. Cost Averaging Methodology
a. Significance of Cost Changes
b. Linkage Between Sales and Cost Sales Information
2. Calculation of COP
3. Test of Comparison Market Sales Prices
4. Results of the COP Test
X. Currency Conversion
XI. Verification
XII. Recommendation

[FR Doc. 2016–26363 Filed 10–31–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (''Sunset'') Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: In accordance with section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') is automatically initiating the five-year reviews (''Sunset Reviews'') of the antidumping and countervailing duty (''AD/CVD'') order(s) listed below. The International Trade Commission (''the Commission'') is publishing concurrently with this notice its notice of *Institution of Five-Year Review* which covers the same order(s).

DATES: *Effective Date:* (November 1, 2016).

FOR FURTHER INFORMATION CONTACT: The Department official identified in the *Initiation of Review* section below at AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230. For information from the Commission contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

The Department's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

Initiation of Review

In accordance with 19 CFR 351.218(c), we are initiating Sunset Reviews of the following antidumping and countervailing duty order(s):

DOC Case No.	ITC Case No.	Country	Product	Department contact
A–580–815	731–TA–461	Japan	Gray Portland Cement and Cement Clinker (4th Review).	David Goldberger (202) 482–4136.
A–570–822	731–TA–624	PRC	Helical Spring Lock Washers (4th Review).	David Goldberger (202) 482–4136.
A–570–970	731–TA–1179	PRC	Multilayered Wood Flooring (1st Review).	Matthew Renkey 202–482–2312.
C–570–971	701–TA–476	PRC	Multilayered Wood Flooring (1st Review).	David Goldberger (202) 482–4136.
A–580–810	731–TA–540	Republic of Korea	Welded ASTM A–312 Stainless Steel Pipe (4th Review).	Jaqueline Arrowsmith (202) 482–5255.
A–821–801	731–TA–340–E	Russia	Solid Urea (4th Review)	David Goldberger (202) 482–4136.
A–583–820	731–TA–625	Taiwan	Helical Spring Lock Washers (4th Review).	David Goldberger (202) 482–4136.
A–583–815	731–TA–541	Taiwan	Welded ASTM A–312 Stainless Steel Pipe (4th Review).	Jaqueline Arrowsmith (202) 482–5255.
A–823–801	731–TA–340–H	Ukraine	Solid Urea (4th Review)	David Goldberger (202) 482–4136.

Filing Information

As a courtesy, we are making information related to sunset proceedings, including copies of the pertinent statute and Department's regulations, the Department's schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on the Department's Web site at the following address: ''*http://enforcement.trade.gov/sunset/*.'' All submissions in these Sunset Reviews must be filed in accordance with the Department's regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (''ACCESS''), can be found at 19 CFR 351.303.[1]

This notice serves as a reminder that any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information.[2] Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives in these segments.[3] The formats for the revised certifications are provided at the end of the *Final Rule.* The Department intends to reject factual submissions if the submitting party does not comply with the revised certification requirements.

On April 10, 2013, the Department modified two regulations related to AD/CVD proceedings: The definition of factual information (19 CFR 351.102(b)(21)), and the time limits for the submission of factual information (19 CFR 351.301).[4] Parties are advised to review the final rule, available at *http://enforcement.trade.gov/frn/2013/1304frn/2013-08227.txt,* prior to submitting factual information in these segments. To the extent that other regulations govern the submission of factual information in a segment (such as 19 CFR 351.218), these time limits will continue to be applied. Parties are also advised to review the final rule concerning the extension of time limits for submissions in AD/CVD proceedings, available at *http://enforcement.trade.gov/frn/2013/1309frn/2013-22853.txt,* prior to submitting factual information in these segments.[5]

Letters of Appearance and Administrative Protective Orders

Pursuant to 19 CFR 351.103(d), the Department will maintain and make available a public service list for these proceedings. Parties wishing to participate in any of these five-year reviews must file letters of appearance as discussed at 19 CFR 351.103(d)). To facilitate the timely preparation of the public service list, it is requested that those seeking recognition as interested parties to a proceeding submit an entry of appearance within 10 days of the publication of the Notice of Initiation.

Because deadlines in Sunset Reviews can be very short, we urge interested parties who want access to proprietary information under administrative protective order (''APO'') to file an APO application immediately following publication in the **Federal Register** of this notice of initiation. The Department's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306.

Information Required From Interested Parties

Domestic interested parties, as defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b), wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with the Department's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, the Department will automatically revoke the order without further review.[6]

If we receive an order-specific notice of intent to participate from a domestic interested party, the Department's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that the Department's information requirements are distinct from the Commission's information requirements. Consult the Department's regulations for information regarding the Department's conduct of Sunset Reviews. Consult the Department's regulations at 19 CFR part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at the Department.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218(c).

Dated: October 27, 2016.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2016–26364 Filed 10–31–16; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See also Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

[2] *See* section 782(b) of the Act.

[3] *See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (''*Final Rule*'') (amending 19 CFR 351.303(g)).

[4] *See Definition of Factual Information and Time Limits for Submission of Factual Information: Final Rule,* 78 FR 21246 (April 10, 2013).

[5] *See Extension of Time Limits,* 78 FR 57790 (September 20, 2013).

[6] *See* 19 CFR 351.218(d)(1)(iii).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for National Marine Sanctuary Advisory Councils

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: ONMS is seeking applications for vacant seats for seven of its 13 national marine sanctuary advisory councils and Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council (advisory councils). Vacant seats, including positions (*i.e.,* primary and alternate), for each of the advisory councils are listed in this notice under **SUPPLEMENTARY INFORMATION**. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; views regarding the protection and management of marine or Great Lakes resources; and possibly the length of residence in the area affected by the sanctuary. Applicants chosen as members or alternates should expect to serve two or three-year terms, pursuant to the charter of the specific national marine sanctuary advisory council or Northwestern Hawaiian Islands Coral

Reef Ecosystem Reserve Advisory Council.

DATES: Applications are due before or by Wednesday, November 30, 2016.

ADDRESSES: Application kits are specific to each advisory council. As such, application kits must be obtained from and returned to the council-specific addresses noted below.

- *Gray's Reef National Marine Sanctuary Advisory Council:* Becky Shortland, NOAA Gray's Reef National Marine Sanctuary, 10 Ocean Science Circle, Savannah, GA 31411; 912–598–2381; email *Becky.Shortland@noaa.gov;* or download applications from *http://graysreef.noaa.gov/management/sac/council_news.html.*
- *Greater Farallones National Marine Sanctuary Advisory Council:* Jenn Gamurot, Greater Farallones National Marine Sanctuary, 991 Marine Drive, The Presidio, San Francisco, CA 94129; 415–970–5252; email *Jenn.Gamurot@noaa.gov;* or download applications from *http://farallones.noaa.gov/manage/sac.html.*
- *Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council:* Kate Spidalieri, NOAA Inouye Regional Center, NOS/ONMS/HIHWNMS/Kate Spidalieri, 1845 Wasp Boulevard, Building 176, Honolulu, HI 96818; 240–533–0679; email *Kate.Spidalieri@noaa.gov;* or download applications from *http://hawaiihumpbackwhale.noaa.gov/council/council_app_accepting.html.*
- *Monitor National Marine Sanctuary Advisory Council:* William Sassorossi, *Monitor* National Marine Sanctuary, 100 Museum Drive, Newport News, VA 23606; 757–591–7329; email *William.Sassorossi@noaa.gov;* or download applications from *http://monitor.noaa.gov/advisory/news.html.*
- *National Marine Sanctuary of American Samoa Advisory Council:* Joseph Paulin, National Marine Sanctuary of American Samoa, Tauese P.F. Sunia Ocean Center, P.O. Box 4318, Pago Pago, American Samoa 96799; 684–633–6500 extension 226; email *Joseph.Paulin@noaa.gov;* or download applications from *http://americansamoa.noaa.gov/.*
- *Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council:* Allison Ikeda, NOAA Inouye Regional Center, NOS/ONMS/PMNM/Allison Ikeda, 1845 Wasp Boulevard, Building 176, Honolulu, HI 96818; 808–725–5818; email *Allison.Ikeda@noaa.gov;* or download applications from *www.papahanaumokuakea.gov/council/.*
- *Olympic Coast National Marine Sanctuary Advisory Council:* Karlyn Langjahr, 115 East Railroad Avenue, Suite 301, Port Angeles, WA 98362; 360–457–6622 extension 31; email *Karlyn.Langjahr@noaa.gov;* or download applications from *http://olympiccoast.noaa.gov/involved/sac/sac_welcome.html.*
- *Stellwagen Bank National Marine Sanctuary Advisory Council:* Elizabeth Stokes, Stellwagen Bank National Marine Sanctuary, 175 Edward Foster Road, Scituate, MA 02066; 781–545–8026 extension 201; email *Elizabeth.Stokes@noaa.gov;* or download applications from *http://stellwagen.noaa.gov/.*

FOR FURTHER INFORMATION CONTACT: For further information on a particular national marine sanctuary advisory council, please contact the individual identified in the **ADDRESSES** section of this notice.

SUPPLEMENTARY INFORMATION: ONMS serves as the trustee for a network of underwater parks encompassing more than 600,000 square miles of marine and Great Lakes waters from Washington state to the Florida Keys, and from Lake Huron to American Samoa. The network includes a system of 13 national marine sanctuaries and Papahānaumokuākea and Rose Atoll marine national monuments. National marine sanctuaries protect our nation's most vital coastal and marine natural and cultural resources, and through active research, management, and public engagement, sustain healthy environments that are the foundation for thriving communities and stable economies. One of the many ways ONMS ensures public participation in the designation and management of national marine sanctuaries is through the formation of advisory councils. National marine sanctuary advisory councils are community-based advisory groups established to provide advice and recommendations to the superintendents of the national marine sanctuaries on issues including management, science, service, and stewardship; and to serve as liaisons between their constituents in the community and the sanctuary. Additional information on ONMS and its advisory councils can be found at *http://sanctuaries.noaa.gov.* Materials related to the purpose, policies, and operational requirements for advisory councils can be found in the charter for a particular advisory council (*http://sanctuaries.noaa.gov/management/ac/council_charters.html*) and the *National Marine Sanctuary Advisory Council Implementation Handbook* (*http://sanctuaries.noaa.gov/management/ac/acref.html*).

The following is a list of the vacant seats, including positions (*i.e.,* primary or alternate), for each of the advisory councils currently seeking applications for primary members and alternates:

Gray's Reef National Marine Sanctuary Advisory Council: K–12 Education (Primary).

Greater Farallones National Marine Sanctuary Advisory Council: Mendocino/Sonoma County Community-at-Large (Alternate); Youth (Primary).

Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council: Maui County (Alternate); Molokai Island (Primary); Molokai Island (Alternate); Native Hawaiian (Primary).

Monitor *National Marine Sanctuary Advisory Council: Economic Development (Primary).*

National Marine Sanctuary of American Samoa Advisory Council: Education (Primary); Fishing (Primary); Youth (Primary).

Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council: Commercial Fishing (Primary); Commercial Fishing (Alternate); Research (Alternate).

Olympic Coast National Marine Sanctuary Advisory Council: Citizen-at-Large (Primary); Citizen-at-Large (Alternate); Research (Primary); Research (Alternate).

Stellwagen Bank National Marine Sanctuary Advisory Council: Business/Industry (Alternate); Conservation (Primary); Education (Alternate); Marine Transportation (Primary); Marine Transportation (Alternate); Mobile Gear Commercial Fishing (Primary); Recreational Fishing (Primary).

Authority: 16 U.S.C. 1431 *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: October 3, 2016.

John Armor,

Acting Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2016–26326 Filed 10–31–16; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Marine Mammal Health and Stranding Response Program, Level A Stranding and Rehabilitation Disposition Data Sheet

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before January 3, 2017.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Stephen Manley, (301) 427–8476 or *stephen.manley@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for revision and extension of a currently approved information collection. A Human Interaction Data Sheet will be added to this data collection, and the currently approved forms in this collection (the Stranding Report form and Rehabilitation Disposition data sheet) have been slightly modified.

The marine mammal stranding report provides information on strandings so that the National Marine Fisheries Service (NMFS) can compile and analyze, by region, the species, numbers, conditions, and causes of illnesses and deaths in stranded marine mammals. NMFS requires this information to fulfill its management responsibilities under the Marine Mammal Protection Act (16 U.S.C. 1421a). NMFS is also responsible for the welfare of marine mammals while in rehabilitation status. The data from the marine mammal rehabilitation disposition report are required for monitoring and tracking of marine mammals held at various NMFS-authorized facilities. This information is submitted primarily by members of the marine mammal stranding networks which are authorized by NMFS. A new human interaction data sheet will provide NMFS with consistent and detailed information on signs of human interaction in stranded marine mammals. This information will assist the Agency in tracking resource conflicts and will provide a solid scientific foundation for conservation and management of marine mammals. With a better understanding of interactions, appropriate measures can be taken to resolve conflicts and, stranding data are the best source of information regarding the occurrence of different types of human interaction.

II. Method of Collection

Paper applications, electronic reports, and telephone calls are required from participants, and methods of submittal include Internet through the NMFS National Marine Mammal Stranding Database; facsimile transmission of paper forms; or mailed copies of forms.

III. Data

OMB Number: 0648–0178.

Form Number: None.

Type of Review: Regular submission (revision and extension of a current information collection).

Affected Public: State governments; not-for-profit institutions; business or other for-profits organizations.

Estimated Number of Respondents: 400.

Estimated Time per Response: 30 minutes each for the stranding report for and rehabilitation disposition forms; 45 minutes for the human interaction form.

Estimated Total Annual Burden Hours: 10,500.

Estimated Total Annual Cost to Public: $1,056 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed repository of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden and submission of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 26, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–26279 Filed 10–31–16; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m., Friday, November 4, 2016.

PLACE: CFTC Headquarters Lobby-Level Hearing Room, Three Lafayette Centre, 1155 21st Street NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') will hold this meeting to consider a supplemental Notice of Proposed Rulemaking on Regulation Automated Trading (''Regulation AT''). The agenda for this meeting will be available to the public and posted on the Commission's Web site at *http://www.cftc.gov.* In the event that the time, date, or place of this meeting changes, an announcement of the change, along with the new time, date, or place of the meeting, will be posted on the Commission's Web site.

CONTACT PERSON FOR MORE INFORMATION: Christopher J. Kirkpatrick, Secretary of the Commission, 202–418–5964.

Christopher J. Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2016–26502 Filed 10–28–16; 4:15 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Threat Reduction Advisory Committee; Notice of Closed Federal Advisory Committee Meeting

AGENCY: Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), Department of Defense (DoD).

ACTION: Federal advisory committee meeting notice.

SUMMARY: The Department of Defense announces the following closed Federal advisory committee meeting of the Threat Reduction Advisory Committee (TRAC).

DATES: Wednesday, November 16, 2016, from 8:30 a.m. to 4:30 p.m. and Thursday, November 17, 2016, from 8:30 a.m. to 2:30 p.m.

ADDRESSES: United States Special Operation Command (USSOCOM) in Tampa, FL on both days.

FOR FURTHER INFORMATION CONTACT: Mr. William Hostyn, DoD, Defense Threat Reduction Agency (DTRA) J2/5/AC, 8725 John J. Kingman Road, MS 6201, Fort Belvoir, VA 22060–6201. Email: *william.p.hostyn.civ@mail.mil.* Phone: (703) 767–4453. Fax: (703) 767–4206.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: This meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150. The TRAC will obtain, review, and evaluate classified information related to the TRAC's mission to provide advice on technology security, combating weapons of mass destruction (CWMD), counterterrorism, and counterproliferation.

Agenda: All discussions for the two-day meeting will be classified at the secret level or higher. On Wednesday, November 16, the TRAC plenary session will open with welcoming remarks by four individuals. Mr. Steve Polchek, Designated Federal Officer, will cover security procedures and administrative details; LtGen Joseph L. Osterman, Deputy Commander, USSOCOM, will welcome the TRAC members; Dr. Arthur Hopkins, Principal Deputy, Performing the Duties of the Assistant Secretary of Defense for Nuclear, Chemical and Biological (NCB) Defense Programs, will provide remarks on NCB's vision for the Unified Command Plan (UCP) changes and the DoD CWMD mission; and Ambassador (AMB) Ronald Lehman, TRAC Chair, opens the meeting with an outline of the two-day session. Following the opening remarks, the Honorable (HON) Michael Nacht and Ms. Eileen Vergino will provide an update on CWMD in North Korea; HON Joseph Benkert will update the group on the progress of the study on Chinese Weapons of Mass Destruction (WMD) operations; and HON Susan Koch will then provide a progress report and preliminary findings on Russian Strategy and Force Development. Following the working lunch, the TRAC-only session will commence to review existing and new taskings. AMB Lehman and Dr. Miriam John, TRAC Vice-Chair, will lead a discussion on the new tasks received from the Under Secretary of Defense for Acquisition, Technology, and Logistics: modernization of strategic nuclear forces and implementation guidance for the 2016 UCP transfer of the CWMD mission from United States Strategic Command to USSOCOM. The TRAC will then deliberate the findings and recommendations of the Russian Strategy and Force Development study. All participants will attend the visitation to the USSOCOM War Game Center for a walk-through and demonstration scenario.

The TRAC will continue meeting on Thursday, November 17, 2016. USSOCOM will provide intelligence briefings on the overlap of special operations and CWMD activities in the Western Pacific area of responsibility. USSOCOM representatives will then deliver a command brief, including an outline of USSOCOM's strategic direction in regards to CWMD, which will highlight potential avenues of coordination with the preexisting CWMD infrastructure. USSOCOM's Directorate of Plans will then give a more detailed picture of the UCP CWMD transition over a working lunch. Following the working lunch, AMB Lehman and LtGen Osterman will lead a group discussion on synergies between the Department of Defense's CWMD mission and USSOCOM. At the conclusion of the discussion, the Chair will adjourn the 39th Plenary.

Meeting Accessibility: Pursuant to section 10(d) of the FACA, 5 U.S.C. 552b(c), and 41 CFR 102–3.155, the DoD has determined that the meeting shall be closed to the public. The Under Secretary of Defense for Acquisition, Technology, and Logistics, in consultation with the DoD FACA Attorney, has determined in writing that all sessions of this meeting are required to be closed to the public because the discussions will contain classified information and matters covered by 5 U.S.C. 552b(c)(1). Such classified matters are inextricably intertwined with the unclassified material and cannot reasonably be segregated into separate discussions without disclosing secret-level or higher material.

Advisory Committee's Designated Federal Officer or Point of Contact: Mr. William Hostyn, DoD, Defense Threat Reduction Agency, J2/5/AC, 8725 John J. Kingman Road, MS 6201, Fort Belvoir, VA 22060–6201. Email: *william.p.hostyn.civ@mail.mil.* Phone: (703) 767–4453. Fax: (703) 767–4206.

Written Statements: Pursuant to section 10(a)(3) of FACA and 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the membership of the TRAC at any time or in response to the stated agenda of a planned meeting. Written statements should be submitted to the TRAC's Designated Federal Officer. The Designated Federal Officer's contact information is listed in this notice, or it can be obtained from the General Services Administration's FACA Database: *http://www.facadatabase.gov/committee/committee.aspx?cid=1663&aid=41.* Written statements that do not pertain to a scheduled meeting of the TRAC may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than five business days prior to the meeting in question. The Designated Federal Officer will review all submitted written statements and provide copies to all TRAC members.

Dated: October 27, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–26378 Filed 10–31–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0121]

Agency Information Collection Activities; Comment Request; Formula Grant EASIE (Electronic Application System for Indian Education)

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 3, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0121. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–349, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Kimberly Smith, 202–453–6469.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Formula Grant EASIE (Electronic Application System for Indian Education).

OMB Control Number: 1810–0021.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 11,300.

Total Estimated Number of Annual Burden Hours: 9,590.

Abstract: The Indian Education Formula Grant (CFDA 84.060A) requires the annual submission of the application from the local educational agency and/or tribe. The amount of each applicant's award is determined by formula, based upon the reported number of American Indian/Alaska Native students identified in the application, the state per pupil expenditure, and the total appropriation available. Applicants provide the data required for funding electronically, and the Office of Indian Education (OIE) is able to apply electronic tools to facilitate the review and analysis leading to grant awards. The system has been named Formula Grant Electronic Application System for Indian Education (EASIE), and is located in the EDFacts System (ESS) Web site.

Dated: October 27, 2016.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–26380 Filed 10–31–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–432]

Application To Export Electric Energy; Castleton Commodities Merchant Trading L.P.

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of Application.

SUMMARY: Castleton Commodities Merchant Trading L.P. (Applicant or Castleton) has applied for authority to transmit electric energy from the United States to Mexico pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests, or motions to intervene must be submitted on or before December 1, 2016.

ADDRESSES: Comments, protests, motions to intervene, or requests for more information should be addressed to: Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585–0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to *Electricity.Exports@hq.doe.gov,* or by facsimile to 202–586–8008.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the Federal Power Act (16 U.S.C. 824a(e)).

On October 11, 2016, DOE received an application from Castleton for authority to transmit electric energy from the United States to Mexico as a power marketer for a five-year term using existing international transmission facilities.

In its application, Castleton states that it does not own or control any electric generation or transmission facilities, and it does not have a franchised service area. The electric energy that Castleton proposes to export to Mexico would be surplus energy purchased from third parties such as electric utilities and Federal power marketing agencies pursuant to voluntary agreements. The existing international transmission facilities to be utilized by the Applicant have previously been authorized by Presidential Permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

PROCEDURAL MATTERS: Any person desiring to be heard in this proceeding should file a comment or protest to the application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedures (18 CFR 385.211). Any person desiring to become a party to these proceedings should file a motion to intervene at the above address in accordance with FERC Rule 214 (18 CFR 385.214). Five copies of such comments, protests, or motions to intervene should be sent to the address provided above on or before the date listed above.

Comments and other filings concerning Castleton's application to export electric energy to Mexico should be clearly marked with OE Docket No. EA–432. An additional copy is to be provided to both Castleton Commodities International LLC, 811 Main Street Suite 3500, Houston, TX 77002 and Daniel E. Frank, Sutherland Asbill & Brennan LLP, 700 Sixth Street, NW., Suite 700, Washington, DC 20001.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after a determination is made by DOE that the proposed action will not have an adverse impact on the sufficiency of supply or reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at *http://energy.gov/node/11845,* or by emailing Angela Troy at *Angela.Troy@hq.doe.gov.*

Issued in Washington, DC, on October 26, 2016.

Christopher Lawrence,

Electricity Policy Analyst, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2016–26332 Filed 10–31–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Southwestern Power Administration

Integrated System Power Rates

AGENCY: Southwestern Power Administration, DOE.

ACTION: Notice of Proposed Change to Southwestern Power Administration Integrated System Non-Federal Transmission Service Rate Schedule and Opportunity for Public Review and Comment.

SUMMARY: The Administrator, Southwestern Power Administration (Southwestern), has determined that an additional Section outlining a new methodology within Southwestern's existing Integrated System Non-Federal Transmission Service (NFTS–13) Rate Schedule is necessary to better align Southwestern's rate schedule with standard practices utilized by the Southwest Power Pool, Inc. (SPP) Regional Transmission Organization. A new section 2.3.6 is proposed that establishes a procedure for determining an Annual Revenue Requirement (ARR) for customers that choose to contract for Network Integration Transmission Service (NITS) on Southwestern's transmission system pursuant to the SPP Open Access Transmission Tariff (OATT).

The proposed Section 2.3.6 does not change Southwestern's NFTS ARR, as determined in its 2013 Integrated System Power Repayment Studies (2013 PRS), but rather replaces the current stated-rate for SPP NITS with a revenue-requirement based methodology that includes determining the SPP NITS ARR portion of Southwestern's NFTS ARR. Furthermore, the proposed Section 2.3.6 affects only those customers that choose to contract for SPP NITS on Southwestern's transmission system under the SPP OATT.

Southwestern has determined that Section 2.3.6 will provide a more appropriate methodology for revenue recovery from NFTS customers that choose to contract for SPP NITS on Southwestern's transmission system under the SPP OATT.

DATES: The consultation and comment period will begin on the date of publication of this **Federal Register** notice and will end on December 1, 2016. If requested, a combined Public Information and Comment Forum (Forum) will be held at 9:00 a.m. on November 17, 2016. If requested, persons desiring the Forum to be held should indicate in writing to Mr. Marshall Boyken, Senior Vice President and Chief Operating Officer (see **FOR FURTHER INFORMATION CONTACT**) by November 8, 2016, their request for such Forum. If no request is received, no such Forum will be held. Persons interested in speaking at the Forum, if held, should submit a request to Mr. Marshall Boyken, Senior Vice President and Chief Operating Officer (see **FOR FURTHER INFORMATION CONTACT**) by November 10, 2016, so that a list of Forum participants can be developed. All comments on the proposed Section 2.3.6 addition to Southwestern's NFTS Rate Schedule, whether provided to Southwestern in written or electronic copy (MS Word format), are due on or before December 1, 2016.

ADDRESSES: If requested, the Forum will be held in Southwestern's offices, Room 1460, Williams Center Tower I, One West Third Street, Tulsa, Oklahoma 74103. Comments should be submitted to Mr. Marshall Boyken, Senior Vice President and Chief Operating Officer (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Mr. Marshall Boyken, Senior Vice President, Chief Operating Officer, Office of Corporate Operations, Southwestern Power Administration, U.S. Department of Energy, One West Third Street, Tulsa, Oklahoma 74103, (918) 595–6646, *marshall.boyken@swpa.gov,* or facsimile transmission (918) 595–6646.

SUPPLEMENTARY INFORMATION: Originally established by Secretarial Order No. 1865 dated August 31, 1943, Southwestern is an agency within the U.S. Department of Energy created by the Department of Energy Organization Act, Public Law 95–91, dated August 4, 1977. Guidelines for preparation of power repayment studies are included in DOE Order No. RA 6120.2 entitled Power Marketing Administration Financial Reporting. Procedures for public participation in power and transmission rate adjustments of the Power Marketing Administrations are found at title 10, part 903, subpart A of the Code of Federal Regulations (10 CFR part 903). Procedures for the confirmation and approval of rates for the Federal Power Marketing Administrations are found at title 18, part 300, subpart L of the Code of Federal Regulations (18 CFR part 300).

Southwestern markets power from 24 multi-purpose reservoir projects with hydroelectric power facilities constructed and operated by the U.S. Army Corps of Engineers (Corps). These projects are located in the states of Arkansas, Missouri, Oklahoma, and Texas. Southwestern's marketing area includes these states plus Kansas and Louisiana. The costs associated with the hydropower facilities of 22 of the 24 projects are repaid via revenues received under the Integrated System rates, as are those of Southwestern's transmission facilities, which consist of 1,380 miles of high-voltage transmission lines, 26 substations, and 46 communication sites. Costs associated with the Sam Rayburn and Robert D. Willis Dams, two Corps projects that are isolated hydraulically, electrically, and financially from the Integrated System, are repaid under separate rate schedules and are not addressed in this notice.

Rate Schedule Change

The current NFTS–13 Rate Schedule includes a stated rate for NITS that is calculated by dividing Southwestern's monthly revenue requirement, derived from Southwestern's NFTS ARR identified within the 2013 PRS, by the net transmission capacity available for NITS. Modifying Southwestern's rate schedule to include an ARR for SPP NITS, rather than applying a stated rate, is necessary to better align with standard practices utilized by SPP. Therefore, in place of applying the NITS stated rate for SPP NITS on Southwestern's transmission system, the proposed Section 2.3.6 includes a procedure for determining (and updating) an SPP NITS ARR, as a portion of Southwestern's NFTS ARR, based on the amount of revenue assumed to be recovered on an annual basis from NITS customers in each approved PRS. If additional customers choose to contract for SPP NITS on Southwestern's transmission system, the proposed Section 2.3.6 methodology updates the SPP NITS ARR and eliminates the need for Southwestern to revise its NFTS Rate Schedule each time additional customers contract for SPP NITS on Southwestern's transmission system.

The title of the NFTS–13 Rate Schedule was changed to NFTS–13A to reflect the addition of Section 2.3.6. A redlined version of the NFTS–13 Rate Schedule, which shows the revision proposed by rate schedule NFTS–13A, will be made available upon request. To request a copy, please contact Mr. Marshall Boyken, Senior Vice President and Chief Operating Officer, (see **FOR FURTHER INFORMATION CONTACT**).

Following review and consideration of written comments, the Administrator will determine whether to finalize and submit the proposed NFTS–13A Rate Schedule to the Deputy Secretary of Energy for confirmation and approval on an interim basis, and subsequently to the Federal Energy Regulatory Commission (FERC) for confirmation and approval on a final basis. The FERC will allow the public an opportunity to provide written comments on the proposed rate schedule change before making a final decision.

Dated: October 26, 2016.

Scott Carpenter,

Administrator.

[FR Doc. 2016–26370 Filed 10–31–16; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–EPA–HQ–OAR–2010–0050; FRL–9954–77–OEI]

Proposed Information Collection Request; Comment Request; Implementation of the Ambient Air Protocol Gas Verification Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is planning to submit an information collection request (ICR), ''Implementation of Ambient Air Protocol Gas Verification Program'' (EPA ICR No. 2375.03, OMB Control No. 2060–0648) 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.*). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR. 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: Comments must be submitted on or before January 3, 2017.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2010–0050 online using *www.regulations.gov* (our preferred method), or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

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: Mrs. Laurie Trinca, Air Quality Assessment Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C304–06, Research Triangle Park, NC 27711; telephone: 919–541–0520; fax: 919–541–1903; email: *trinca.laurie@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.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) 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; (ii) 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; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) 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. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: This ICR includes ambient air monitoring data reporting and recordkeeping activities associated with the 40 CFR part 58 Appendix A, Ambient Air Quality Surveillance Quality Assurance Regulations. These data and information are collected by state, local, and tribal air quality management agencies and reported to the EPA.

The EPA Ambient Air Quality Monitoring Program's quality assurance requirements in 40 CFR part 58, Appendix A, require: ''2.6 Gaseous and Flow Rate Audit Standards. Gaseous pollutant concentration standards (permeation devices or cylinders of compressed gas) used to obtain test concentrations for CO, SO_2, NO, and NO_2 must be traceable to either a National Institute of Standards and Technology (NIST) Traceable Reference Material (NTRM), NIST Standard Reference Materials (SRM), and Netherlands Measurement Institute (NMI) Primary Reference Materials (valid as covered by Joint Declaration of Equivalence) or a NIST-certified Gas Manufacturer's Internal Standard (GMIS), certified in accordance with one of the procedures given in reference 4 of this appendix. Vendors advertising certification with the procedures provided in reference 4 of this appendix and distributing gases as ''EPA Protocol Gas'' must participate in the EPA Protocol Gas Verification Program or not use ''EPA'' in advertising.

These requirements give assurance to end users that all specialty gas producers selling EPA Protocol Gases are participants in a program that provides an independent assessment of the accuracy of their gases' certified concentrations. In 2010, the EPA developed an Ambient Air Protocol Gas Verification Program (AA–PGVP) that provides end users with information about participating producers and verification results.

Each year, EPA will attempt to compare gas cylinders from every specialty gas producer being used by ambient air monitoring organizations. The EPA's Regions 2 and 7 have agreed to provide analytical services for verification of 40 cylinders/lab or 80 cylinders total/year. Cylinders will be Start Printed Page 30302verified at a pre-determined time each quarter.

In order to make the appropriate selection, the EPA needs to know what specialty gas producers are being used by the monitoring organizations. Therefore, the EPA needs to survey each primary quality assurance organization every year to collect information on specialty gas producers being used and whether the monitoring organization would like to participate in the verification for the upcoming calendar year.

Respondent's obligation to respond: Mandatory (40 CFR part 58).

Estimated number of respondents: 211 (total).

Frequency of response: Annual.

Total estimated burden: 70 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $4674 (per year).

Changes in Estimates: The renewal ICR will address all changes in the total estimated respondent burden since the last renewal.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2016–26319 Filed 10–31–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2015–0499; FRL–9954–82–OW]

Final National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges From the Application of Pesticides; Reissuance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final permit issuance.

SUMMARY: This notice announces issuance by all ten Environmental Protection Agency (EPA) Regions of the final 2016 National Pollutant Discharge Elimination System (NPDES) pesticide general permit (PGP)—the ''2016 PGP.'' The 2016 PGP, which has an effective date of October 31, 2016, replaces the existing permit (''2011 PGP'') that expires at midnight on October 31, 2016, and authorizes certain point source discharges from the application of pesticides to waters of the United States in accordance with the terms and conditions described therein. EPA is issuing this permit for five (5) years in all areas of the country where EPA is the NPDES permitting authority.

DATES: The permit is effective on October 31, 2016, and will expire at midnight, October 31, 2021. In accordance with 40 CFR part 23, this permit shall be considered issued for the purpose of judicial review on November 15, 2016. Under Section 509(b) of the Clean Water Act, judicial review of this general permit can be requested by filing a petition for review in the United States Court of Appeals within 120 days after the permit is considered issued. Under Section 509(b) of the Clean Water Act, the requirements of this permit may not be challenged later in civil or criminal proceedings to enforce these requirements. In addition, this permit may not be challenged in other agency proceedings. Deadlines for submittal of a Notices of Intent to be covered, if required, are provided in Part 1.2.3, Table 1–2, of the 2016 PGP.

FOR FURTHER INFORMATION CONTACT: EPA Regional Office listed in Section I.C., or you can send an email to *pgp@epa.gov.* You may also contact Prasad Chumble, EPA Headquarters, Office of Water, Office of Wastewater Management at tel.: 202–564–0021 or email: *chumble.prasad@epa.gov.*

SUPPLEMENTARY INFORMATION: This section is organized as follows:

Table of Contents

I. General Information

A. Does this action apply to me?

You may be affected by this action if you apply pesticides, under the use patterns in Section III.B, that result in a discharge to waters of the United States in one of the geographic areas identified in Section III.A. Potentially affected entities, as categorized in the North American Industry Classification System (NAICS), may include, but are not limited to:

TABLE 1—ENTITIES POTENTIALLY REGULATED BY THE 2016 PGP

Category	NAICS	Examples of potentially affected entities
Agriculture parties—General agricultural interests, farmers/producers, forestry, and irrigation.	111 Crop Production	Producers of crops mainly for food and fiber, including farms, orchards, groves, greenhouses, and nurseries that have irrigation ditches requiring pest control.
	113110 Timber Tract Operations	The operation of timber tracts for the purpose of selling standing timber.
	113210 Forest Nurseries Gathering of Forest Products.	Growing trees for reforestation and/or gathering forest products, such as gums, barks, balsam needles, rhizomes, fibers, Spanish moss, ginseng, and truffles.
	221310 Water Supply for Irrigation	Operating irrigation systems.
Pesticide parties (includes pesticide manufacturers, other pesticide users/interests, and consultants).	325320 Pesticide and Other Agricultural Chemical Manufacturing.	Formulation and preparation of agricultural pest control chemicals.
Public health parties (includes mosquito or other vector control districts and commercial applicators that service these).	923120 Administration of Public Health Programs.	Government establishments primarily engaged in the planning, administration, and coordination of public health programs and services, including environmental health activities.
Resource management parties (includes State departments of fish and wildlife, State departments of pesticide regulation, State environmental agencies, and universities).	924110 Administration of Air and Water Resource and Solid Waste Management Programs.	Government establishments primarily engaged in the administration, regulation, and enforcement of air and water resource programs; the administration and regulation of water and air pollution control and prevention programs; the administration and regulation of flood control programs; the administration and regulation of drainage development and water resource consumption programs; and coordination of these activities at intergovernmental levels.

TABLE 1—ENTITIES POTENTIALLY REGULATED BY THE 2016 PGP—Continued

Category	NAICS	Examples of potentially affected entities
	924120 Administration of Conservation Programs.	Government establishments primarily engaged in the administration, regulation, supervision and control of land use, including recreational areas; conservation and preservation of natural resources; erosion control; geological survey program administration; weather forecasting program administration; and the administration and protection of publicly and privately owned forest lands. Government establishments responsible for planning, management, regulation and conservation of game, fish, and wildlife populations, including wildlife management areas and field stations; and other administrative matters relating to the protection of fish, game, and wildlife are included in this industry.
Utility parties (includes utilities)	221 Utilities	Provide electric power, natural gas, steam supply, water supply, and sewage removal through a permanent infrastructure of lines, mains, and pipes.

B. How can I get copies of this document and other related information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. EPA–HQ–OW–2015–0499. The official public docket is the collection of materials that are available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) WJC West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. Although all documents in the docket are listed in an index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available in hard copy at the EPA Docket Center Public Reading Room, open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and the Water Docket is (202) 566–1744.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the United States government on-line source for federal regulations at *http://www.regulations.gov.*

An electronic version of the public docket is available through the EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.regulations.gov* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.* Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials at the EPA Docket Center.

Electronic versions of the 2016 PGP and Fact Sheet are also available on the EPA's NPDES Web site at *https://www.epa.gov/npdes/pesticide-permitting.*

C. Who are the EPA regional contacts for this final permit?

For EPA Region 1, contact George Papadopoulos at tel.: (617) 918–1579; or email at *papadopoulos.george@epa.gov.*

For EPA Region 2, contact Maureen Krudner at tel.: (212) 637–3874; or email at *krudner.maureen@epa.gov.*

For EPA Region 3, contact Mark Smith at tel.: (215) 814–3105; or email at *smith.mark@epa.gov.*

For EPA Region 4, contact Sam Sampath at tel.: (404) 562–9229; or email at *sampath.sam@epa.gov.*

For EPA Region 5, contact Jason Hewitt at tel.: (312) 353–3114; or email at *hewitt.jason@epa.gov.*

For EPA Region 6, contact Kilty Baskin at tel.: (214) 665–7500 or email at *baskin.kilty@epa.gov.*

For EPA Region 7, contact Kimberly Hill at tel.: (913) 551–7841 or email at: *hill.kimberly@epa.gov.*

For EPA Region 8, contact David Rise at tel.: (406) 457–5012 or email at: *rise.david@epa.gov.*

For EPA Region 9, contact Pascal Mues at tel.: (415) 972–3768 or email at: *mues.pascal@epa.gov.*

For EPA Region 10, contact Dirk Helder at tel.: (208) 378–5749 or email at: *helder.dirk@epa.gov.*

II. Background

Section 301(a) of the Clean Water Act (CWA) provides that ''the discharge of any pollutant by any person shall be unlawful'' unless the discharge is in compliance with certain other Sections of the Act. 33 U.S.C. 1311(a). The CWA defines ''discharge of a pollutant'' as ''(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.'' 33 U.S.C. 1362(12). A ''point source'' is any ''discernible, confined and discrete conveyance'' but does not include ''agricultural stormwater discharges and return flows from irrigated agriculture.'' 33 U.S.C. 1362(14).

The term ''pollutant'' includes, among other things, ''garbage . . . chemical wastes, biological materials . . . and industrial, municipal, and agricultural waste discharged into water.'' 33 U.S.C. 1362(6).

A person may discharge a pollutant without violating the Section 301 prohibition by obtaining authorization to discharge (referred to herein as ''coverage'') under a Section 402 NPDES permit (33 U.S.C. 1342). Under Section 402(a), EPA may ''issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding Section 1311(a)'' upon certain conditions required by the Act.

EPA issued the first Pesticide General Permit (''2011 PGP'') on October 31, 2011, in response to the United States Sixth Circuit Court of Appeals ruling vacating EPA's 2006 Final Rule on Aquatic Pesticides. *National Cotton Council of America.* v. *EPA,* 553 F.3d 927 (6th Cir. 2009). EPA is issuing the 2016 PGP to replace the 2011 PGP which expires at midnight on October 31, 2016. Similar to the 2011 PGP, the 2016 PGP provides coverage for certain point source discharges from the application of pesticides to waters of the United States in areas where EPA is the NPDES permitting authority.

EPA published the draft 2016 PGP and accompanying Fact Sheet in the **Federal Register** on January 26, 2016 (81 FR 4289), soliciting comments on the draft permit. EPA also conducted formal consultation with Indian Tribal Governments. EPA received 28 written comment letters on the draft permit.

EPA considered all comments received during the comment period in preparing the final permit. EPA responded to all significant comments in the Response to Comment Document which is available as part of the docket for this permit.

III. Scope and Applicability

A. Geographic Coverage

EPA provides permit coverage for classes of point source discharges that occur in areas where EPA is the NPDES permitting authority. The geographic coverage of the 2016 PGP is listed in Appendix C of the permit and also listed below. This permit also applies in all areas of Indian Country that are not covered by an EPA-approved permitting program, for example, the areas of Indian Country described below:

EPA Region 1

- Massachusetts, including Indian Country within Massachusetts
- Indian Country within Connecticut
- New Hampshire
- Indian Country within Rhode Island
- Federal Facilities within Vermont

EPA Region 2

- Indian Country within New York State
- Puerto Rico

EPA Region 3

- The District of Columbia
- Federal Facilities within Delaware

EPA Region 4

- Indian Country within Alabama
- Indian Country within Florida
- Indian Country within Mississippi
- Indian Country within North Carolina

EPA Region 5

- Indian Country within Michigan
- Indian Country within Minnesota, excluding Fond du Lac Band of Chippewa
- Indian Country within Wisconsin, excluding Lac du Flambeau Band of Lake Superior Chippewa Indians

EPA Region 6

- Indian Country within Louisiana
- New Mexico, including Indian Country within New Mexico, except Navajo Reservation Lands (see Region 9) and Ute Mountain Reservation Lands (see Region 8)
- Indian Country within Oklahoma
- Discharges in Texas that are not under the authority of the Texas Commission on Environmental Quality (formerly TNRCC), including activities associated with the exploration, development, or production of oil or gas or geothermal resources, including transportation of crude oil or natural gas by pipeline, including Indian Country.

EPA Region 7

- Indian Country within Iowa
- Indian Country within Kansas
- Indian Country within Nebraska, except Pine Ridge Reservation lands (see Region 8)

EPA Region 8

- Federal Facilities in Colorado, including those on Indian Country within Colorado as well as the portion of the Ute Mountain Reservation located in New Mexico
- Indian Country within Montana
- Indian Country within North Dakota
- Indian Country within South Dakota, as well as the portion of the Pine Ridge Reservation located in Nebraska (see Region 7)
- Indian Country within Utah, except Goshute and Navajo Reservation lands (see Region 9)
- Indian Country within Wyoming

PA Region 9

- The Island of American Samoa
- Indian Country within Arizona as well as Navajo Reservation lands in New Mexico (see Region 6) and Utah (see Region 8), excluding Hualapai Tribe
- Indian Country within California, excluding Hoopa Valley Tribe
- The Island of Guam
- The Johnston Atoll
- Midway Island, Wake Island, and other unincorporated U.S. possessions
- The Commonwealth of the Northern Mariana Islands
- Indian Country within the State of Nevada, as well as the Duck Valley Reservation in Idaho, the Fort McDermitt Reservation in Oregon (see Region 10) and the Goshute Reservation in Utah (see Region 8)

EPA Region 10

- Indian Country and the Denali National Park and Preserve within Alaska
- Idaho, including Indian Country within Idaho, except Duck Valley Reservation lands (see Region 9)
- Indian Country within Oregon, except Fort McDermitt Reservation lands (see Region 9)
- Federal Facilities in Washington, including those located on Indian Country within Washington

B. Categories of Pesticide Use-Patterns Covered

This permit regulates discharges to waters of the United States from the application of (1) biological pesticides, and (2) chemical pesticides that leave a residue. These apply to the following pesticide use patterns:

- Mosquito and Other Flying Insect Pest Control—to control public health/nuisance and other flying insect pests that develop or are present during a portion of their life cycle in or above standing or flowing water. Public health/nuisance and other flying insect pests in this use category include mosquitoes and black flies.
- Weed and Algae Pest Control—to control weeds, algae, and pathogens that are pests in water and at water's edge, including ditches and/or canals.
- Animal Pest Control—to control animal pests in water and at water's edge. Animal pests in this use category include fish, lampreys, insects, mollusks, and pathogens.
- Forest Canopy Pest Control—application of a pesticide to a forest canopy to control the population of a pest species (*e.g.,* insect or pathogen) where, to target the pests effectively, a portion of the pesticide unavoidably will be applied over and deposited to water.

The scope of activities encompassed by these pesticide use patterns is described in greater detail in Part III.1.1 of the Fact Sheet for the 2016 PGP.

C. Summary of Updates to the 2011 PGP and From the Proposed 2016 PGP

The 2016 PGP replaces the 2011 PGP, which was issued for a five-year term on October 31, 2011 (76 FR 68750) and expires October 31, 2016, at midnight. While the requirements of the 2016 PGP remain the same as those in the 2011 PGP, some minor updates have been added and are discussed in more detail in the 2016 PGP Fact Sheet, such as:

- Added electronic reporting requirements in Part 7.8 of the PGP to be consistent with EPA's Electronic Reporting Rule (78 FR 46005); and
- Updated the definition of National Marine Fisheries Service (NMFS) Listed Resources of Concern to include additional species as a result of consultation between EPA and NMFS, as required under Section 7 of the Endangered Species Act.

EPA published the draft 2016 PGP for public comment on January 26, 2016 (81 FR 4289). The following is a summary of permit modifications from the draft 2016 PGP:

- Changed the date when Notices Of Intent (NOIs) are required from October 31, 2016, to January 12, 2017, in order to allow Decision-makers enough time to read and understand the permit requirements and comply with the reporting and recordkeeping requirements of the permit; and

• Updated Part 9.0 of the 2016 PGP to reflect state and tribal CWA Section 401 certifications.

D. Summary of 2016 PGP Terms and Requirements

The 2016 PGP is similar to the 2011 PGP, and is structured in the same nine parts: (1) Coverage under the permit, (2) technology-based effluent limitations, (3) water quality-based effluent limitations, (4) monitoring, (5) pesticide discharge management plan, (6) corrective action, (7) recordkeeping and Annual Reporting, (8) EPA contact information and mailing addresses, and (9) permit conditions applicable to specific states, Indian Country, or territories. Additionally, as with the 2011 PGP, the 2016 PGP includes nine appendices with additional conditions and guidance for permittees: (A) Definitions, abbreviations, and acronyms, (B) standard permit conditions, (C) areas covered, (D) NOI form, (E) Notice of Termination (NOT) form, (F) Pesticide Discharge Evaluation worksheet (PDEW), (G) Annual Reporting template, (H) Adverse Incident template, and (I) endangered species procedures.

The following is a summary of the 2016 PGP's requirements:

• The PGP defines ''Operator'' (*i.e.,* the entity required to obtain NPDES permit coverage for discharges) to include any (a) *Applicator* who performs the application of pesticides or has day-to-day control of the application of pesticides that results in a discharge to waters of the United States, or (b) *Decision-maker* who controls any decision to apply pesticides that results in a discharge to waters of the United States. There may be instances when a single entity acts as both an Applicator and a Decision-maker.

• All Applicators are required to minimize pesticide discharges by using only the amount of pesticide and frequency of pesticide application necessary to control the target pest, maintain pesticide application equipment in proper operating condition, control discharges as necessary to meet applicable water quality standards, and monitor for and report any adverse incidents.

• All Decision-makers are required, to the extent not determined by the Applicator, to minimize pesticide discharges by using only the amount of pesticide and frequency of pesticide application necessary to control the target pest. All Decision-makers are also required to control discharges as necessary to meet applicable water quality standards and monitor for and report any adverse incidents.

• Coverage under this permit is available only for discharges and discharge-related activities that are not likely to adversely affect species that are federally-listed as endangered or threatened (''listed'') under the Endangered Species Act (ESA) or habitat that is federally-designated as critical under the ESA (''critical habitat''), except for certain cases specified in the permit involving prior consultation with the NMFS, and for Declared Pest Emergency Situations. The permit contains several provisions addressing listed species, including for certain listed species identified in the permit as NMFS Listed Resources of Concern, that Decision-makers whose discharges may affect these resources certify compliance with one of six criteria which together ensure that any potential adverse effects have been properly considered and addressed. These NMFS Listed Resources of Concern for the PGP are identified in detail on EPA's Web site at *https://www.epa.gov/npdes/pesticide-permitting-ESA-procedures.* Other requirements that address protection of listed species include the waiting periods between submission of an NOI and authorization to discharge, and specific permit conditions requiring compliance with the results of any ESA Section 7 consultation with the Services, or ESA Section 10 permit issued by the Services.

• Certain Decision-makers [*i.e.,* any agency for which pest management for land resource stewardship is an integral part of the organization's operations, entities with a specific responsibility to control pests (*e.g.,* mosquito and weed control districts), local governments or other entities that apply pesticides in excess of specified annual treatment area thresholds, and entities that discharge pesticides to Tier 3 waters or to waters of the United States containing NMFS Listed Resources of Concern] are required to also submit an NOI to obtain authorization to discharge and implement pest management options to reduce the discharge of pesticides to waters of the United States. Of this group, certain large Decision-makers must also develop a Pesticide Discharge Management Plan (PDMP), submit annual reports, and maintain detailed records. Certain small Decision-makers are required to complete a pesticide discharge evaluation worksheet for each pesticide application (in lieu of the more comprehensive PDMP), an annual report, and detailed recordkeeping.

• Permit conditions take effect as of October 31, 2016; however, Operators with eligible discharges are authorized for permit coverage (or automatically covered) through January 12, 2017 without submission of an NOI. Thus, for any discharges commencing on or before January 12, 2017 that will continue after this date, an NOI must be submitted no later than January 2, 2017 to ensure uninterrupted permit coverage, and for any discharge occurring after January 12, 2017, no later than 10 days before the first discharge occurring after January 12, 2017.

IV. Cost Impacts of the PGP

EPA expects the costs that covered entities, including small businesses, will bear to comply with this permit to be minimal. A copy of the EPA's cost impact analysis, titled, ''*Cost Impact Analysis for the EPA's Final 2016 Pesticide General Permit (PGP)*'' is available in the docket for this permit.

V. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

In compliance with Executive Order 13175, EPA consulted with tribal officials to gain an understanding of, and where necessary, to address tribal implications of the 2016 PGP. In the course of this consultation, EPA undertook the following activities:

• October 28, 2015—EPA mailed notification letters to tribal leaders initiating consultation and coordination on the renewal of the PGP. The initiation letter was posted on the tribal portal Web site at *https://www.epa.gov/tribal.*

• November 19, 2015—EPA held an informational teleconference open to all tribal representatives, and reserved the last part of the teleconference for official consultation comments. Seven tribal officials participated. EPA also invited tribes to submit written comments on the draft 2016 PGP. The presentation was posted on the tribal portal Web site at *http://tcots.epa.gov.*

EPA did not receive any comments during the formal tribal consultation period. EPA notes that as part of the finalization of this permit, the Agency completed Section 401 certification procedures with all applicable tribes where this permit will apply (see Part 9 and Appendix C of the PGP).

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: October 24, 2016.

H. Curtis Spalding,

Regional Administrator, EPA Region 1.

Dated: October 24, 2016.

Javier Laureano,

Director, Clean Water Division, EPA Region 2.

Dated: October 24, 2016.

Carmen R. Guerrero-Perez,

Division Director, Caribbean Environmental Protection Division, EPA Region 2.

Dated: October 24, 2016.

Jon M. Capacasa,

Director, Water Protection Division, EPA Region 3.

Dated: October 24, 2016.

James D. Giattina,

Director, Water Protection Division, EPA Region 4.

Dated: October 24, 2016.

Christopher Korleski,

Director, Water Division, EPA Region 5.

Dated: October 24, 2016.

William K. Honker,

Director, Water Division, EPA Region 6.

Dated: October 24, 2016.

Karen A. Flournoy,

Director, Water, Wetlands and Pesticides Division, EPA Region 7.

Dated: October 24, 2016.

Darcy O'Connor,

Acting Assistant Regional Administrator, Office of Water Protection, EPA Region 8.

Dated: October 24, 2016.

Tomás Torres,

Division Director, Water Division, EPA Region 9.

Dated: October 24, 2016.

Christine Psyk,

Deputy Director, Office of Water and Watersheds, EPA Region 10.

[FR Doc. 2016–26375 Filed 10–31–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R07–OW–2016–0602; FRL–9954–74–Region 7]

Notice of Approval of the Primacy Revision Application for the Public Water Supply Supervision Program from the State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of approval and solicitation of requests for a public hearing.

SUMMARY: The Environmental Protection Agency (EPA) is hereby giving notice that the State of Missouri is revising its approved Public Water Supply Supervision Program delegated to the Missouri Department of Natural Resources. EPA has reviewed the application and intends to approve these program revisions.

DATES: This determination to approve the Missouri program revision is made pursuant to 40 CFR 142.12(d) (3). This determination shall become final and effective on December 1, 2016, unless (1) a timely and appropriate request for a public hearing is received or (2) the Regional Administrator elects to hold a public hearing on his own motion. Any interested person, other than Federal Agencies, may request a public hearing.

A request for a public hearing must be submitted to the Regional Administrator at the address shown below by December 1, 2016. If a request for a public hearing is made within the requested thirty-day time frame, a public hearing will be held and a notice will be given in the **Federal Register** and a newspaper of general circulation. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. If no timely and appropriate request for a hearing is received, and the Regional Administrator does not elect to hold a hearing on his own motion, this determination will become effective on December 1, 2016.

All interested parties may request a public hearing on the approval to the Regional Administrator at the EPA Region 7 address shown below.

ADDRESSES: Any request for a public hearing shall include the following information: (1) Name, address and telephone number of the individual, organization or other entity requesting a hearing; (2) a brief statement of the requesting person's interest in the Regional Administrator's determination and a brief statement on information that the requesting person intends to submit at such hearing; (3) the signature of the individual making the request or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity. Requests for Public Hearing shall be addressed to: Regional Administrator, Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219.

All documents relating to this determination are available for inspection between the hours of 9:00 a.m. and 3:00 p.m., Monday through Friday at the following offices: (1) U.S. Environmental Protection Agency, Region 7, Water Wetlands and Pesticides Division, Drinking Water Management Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219 and (2) the Missouri Department of Natural Resources, Lewis and Clark State Office Building, 1101 Riverside Drive, Jefferson City, Missouri 65102.

Submit your comments, identified by Docket ID No. EPA–R07–OW–2016–0602, to *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Neftali Hernandez, Environmental Protection Agency, Region 7, Drinking Water Management Branch, (913) 551–7036, or by email at *hernandez-santiago.neftali@epa.gov.*

SUPPLEMENTARY INFORMATION: The EPA is hereby giving notice that the State of Missouri is revising its approved Public Water Supply Supervision Program delegated to the Missouri Department of Natural Resources. The Missouri Department of Natural Resources revised their program by incorporating the following EPA National Primary Drinking Water Regulation: Ground Water Rule (November 8, 2006, 71 FR 65574). EPA has reviewed the application and determined that the revisions are no less stringent than the corresponding Federal regulations and that the State of Missouri continues to meet all requirements for primary enforcement responsibility as specified in 40 CFR 142.10. Therefore, EPA intends to approve these program revisions.

(Authority: Section 1413 of the Safe Drinking Water Act, as amended, and 40 CFR 142.10, 142.12(d) and 142.13)

Dated: October 19, 2016.

Mark Hague,

Regional Administrator, Region 7.

[FR Doc. 2016–26372 Filed 10–31–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2015–0635; FRL–9954–79–ORD]

Board of Scientific Counselors (BOSC) Chemical Safety for Sustainability Subcommittee Meeting—November 2016

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the U.S. Environmental Protection Agency, Office of Research and Development (ORD), gives notice of a meeting of the Board of Scientific Counselors (BOSC) Chemical Safety for Sustainability Subcommittee.

DATES: The meeting will be held on Wednesday, November 16, 2016, from 8:00 a.m. to 6:00 p.m., Thursday, November 17, 2016, from 8:30 a.m. to 6:00 p.m., and will continue on Friday, November 18, 2016, from 8:30 a.m. to 3:30 p.m. All times noted are Eastern Time. Attendees must register by November 10, 2016, online at: *https://www.eventbrite.com/e/us-epa-bosc-chemical-safety-for-sustainability-subcommittee-tickets-28454076910.* Requests for the draft agenda or for presenting written or oral statements at the meeting will be accepted up to November 14, 2016.

ADDRESSES: The meeting will be held at the EPA's Main Campus Facility, 109 T.W. Alexander Drive, Research Triangle Park, North Carolina 27711.

INSTRUCTIONS: Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2015–0635, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email:* Send comments by electronic mail (email) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2015–0635.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2015–0635.
- *Mail:* Send comments by mail to: Board of Scientific Counselors (BOSC) Chemical Safety for Sustainability Subcommittee Docket, Mail Code: 2822T, 1301 Constitution Ave. NW., Washington, DC 20004, Attention Docket ID No. EPA–HQ–ORD–2015–0635.
- *Hand Delivery or Courier:* Deliver comments to: EPA Docket Center (EPA/DC), Room 3334, William Jefferson Clinton West Building, 1301 Constitution Ave. NW., Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2015–0635. Note: This is not a mailing address. Deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Direct your comments to Docket ID No. EPA–HQ–ORD–2015–0635. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/dockets/.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Board of Scientific Counselors (BOSC) Chemical Safety for Sustainability Subcommittee Docket, EPA/DC, William Jefferson Clinton West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer via mail at: Megan Fleming, Mail Code 8104R, Office of Science Policy, Office of Research and Development, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; via phone/voice mail at: (202) 564–6604; or via email at: *fleming.megan@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information: The meeting is open to the public. Any member of the public interested in attending the meeting must register by November 10, 2016, online at: *https://www.eventbrite.com/e/us-epa-bosc-chemical-safety-for-sustainability-subcommittee-tickets-28454076910.* Any member of the public interested in receiving a draft agenda, attending the meeting, or presenting written or oral statements at the meeting should contact Megan Fleming via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above.

For security purposes, all attendees must go through a metal detector, sign in with the security desk, and show government-issued photo identification to enter the building. Attendees are encouraged to arrive at least 15 minutes prior to the start of the meeting to allow sufficient time for security screening. Proposed agenda items for the meeting include, but are not limited to, the following: Overview of materials provided to the subcommittee; Overview of ORD's Chemical Safety for Sustainability Research Program; A short update from ORD's Human Health Risk Assessment Research Program; Poster session; and Subcommittee discussion.

Written Statements: Written statements for the public meeting should be received by Megan Fleming via email at the contact information listed above by November 14, 2016. Written statements should be supplied in one of the following electronic formats: Adobe Acrobat PDF, MS Word, MS Power Point, or Rich Text format.

Oral Statements: In general, each individual making an oral statement at the public meeting will be limited to a total of three minutes. Each person making an oral statement should also consider providing written comments so that the points presented orally can be expanded upon in writing. Interested parties should contact Megan Fleming in writing (preferably via email) at the contact information noted above by November 14, 2016, to be placed on the list of public speakers for the BOSC meeting.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Megan Fleming at (202) 564–6604 or *fleming.megan@epa.gov.* To request accommodation of a disability, please contact Megan Fleming, preferably at least ten days prior to the meeting, to give the EPA as much time as possible to process your request.

Dated: October 25, 2016.

Fred S. Hauchman,

Director, Office of Science Policy.

[FR Doc. 2016–26371 Filed 10–31–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9954–73–OA]

Notification of a Public Meeting of the Chartered Science Advisory Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces a public meeting of the chartered SAB to: (1) Conduct a quality review of the draft SAB review of the EPA's proposed methodology for mortality risk valuation estimates for policy analysis; (2) discuss information provided by the EPA on planned actions in the Spring 2016 semi-annual regulatory agenda and their supporting science; (3) discuss information about shipboard treatment efficacy in the SAB report, Efficacy of Ballast Water Treatment Systems: A Report by the Science Advisory Board, and (4) receive briefings on future topics from the EPA.

DATES: The public meeting will be held on Wednesday, November 30, 2016, from 1:30 p.m. to 5:00 p.m. and Thursday December 1, 2016, from 9:00 a.m. to 1:00 p.m.

ADDRESSES: The meeting will be held at the Westin Arlington Gateway Hotel, 801 North Glebe Road, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants further information concerning the meeting may contact Mr. Thomas Carpenter, Designated Federal Officer (DFO), EPA Science Advisory Board (1400R), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; via telephone/voice mail (202) 564–4885, or email at *carpenter.thomas@epa.gov.* General information concerning the SAB can be found on the EPA Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

Background: The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (ERDDAA), codified at 42 U.S.C. 4365, to provide independent scientific and technical advice to the Administrator on the scientific and technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. Pursuant to FACA and EPA policy, notice is hereby given that the SAB will hold a public meeting to discuss and deliberate on the topics below.

(1) Quality Review of a Draft SAB Report on EPA's Proposed Methodology for Mortality Risk Valuation Estimates for Policy Analysis

The EPA's Office of Policy requested advice on proposed improvements to the Agency's methodology for estimating benefits associated with reduced risk of mortality. This methodology takes into account the amounts that individuals are willing to pay for reductions in mortality risk. The resulting values are combined into an estimate known as the value of statistical life (VSL) which is used in regulatory benefit-cost analysis. The EPA has also requested that the SAB review options for accounting for changes in the VSL over time as real income grows, known as income elasticity of willingness to pay.

The chartered SAB will conduct a quality review of the committee's draft report before it is transmitted to the EPA Administrator. The SAB quality review process ensures that all draft reports developed by SAB panels, committees or workgroups are reviewed and approved by the Chartered SAB before being finalized and transmitted to the EPA Administrator. These reviews are conducted in a public meeting as required by FACA.

Background on the current advisory activity, Valuing Mortality Risk Reductions for Policy: Proposed Updates to Valuation and Income Elasticity Estimates can be found on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Valuing%20fatal%20risk%20for%20policy?OpenDocument.*

(2) Discussion of Information on the Agency's Semiannual Regulatory Agenda

As part of the EPA's effort to routinely inform the SAB about proposed and planned agency actions that have a scientific or technical basis, the agency provided notice to the SAB that the Office of Management and Budget published the ''Unified (Regulatory) Agenda'' on the Web on May 18, 2016 available at *http://www.reginfo.gov/public/do/eAgendaMain.*

The SAB convened a Work Group to review information provided in the agency's Spring 2016 regulatory agenda regarding EPA planned actions and their supporting science. The SAB will discuss recommendations and information developed by the Work Group regarding the adequacy of the science supporting the planned actions. Information about this advisory activity can be found on the Web at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/SAB%20Fall%202015%20Reg%20Agenda?OpenDocument.*

(3) Discussion of Information About Shipboard Treatment Efficacy in the SAB Report, Efficacy of Ballast Water Treatment Systems: A Report by the Science Advisory Board

The SAB will discuss recommendations and information developed by a Work Group regarding the conclusions about shipboard treatment efficacy in the SAB report, Efficacy of Ballast Water Treatment Systems: A Report by the Science Advisory Board (EPA–SAB–11–009). The SAB convened a Work Group to gather and review information on the report's underlying data and related conclusions. The SAB is not seeking new data regarding ballast water treatment system efficacy and will focus its discussion on the data and information available for the report. Information about this advisory activity can be found on the Web at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Ballast%20Water%20Fact%20Finding?OpenDocument.*

Availability of Meeting Materials: A meeting agenda and other materials for the meeting will be placed on the SAB Web site at *http://epa.gov/sab.*

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office.

Federal advisory committees and panels, including scientific advisory committees, provide independent advice to the EPA. Members of the public can submit relevant comments pertaining to the EPA's charge, meeting materials, or the group providing advice. Input from the public to the SAB will have the most impact if it provides specific scientific or technical information or analysis for the SAB to consider or if it relates to the clarity or accuracy of the technical information. Members of the public wishing to provide comment should contact the DFO directly.

Oral Statements: In general, individuals or groups requesting an oral presentation at a public meeting will be limited to five minutes. Persons interested in providing oral statements at the November 30–December 1, 2016, meeting should contact Mr. Thomas Carpenter, DFO, in writing (preferably via email) at the contact information noted above by November 21, 2016 to be placed on the list of registered speakers.

Written Statements: Written statements for the November 30–December 1, 2016, meeting should be received in the SAB Staff Office by November 21, 2016, so that the information can be made available to the SAB for its consideration prior to the meeting. Written statements should be supplied to the DFO at the contact information above via email (preferred) or in hard copy with original signature. Submitters are requested to provide a signed and unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its Web sites. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the SAB Web site. Copyrighted material will not be posted without explicit permission of the copyright holder.

Accessibility: For information on access or services for individuals with disabilities, please contact Mr. Carpenter at the phone number or email address noted above, preferably at least ten days prior to the meeting, to give the EPA as much time as possible to process your request.

Dated: October 25, 2016.

Khanna Johnston,

Acting Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2016–26373 Filed 10–31–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS16–09]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of meeting.

Description: In accordance with Section 1104(b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in open session for its regular meeting:

Location: Federal Reserve Board—International Square location, 1850 K Street NW., Washington, DC 20006.

Date: November 9, 2016.

Time: 10:00 a.m.

Status: Open.

Reports

Chairman
Executive Director
Delegated State Compliance Reviews
Financial Report

Action and Discussion Items

September 14, 2016 Open Session Minutes
FY17 ASC State and Appraisal Foundation Grants
Amended FY17 ASC Budget
Revised State Grant Policy
Revised ASC Policy Statements

How to Attend and Observe an ASC meeting: If you plan to attend the ASC Meeting in person, we ask that you send an email to *meetings@asc.gov.* You may register until close of business four business days before the meeting date. You will be contacted by the Federal Reserve Law Enforcement Unit on security requirements. You will also be asked to provide a valid government-issued ID before being admitted to the Meeting. The meeting space is intended to accommodate public attendees. However, if the space will not accommodate all requests, the ASC may refuse attendance on that reasonable basis. The use of any video or audio tape recording device, photographing device, or any other electronic or mechanical device designed for similar purposes is prohibited at ASC meetings.

Dated: October 26, 2016.

James R. Park,

Executive Director.

[FR Doc. 2016–26346 Filed 10–31–16; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 25, 2016.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *First Liberty Capital Corporation Employee Stock Ownership Plan, Hugo, Colorado;* to acquire an additional 5.6 percent, for a total of 37.6 percent, of the voting shares of the First Liberty Capital Corporation, and thereby acquire shares of The First National Bank of Hugo, all of Hugo, Colorado.

B. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

2. *AltaPacific Bancorp, Santa Rosa, California;* to acquire Commerce Bank of Temecula Valley, Murrieta, California.

Board of Governors of the Federal Reserve System, October 27, 2016.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2016–26361 Filed 10–31–16; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Community Services Block Grant (CSBG) Annual Report.

OMB No.: New.

Description: Section 678E of the Community Services Block Grant (CSBG) Act requires States, including the District of Columbia and the Commonwealth of Puerto Rico, and U.S. territories, to annually prepare and submit a report on the measured performance of the State and the eligible entities in the State. Prior to the participation of the State in the performance measurement system, the State shall include in the report any information collected by the State relating to such performance. Each State shall also include in the report an accounting of the expenditure of funds received by the State through the CSBG program, including an accounting of funds spent on administrative costs by the State and the eligible entities, and funds spent by the eligible entities on the direct delivery of local services, and shall include information on the number of and characteristics of clients served under the subtitle in the State, based on data collected from the eligible entities. The State shall also include in the report a summary describing the training and technical assistance offered by the State.

This request will support an automated Annual Report form, streamlining State administrative information and incorporating Results Oriented Management and Accountability (ROMA) Next Generation as well as National Performance Indicators (NPI) for individual, family, and community measures as reported by eligible entities. The revised and automated form may impose an added first-use burden; however, this burden will lessen in subsequent years. Copies of the proposed collection of information can be obtained by visiting: *http://www.acf.hhs.gov/programs/ocs/programs/csbg.*

Respondents: State Governments, including the District of Columbia and the Commonwealth of Puerto Rico, and U.S. territories and CSBG eligible entities.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
CSBG Annual Report	52	1	203	10,566
CSBG Annual Report	1035	1	756	782,460

Estimated Total Annual Burden Hours: 793,026.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW., Washington, DC 20201. Attention Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2016–26336 Filed 10–31–16; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1393]

Agency Information Collection Activities; Proposed Collection; Comment Request; Patent Term Restoration, Due Diligence Petitions, Filing, Format, and Content of Petitions

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on Patent Term Restoration, Due Diligence Petitions, Filing, Format, and Content of Petitions.

DATES: Submit either electronic or written comments on the collection of information by January 3, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2013–N–1393 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Patent Term Restoration, Due Diligence Petitions, Filing, Format, and Content of Petitions.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 11601 Landsdown Street, 10A63, North Bethesda, MD 20852, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the 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. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

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

Patent Term Restoration, Due Diligence Petitions, Filing, Format, and Content of Petitions—21 CFR Part 60—OMB Control Number 0910–0233—Extension

FDA's patent extension activities are conducted under the authority of the Drug Price Competition and Patent Term Restoration Act of 1984 (21 U.S.C. 355(j)) and the Generic Animal Drug and Patent Term Restoration Act of 1988 (35 U.S.C. 156). New human drug, animal drug, human biological, medical device, food additive, or color additive products regulated by the FDA must undergo FDA safety, or safety and effectiveness review before marketing is permitted. Where the product is covered by a patent, part of the patent's term may be consumed during this review, which diminishes the value of the patent. In enacting the Drug Price Competition and Patent Term Restoration Act of 1984 and the Generic Animal Drug and Patent Term Restoration Act of 1988, Congress sought to encourage development of new, safer, and more effective medical and food additive products. It did so by authorizing the U.S. Patent and Trademark Office (USPTO) to extend the patent term by a portion of the time during which FDA's safety and effectiveness review prevented marketing of the product. The length of the patent term extension is generally limited to a maximum of 5 years, and is calculated by USPTO based on a statutory formula. When a patent holder submits an application for patent term extension to USPTO, USPTO requests information from FDA, including the length of the regulatory review period for the patented product. If USPTO concludes that the product is eligible for patent term extension, FDA publishes a notice that describes the length of the regulatory review period and the dates used to calculate that period. Interested parties may request, under § 60.24 (21 CFR 60.24), revision of the length of the regulatory review period, or may petition under § 60.30 (21 CFR 60.30) to reduce the regulatory review period by any time where marketing approval was not pursued with ''due diligence.''

The statute defines due diligence as ''that degree of attention, continuous directed effort, and timeliness'' as may reasonably be expected from, and are ordinarily exercised by, a person during a regulatory review period. As provided in § 60.30(c), a due diligence petition ''shall set forth sufficient facts, including dates if possible, to merit an investigation by FDA of whether the applicant acted with due diligence.'' Upon receipt of a due diligence petition, FDA reviews the petition and evaluates whether any change in the regulatory review period if necessary. If so, the corrected regulatory review period is published in the **Federal Register**. A due diligence petitioner not satisfied with FDA's decision regarding the petition may, under § 60.40 (21 CFR 60.40), request an informal hearing for reconsideration of the due diligence determination. Petitioners are likely to include persons or organizations having knowledge that FDA's marketing permission for that product was not actively pursued throughout the regulatory review period. The information collection for which an extension of approval is being sought is the use of the statutorily created due diligence petition.

Since 1992, 20 requests for revision of the regulatory review period have been submitted under § 60.24(a). For 2013, 2014 and 2015, a total of 5 requests have been submitted under § 60.24(a). During that same time period, there have been no requests under §§ 60.30 and 60.40; however, for purposes of this information collection approval, we are estimating that we may receive one submission annually.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
60.24(a)	3	1.66	5	100	500
60.30	1	1	1	50	50
60.40	1	1	1	10	10
Total					560

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: October 27, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–26322 Filed 10–31–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1163]

Agency Information Collection Activities: Proposed Collection; Comment Request; Institutional Review Boards

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the recordkeeping requirements for institutional review boards (IRBs).

DATES: Submit either electronic or written comments on the collection of information by January 3, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2013–N–1163 for ''Agency Information Collection Activities: Proposed Collection; Comment Request; Institutional Review Boards.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS

CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 11601 Landsdown Street, 10A63, North Bethesda, MD 20852, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the 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. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

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

Institutional Review Boards—21 CFR 56.115

OMB Control Number 0910–0130—Extension

When reviewing clinical research studies regulated by FDA, institutional review boards (IRBs) are required to create and maintain records describing their operations, and make the records available for FDA inspection when requested. These records include: Written procedures describing the structure and membership of the IRB and the methods that the IRB will use in performing its functions; the research protocols, informed consent documents, progress reports, and reports of injuries to subjects submitted by investigators to the IRB; minutes of meetings showing attendance, votes, and decisions made by the IRB; the number of votes on each decision for, against, and abstaining; the basis for requiring changes in or disapproving research; records of continuing review activities; copies of all correspondence between investigators and the IRB; statement of significant new findings provided to subjects of the research; a list of IRB members by name, showing each member's earned degrees, representative capacity, and experience in sufficient detail to describe each member's contributions to the IRB's deliberations; and any employment relationship between each member and the IRB's institution. This information is used by FDA in conducting audit inspections of IRBs to determine whether IRBs and clinical investigators are providing adequate protections to human subjects participating in clinical research.

The recordkeeping requirement burden is based on the following information; the burden for the paragraphs under 21 CFR 56.115 has been considered as one estimated burden. This burden estimate assumes that there are approximately 2,520 IRBs, that each IRB meets on an average of 14.6 times annually, and that approximately 100 hours of person-time per meeting are required to meet the requirements of the regulation.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR Section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeper	Total hours
56.115	2,520	14.6	36,792	100	3,679,200

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: October 26, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–26258 Filed 10–31–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–2872]

Medical Device User Fee Amendments; Public Meeting; Request for Comments; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending the comment period for the Medical Device User Fee Amendments (MDUFA) reauthorization draft recommendations that were announced in the **Federal Register** on October 7, 2016. In that **Federal Register** notice, FDA requested comments on the draft recommendations related to the reauthorization of the medical device user fee amendments. The Agency is taking this action to allow interested persons the statutorily required 30 days to submit comments.

DATES: FDA is extending the comment period on the MDUFA reauthorization draft recommendations published October 7, 2016 (81 FR 69829). Submit either electronic or written comments by November 28, 2016.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–N–2872 for ''Medical Device User Fee Amendments; Public Meeting; Request for Comments; Extension of Comment Period.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Aaron Josephson, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5449, Silver Spring, MD 20993, 301–796–5178, *Aaron.Josephson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 7, 2016, FDA published a request for comments with a 30-day comment period beginning October 14, 2016, to request comments on MDUFA reauthorization draft recommendations.

Because the Agency was unable to post the draft recommendations until October 25, 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 MDUFA reauthorization draft recommendations until November 28, 2016.

Dated: October 27, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–26318 Filed 10–31–16; 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; Nurse Anesthetist Traineeship Program Specific Data Forms

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects (Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995), 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 January 3, 2017.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N39, 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: Nurse Anesthetist Traineeship (NAT) Program Specific Data Forms (Application).

OMB No. 0915–0374—Revision.

Abstract: HRSA provides advanced education nursing training grants to educational institutions to increase the numbers of Nurse Anesthetists through the NAT Program. The NAT Program is authorized by Section 811 of the Public Health Service (PHS) Act (42 U.S.C. 296j). The NAT Tables request information on program participants such as the number of enrollees, number of enrollees/trainees supported, number of graduates, number of graduates supported, projected data on the number of enrollees/trainees and graduates for the previous fiscal year, the types of programs the Nurse Anesthesia student trainees are enrolling into and/or from which enrollees/trainees are graduating, and the distribution of Nurse Anesthetists who practice in underserved, rural, or public health practice settings.

Need and Proposed Use of the Information: Funds appropriated for the NAT Program are distributed among eligible institutions based on a formula, as permitted by PHS Act section 806(e)(1). HRSA uses the data from the NAT Tables to determine the award amount, to ensure compliance with programmatic and grant requirements, and to provide information to the public and Congress.

HRSA is streamlining the data collection forms from three tables to two tables by making the following changes:

• Table 1—NAT: Enrollment, Traineeship Support, Graduates, Graduates Supported and Projected Data will no longer capture data by students in first 12 months of study and students beyond first 12 months of study the program. Data will continue to be captured by Master's and Doctoral students.

• Table 2A—NAT: Graduate Data—Rural, Underserved, or Public Health is now Table 2 due to the elimination of Table 2B. There are no other changes to this form.

• Table 2B—NAT: Graduates Supported by Traineeship Data—Rural, Underserved, or Public Health (7/01/15–6/30/16) will be discontinued as of 07/01/18.

Rationale: The NAT Program Specific Data Forms will be revised to streamline the process and capture only essential data for use in the formula calculation, ensure grantee compliance, and measure and evaluate the program.

Likely Respondents: Eligible applicants are education programs that provide registered nurses with full-time nurse anesthesia education and are accredited by the Council on Accreditation (COA) of Nurse Anesthesia Educational Programs. Such programs may include schools of nursing, nursing centers, academic health centers, state or local governments, and other public or private nonprofit entities authorized by the Secretary to confer degrees to registered nurses for full-time nurse anesthesia education. Faith-based and community-based organizations, Tribes, and tribal organizations may apply for these funds if otherwise eligible. In addition to the 50 states, only the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Northern Mariana Islands, American Samoa, the U.S. Virgin Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau may apply.

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

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Table 1—NAT: Enrollment, Traineeship Support, Graduate, Graduates Supported and Projected Data	100	1	100	3.4	340
Table 2—NAT: Graduate Data—Rural, Underserved, or Public Health	100	1	100	2.8	280
Total	*100		100		620

* The same respondents are completing Tables 1 and Table 2.

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.

Jason E. Bennett,

Director, Division of the Executive Secretariat.

[FR Doc. 2016–26283 Filed 10–31–16; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Maternal, Infant, and Early Childhood Home Visiting Program Fiscal Year (FY) 2015, FY 2016, FY 2017 Non-Competing Continuation Progress Report for Formula Grant

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects (Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995), 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 should be received no later than January 3, 2017.

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: Maternal, Infant, and Early Childhood Home Visiting Program Fiscal Year (FY) 2015, FY 2016, FY 2017 Non-Competing Continuation Progress Report for Formula Grant.

OMB No. 0915–0355—Revision.

Abstract: The Federal Home Visiting Program (also known as the Maternal, Infant, and Early Childhood Home Visiting Program), administered by HRSA in close partnership with the Administration for Children and Families, supports voluntary, evidence-based home visiting services during pregnancy and to parents with young children up to kindergarten entry. Formula grant awards support Federal Home Visiting Program grantees in meeting statutory and programmatic objectives for implementing high quality home visiting programs and coordinating with comprehensive statewide early childhood systems. All 50 states, the District of Columbia, 5 territories, and applicable nonprofit organizations are eligible to receive formula grant awards. There are currently 56 entities with formula grant awards.

Need and Proposed Use of the Information: This information collection is requested for eligible entities to submit non-competing continuation progress reports on an annual basis.

On March 23, 2010, the President signed into law the Patient Protection and Affordable Care Act (ACA). Section 2951 of the ACA amended Title V of the Social Security Act by adding a new section, 511, which authorized the creation of the Federal Home Visiting Program. A portion of funding under this program is awarded to participating states and eligible jurisdictions using a funding formula. Formula funding is the main funding mechanism used by HRSA to provide support to eligible entities for the provision of voluntary high-quality home visiting services to families living in at-risk communities.

The information collected will be used to review grantee progress on proposed project plans to assess whether the project is performing adequately to achieve the goals and objectives that were previously approved. This report will also provide implementation plans for the upcoming year that will result in a high-quality project. Non-competing continuation progress reports are submitted via HRSA's Electronic Handbook.

Failure to collect this information would impair federal monitoring and oversight of the use of grant funds. Grantees are required to provide a performance narrative in the following sections: Project Identifier Information; Accomplishments and Barriers, Home Visiting Program Goals and Objectives; Update on the Home Visiting Program Promising Approach (as applicable), Implementation of the Home Visiting Program in Targeted At-Risk Communities; Progress Towards Meeting Legislatively-Mandated Reporting on Benchmark Areas; Home Visiting Quality Improvement Efforts, and; Updates on the Administration of the Home Visiting Program.

The purpose of this revision is to include standardized tables and instructions to assist grantees in completing the required sections. Reporting progress, in part, by using these tables will assist federal staff to assess whether the grant activities align with statutory and programmatic requirements and objectives and will result in the implementation of a high-quality project. To account for the additional tables included in this revision request, the estimated annualized burden hours have been revised to reflect 80 hours per response. The previous estimate was 42 hours per response.

Likely Respondents: Eligible entities under the Social Security Act, Title V, Section 511(c) (42 U.S.C., Section 711(c)), as added by Section 2951 of the ACA (Pub. L. 111–148)

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 Information Collection Request are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Formula Non-Competing Continuation Progress Report	56	1	56	80	4,480

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Total	56		56		4,480

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.

Jason E. Bennett,

Director, Division of the Executive Secretariat.

[FR Doc. 2016–26284 Filed 10–31–16; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: HHS–OS–0990–0323–30D]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request

AGENCY: Office of the Secretary, HHS

ACTION: Notice

SUMMARY: In compliance with section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, has submitted an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB) for review and approval. The ICR is for renewal of the approved information collection assigned OMB control number 0990–0323, scheduled to expire on January 31, 2017. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public on this ICR during the review and approval period.

DATES: Comments on the ICR must be received on or before December 1, 2016.

ADDRESSES: Submit your comments to *OIRA_submission@omb.eop.gov* or via facsimile to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Information Collection Clearance staff, *Information.CollectionClearance@hhs.gov* or (202) 690–5683.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the OMB control number 0990–0323–30D for reference.

Information Collection Request Title: MedicalCountermeasures.gov

Abstract: In order to route product developers to the most appropriate personnel within the Department of Health and Human Services (HHS), HHS collects some basic information about the company's product through *MedicalCountermeasures.gov*. Using this information and a routing system that has been developed with input from participating agencies within HHS, including the Office of the Assistant Secretary for Preparedness and Response (ASPR), the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the National Institutes of Health (NIH), *Medical Countermeasures.gov* routes the meeting request to the appropriate person within HHS. ASPR is requesting an extension by OMB for a three-year clearance.

Need and Proposed Use of the Information: Meeting Request Routing System for *MedicalCountermeasures.gov*—OMB No. 0990–0323—Extension—Office of the Assistant Secretary for Preparedness and Response (ASPR), Office of the Biomedical Advanced Research and Development Authority (BARDA).

Likely Respondents: Medical Countermeasure Developers.

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

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Meeting Request	225	1	8/60	30
Total	225	1	8/60	30

Terry S. Clark,

Asst Information Collection Clearance Officer.

[FR Doc. 2016–26321 Filed 10–31–16; 8:45 am]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Invention; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for licensing in the U.S. in accordance with 35 U.S.C. 209 and 37 CFR part 404 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Licensing information may be obtained by communicating with the indicated licensing contact at the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rockville, MD 20852; tel. 301–496–2644. A signed Confidential Disclosure Agreement will be required to receive copies of unpublished scientific data.

SUPPLEMENTARY INFORMATION: Technology description follows.

A Human Progenitor Mast Cell Line for Allergic and Fibrotic Research and Therapeutic Screening

Description of Technology: Hermansky-Pudlak Syndrome type-1 (HPS-1) is a rare genetic disorder that affects around 1 in 500,000 people worldwide and 1 in 1,800 Puerto Ricans. Patients with HPS-1 display oculocutaneous albinism, bleeding due to platelet abnormality, and pulmonary fibrosis. Those that develop pulmonary fibrosis often succumb and live no more than a decade after early onset of breathing problems.

Scientists at the National Institute of Allergy and Infectious Diseases (NIAID) have developed the HPS-1 proMastocyte (HPM) cell line, containing an HPS-1 mutation. This cell line resembles a progenitor mast cell with reduced granule formation, significant chemotactic ability, and is the first mast cell line shown to constitutively release cytokines, chemokines, and most importantly fibrotic proteins. This cell line serves as a model to study granule formation, early mast cell development, chemotaxis and mechanisms controlling synthesis of molecules contributing to fibrosis.

The cell line is available as live cells approximately 3–4 million cells per sample in a T25 Flask.

Potential Commercial Applications:

- A tool to further understand fibrosis
- A tool to study granule formation, early mast cell development, degranulation and chemotaxis
- Screening tool to identify target compounds for the treatment of pulmonary fibrosis

Competitive Advantages:

- First progenitor mast cell line known to produce fibrotic elements
- Progenitor mast cell line with rapid growth, no cytokine stimulation needed. Cell doubling time of 2–3 days

Inventors: Arnold S. Kirchenbaum and Dean D.Metcalfe, both of NIAID.

Publications:

Kirshenbaum AS et al. Immunophenotypic and Ultrastructural Analysis of Mast Cells in Hermansky-Pudlak Syndrome Type-1: A Possible Connection to Pulmonary Fibrosis.; PLoS One. 2016, Jul 26;11(7):e0159177, PMID 27459687

Intellectual Property: HHS Reference No. E–270–2016/0. Available as a Biological Material.

Licensing Contact: Dr. Benjamin Hurley, (240) 669–5092, *benjamin.hurley@nih.gov.*

Collaborative Research Opportunity: The National Institute of Allergy and Infectious Diseases is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize this invention.

For collaboration opportunities, please contact Dr. Dianca Finch; 240–669–5503, *dianca.finch@nih.gov.*

Dated: October 26, 2016.

Suzanne Frisbie,

Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.

[FR Doc. 2016–26260 Filed 10–31–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Frederick National Laboratory Advisory Committee to the National Cancer Institute, November 16, 2016, 01:00 p.m. to November 16, 2016, 05:30 p.m., National Cancer Institute Advanced Technology Research Facility (ATRF), 8560 Progress Drive, Auditorium Room E1600, Frederick, MD, 21702 which was published in the **Federal Register** on October 24, 2016, 81 FR 73119.

This Notice has been amended to change the: Meeting date; start and end times; agenda and type of meeting. The meeting will now be held on November 16, 2016 from 8:00 a.m. to November 17, 2017, 12:00 p.m. to conduct a site visit of the Frederick National Laboratory for Cancer Research and the National Cancer Institute (NCI) RAS Initiative. The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The project/program and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the project/program, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Dated: October 26, 2016.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–26259 Filed 10–31–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Animal Assisted Intervention Review.

Date: December 5, 2016.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Mayflower Hotel, 1127 Connecticut Avenue NW., Washington, DC 20036.

Contact Person: Marita R. Hopmann, Ph.D., Scientific Review Officer, Division of Scientific Review, National Institute of Child Health and Human Development, 6710B Bethesda Drive, Bethesda, MD 20892, (301) 435–6911, *hopmannm@mail.nih.gov.*

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Comparative and Developmental Perspectives on the Emergence of Cognitive Competence.

Date: December 7, 2016.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6710B Rockledge Drive, Bethesda, MD 20718 (Telephone Conference Call).

Contact Person: Marita R. Hopmann, Ph.D., Scientific Review Officer, Division of Scientific Review, National Institute of Child Health and Human Development, 6710B Bethesda Drive, Bethesda, MD 20892, (301) 435–6911, *hopmannm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 26, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–26261 Filed 10–31–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of Intertek USA, Inc., as a Commercial Gauger and Laboratory

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

ACTION: Notice of accreditation and approval of Intertek USA, Inc., as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given, pursuant to CBP regulations, that Intertek USA, Inc., has been approved to gauge and accredited to test petroleum and petroleum products for customs purposes for the next three years as of July 14, 2015.

DATES: *Effective Dates:* The accreditation and approval of Intertek USA, Inc., as commercial gauger and laboratory became effective on July 14, 2015. The next triennial inspection date will be scheduled for July 2018.

FOR FURTHER INFORMATION CONTACT: Approved Gauger and Accredited Laboratories Manager, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, tel. 202–344–1060.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to 19 CFR 151.12 and 19 CFR 151.13, that Intertek USA, Inc., 230 Crescent Ave, Chelsea, MA 02150, has been approved to gauge and accredited to test petroleum and petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Intertek USA, Inc., is approved for the following gauging procedures for petroleum and certain petroleum products set forth by the American Petroleum Institute (API):

API chapters	Title
3	Tank gauging.
7	Temperature Determination.
8	Sampling.
12	Calculations.
17	Maritime Measurements.

Intertek USA, Inc., is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
27–04	D95	Standard Test Method for Water in Petroleum Products and Bituminous Materials by Distillation.
27–06	D473	Standard Test Method for Sediment in Crude Oils and Fuel Oils by the Extraction Method.
27–08	D86	Standard Test Method for Distillation of Petroleum Products.
27–09	D4953	Standard Test Method for Vapor Pressure of Gasoline and Gasoline-Oxygenate Blends (Dry Method).
27–11	D445	Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids.
27–13	D4294	Standard Test Method for Sulfur in Petroleum and Petroleum Products by Energy-Dispersive X-ray Fluorescence Spectrometry.
27–48	D4052	Standard Test Method for Density and Relative Density of Liquids by Digital Density Meter.
27–50	D93	Standard Test Methods for Flash-Point by Pensky-Martens Closed Cup Tester.
27–54	D1796	Standard Test Method for Water and Sediment in Fuel Oils by the Centrifuge Method.
27–58	D5191	Standard Test Method For Vapor Pressure of Petroleum Products.
N/A	D1319	Standard Test Method for Hydrocarbon Types in Liquid Petroleum Products by Fluorescent Indicator Absorption.
N/A	D3606	Standard Test Method for Determination of Benzene and Toluene in Finished Motor and Aviation Gasoline by Gas Chromatography.
N/A	D4815	Standard Test Method for Determination of MTBE, ETBE, TAME, DIPE, tertiary-Amyl Alcohol and C1 to C4 Alcohols in Gasoline by Gas Chromatography.
N/A	D5453	Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Spark Ignition Engine Fuel, Diesel Engine Fuel, and Engine Oil by Ultraviolet Fluorescence.

Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border

Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories.

http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories

Dated: October 21, 2016.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services Directorate.

[FR Doc. 2016–26313 Filed 10–31–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of Inspectorate America Corporation, as a Commercial Gauger and Laboratory

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

ACTION: Notice of accreditation and approval of Inspectorate America Corporation as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given, pursuant to CBP regulations, that Inspectorate America Corporation has been approved to gauge petroleum and certain petroleum products and accredited to test petroleum and certain petroleum products for customs purposes for the next three years as of February 17, 2016.

DATES: *Effective Date:* The accreditation and approval of Inspectorate America Corporation as commercial gauger and laboratory became effective on February 17, 2016. The next triennial inspection date will be scheduled for February 2019.

FOR FURTHER INFORMATION CONTACT: Approved Gauger and Accredited Laboratories Manager, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, tel. 202–344–1060.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to 19 CFR 151.12 and 19 CFR 151.13, that Inspectorate America Corporation, 3306 Loop 197 N., Texas City, TX 77590 has been approved to gauge petroleum and certain petroleum products and accredited to test petroleum and certain petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Inspectorate America Corporation is approved for the following gauging procedures for petroleum and certain petroleum products from the American Petroleum Institute (API):

API Chapters	Title
3	Tank Gauging.
5	Metering.
7	Temperature Determination.
8	Sampling.
12	Calculations.
14	Natural Gas Fluids Measurement.
17	Marine Measurement.

Inspectorate America Corporation is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
27–01	D 287	Standard Test Method for API Gravity of Crude Petroleum and Petroleum Products (Hydrometer Method).
27–03	D 4006	Standard Test Method for Water in Crude Oil by Distillation.
27–04	D 95	Standard Test Method for Water in Petroleum Products and Bituminous Materials by Distillation.
27–05	D 4928	Standard Test Method for Water in Crude Oils by Coulometric Karl Fischer Titration.
27–06	D 473	Standard Test Method for Sediment in Crude Oils and Fuel Oils by the Extraction Method.
27–07	D 4807	Standard Test Method for Sediment in Crude Oil by Membrane Filtration.
27–08	D 86	Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure.
27–11	D 445	Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids (and Calculation of Dynamic Viscosity).
27–13	D 4294	Standard Test Method for Sulfur in Petroleum and Petroleum Products by Energy Dispersive X-ray Fluorescence Spectrometry.
27–14	D 2622	Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry.
27–46	D 5002	Standard Test Method for Density and Relative Density of Crude Oils by Digital Density Analyzer.
27–48	D 4052	Standard Test Method for Density and Relative Density of Liquids by Digital Density Meter.
27–50	D 93	Standard Test Methods for Flash Point by Pensky-Martens Closed Cup Tester.
27–53	D 2709	Standard Test Method for Water and Sediment in Middle Distillate Fuels by Centrifuge.
27–54	D 1796	Standard Test Method for Water and Sediment in Fuel Oils by the Centrifuge Method (Laboratory Procedure).
	D 1160	Standard Test Method for Distillation of Petroleum Products at Reduced Pressure.

Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *CBPGaugersLabs@cbp.dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories.*

Dated: October 24, 2016.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services Directorate.

[FR Doc. 2016–26312 Filed 10–31–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2016–0086]

DHS Data Privacy and Integrity Advisory Committee

AGENCY: Privacy Office, DHS.

ACTION: Committee Management; Notice of Federal Advisory Committee Meeting.

SUMMARY: The DHS Data Privacy and Integrity Advisory Committee will meet on December 6, 2016, in Washington, DC The meeting will be open to the public.

DATES: The DHS Data Privacy and Integrity Advisory Committee will meet on Tuesday, December 6, 2016, from 9:00 a.m. to 12:30 p.m. Please note that the meeting may end early if the Committee has completed its business.

ADDRESSES: The meeting will be held both in person in Washington, DC at 650 Massachusetts Avenue NW., 4th Floor, and via online forum (URL will be posted on the Privacy Office Web site in advance of the meeting at *www.dhs.gov/privacy-advisory-committees*). For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, contact Sandra Taylor, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee, as soon as possible.

To facilitate public participation, we invite public comment on the issues to be considered by the Committee as listed in the **SUPPLEMENTARY INFORMATION** section below. A public comment period will be held during the meeting from 12:15 p.m.–12:30 p.m., and speakers are requested to limit their comments to three minutes. If you would like to address the Committee at the meeting, we request that you register in advance by contacting Sandra Taylor at the address provided below or sign up at the registration desk on the day of the meeting. The names and affiliations, if any, of individuals who address the Committee are included in the public record of the meeting. Please note that the public comment period may end before the time indicated, following the last call for comments. Written comments should be sent to Sandra Taylor, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee, by November 21, 2016. Persons who wish to submit comments and who are not able to attend or speak at the meeting may submit comments at any time. All submissions must include the Docket Number (DHS–2016–0086) and may be submitted by any *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: PrivacyCommittee@hq.dhs.gov.* Include the Docket Number (DHS–2016–0086) in the subject line of the message.
- *Fax:* (202) 343–4010.
- *Mail:* Sandra Taylor, Designated Federal Officer, Data Privacy and Integrity Advisory Committee, Department of Homeland Security, 245 Murray Lane SW., Mail Stop 0655, Washington, DC 20528.

Instructions: All submissions must include the words ''Department of Homeland Security Data Privacy and Integrity Advisory Committee'' and the Docket Number (DHS–2016–0086). Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

If you wish to attend the meeting, please bring a government issued photo I.D. and plan to arrive at 650 Massachusetts Avenue NW., 4th Floor, Washington, DC, no later than 8:50 a.m. The DHS Privacy Office encourages you to register for the meeting in advance by contacting Sandra Taylor, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee, at *PrivacyCommittee@hq.dhs.gov.* Advance registration is voluntary. The Privacy Act Statement below explains how DHS uses the registration information you may provide and how you may access or correct information retained by DHS, if any.

Docket: For access to the docket to read background documents or comments received by the DHS Data Privacy and Integrity Advisory Committee, go to *http://www.regulations.gov* and search for docket number DHS–2016–0086.

FOR FURTHER INFORMATION CONTACT: Sandra Taylor, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee, Department of Homeland Security, 245 Murray Lane SW., Mail Stop 0655, Washington, DC 20528, by telephone (202) 343–1717, by fax (202) 343–4010, or by email to *PrivacyCommittee@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act (FACA), Title 5, U.S.C., appendix. The DHS Data Privacy and Integrity Advisory Committee provides advice at the request of the Secretary of Homeland Security and the DHS Chief Privacy Officer on programmatic, policy, operational, administrative, and technological issues within DHS that relate to personally identifiable information, as well as data integrity and other privacy-related matters. The Committee was established by the Secretary of Homeland Security under the authority of 6 U.S.C. 451.

Proposed Agenda

During the meeting, the Acting Chief Privacy Officer will provide an update on the activities of the Privacy Office. The Committee will also receive updates on the Biometric Framework, the Privacy Compliance Review program, and DHS social media use. Lastly, the Policy Subcommittee will provide a status on the data breach tasking issued during the February 2016 meeting. The final agenda will be posted on or before November 5, 2016, on the Committee's Web site at *www.dhs.gov/privacy-advisory-committees.* Please note that the meeting may end early if all business is completed.

Privacy Act Statement: DHS's Use of Your Information

Authority: DHS requests that you voluntarily submit this information under its following authorities: the *Federal Records Act,* 44 U.S.C. 3101; the FACA, 5 U.S.C. appendix; and the *Privacy Act of 1974,* 5 U.S.C. 552a.

Principal Purposes: When you register to attend a DHS Data Privacy and Integrity Advisory Committee meeting, DHS collects your name, contact information, and the organization you represent, if any. We use this information to contact you for purposes related to the meeting, such as to confirm your registration, to advise you of any changes in the meeting, or to assure that we have sufficient materials to distribute to all attendees. We may also use the information you provide for public record purposes such as posting publicly available transcripts and meeting minutes.

Routine Uses and Sharing: In general, DHS will not use the information you provide for any purpose other than the Principal Purposes, and will not share this information within or outside the agency. In certain circumstances, DHS may share this information on a case-by-case basis as required by law or as necessary for a specific purpose, as described in the DHS/ALL–002 Mailing and Other Lists System of Records Notice (November 25, 2008, 73 FR 71659).

Effects of Not Providing Information: You may choose not to provide the requested information or to provide only some of the information DHS requests. If you choose not to provide some or all of the requested information, DHS may not be able to contact you for purposes related to the meeting.

Accessing and Correcting Information: If you are unable to access or correct this information by using the method that you originally used to submit it, you may direct your request in writing to the DHS Deputy Chief FOIA Officer at *foia@hq.dhs.gov.* Additional instructions are available at *http://www.dhs.gov/foia* and in the DHS/ALL–002 Mailing and Other Lists System of Records referenced above.

Dated: October 25, 2016.

Jonathan R. Cantor,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2016–26275 Filed 10–31–16; 8:45 am]

BILLING CODE 9110–9L–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5974–N–01]

Section 184 Indian Housing Loan Guarantee Program Increase to Annual Premium

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The Section 184 Indian Housing Loan Guarantee program (Section 184 program) is a home mortgage program specifically designed for American Indian and Alaska Native families, Alaska villages, tribes, or tribally designated housing entities. Over the last five years, the Section 184 program has doubled the number of loans and eligible families being assisted by the program. For HUD to continue to meet the increasing demand for participation in this program, HUD is exercising its authority to increase the annual premium to the borrower from 0.15 to 0.25 percent of the remaining loan balance. This annual premium will continue until the unpaid principal balance, excluding the upfront loan guarantee fee, reaches 78 percent of the lower of the initial sales price or appraised value based on the initial amortization schedule. Effective December 1, 2016 the new annual premium of 0.25 percent of the remaining loan balance will apply to all new loan guarantees, including refinances.

DATES: *Effective Date:* December 1, 2016.

FOR FURTHER INFORMATION CONTACT: Heidi J. Frechette, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4126, Washington, DC 20410; telephone number 202–401–7914 (this is not a toll-free number). Persons with hearing or speech disabilities may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

Section 184 of the Housing and Community Development Act of 1992 (Pub. L. 102–550, approved October 28, 1992), as amended by the Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. 104–330, approved October 26, 1996) and 2013 Consolidated and Further Continuing Appropriations Act (Pub. L. 113–6, approved March 26, 2013), established the Section 184 program to provide access to sources of private mortgage financing to Indian families, Indian housing authorities, and Indian tribes. Congress established this program in 1992 to facilitate homeownership and increase access to capital in Native American Communities. The Section 184 program addresses obstacles to mortgage financing on trust land and in other Indian and Alaska Native areas by giving HUD the authority to guarantee loans to eligible persons and entities to construct, acquire, refinance, or rehabilitate one- to four-family dwellings in these areas.

The Section 184 Loan Guarantee Fund (the Fund) is used to fulfill obligations of the Secretary with respect to the loans guaranteed under this program. The Fund receives annual appropriations to cover the cost of the program, and amounts for claims, notes, mortgages, contracts, and property acquired by the Secretary under the Section 184 program, which reduces the amount of appropriations needed to support the program. In recent years, rapidly growing demand has required HUD to increase the guarantee premium and implement a new annual upfront fee to support new loan guarantees. HUD issued loan guarantee commitments for $495.4 million in fiscal year (FY) 2011, $670.8 million in FY 2012, $672.3 million in FY 2013, $595 million in FY 2014, $738.1 million in FY 2015, and $756.3 million in FY 2016.[1] Additionally, expenses have increased for acquisitions, insurance, and other program costs, and HUD has seen higher losses now that the Fund has guaranteed over $5.5 billion in current loans.

On October 7, 2014, HUD issued a notice exercising its new statutory authority to implement an annual premium to the borrower in the amount of 0.15 percent. (79 FR 60492). The notice also provided guidance on the cancellation of the annual premium when the loan reaches the 78 percent loan-to-value ratio. The new annual premium became effective on November 15, 2014 for all new loan guarantees, including refinances.

II. Increased Premium

To meet projected demand for participation in the Section 184 program for FY 2017, HUD is increasing the annual premium from 0.15 to 0.25 percent of the remaining loan balance until the unpaid principal balance, excluding the upfront loan guarantee fee, reaches 78 percent of the lower of the initial sales price or appraised value based on the initial amortization schedule on all new loans, including refinances. This increase will apply to all new program applicants as of the effective date of this notice. It will not apply to existing mortgages guaranteed by this program. Without an increase in the annual premium, HUD will not have sufficient funding to the meet the anticipated demand for Section 184 mortgage loans in FY 2017. The decision to increase the annual loan guarantee premium provides a balanced approach that addresses the current demands for the program while focusing on the need to remain affordable.

By increasing the annual premium paid by borrowers, the credit subsidy rate[2] will go down, and HUD expects the program will be able to guarantee the volume of loans predicted for FY 2017. An annual premium of 0.25 percent would cost a borrower with a $175,000 mortgage (the average loan size for the program) an extra $36.18 a month in total monthly fees on the borrower's monthly payment or $434.16 annually. Since the 0.25 percent annual premium is tied to the loan balance, the annual premium will decrease for the borrower every year as the loan balance declines and then disappear after the loan-to-value ratio reaches 78 percent of the lower of the initial sales price or appraised value based on the initial amortization schedule. Even with these additional costs to borrowers, the Section 184 program will still be one of the least expensive loan products available to Native borrowers. While

[1] Year-to-date cumulative report totaling Section 184 loans guaranteed through end of July 2016.

[2] Credit Subsidy Rate as defined in the Federal Credit Reform Act (FCRA) of 1990, as amended by the Balanced Budget Act of 1997.

paying an annual premium may be a hardship for some potential borrowers, HUD believes it will have a limited impact on the demand for the program, and the new annual premium will allow HUD to continue to meet the demand for mortgage lending transactions in fiscal year 2017 so that more Indian and Alaska Native families have the opportunity to become homeowners.

To reduce some of the impact accompanying the annual premium, the payment of the annual premium can be made through monthly payments, to spread out the cost for borrowers, or annual and lump sum payments, to keep a borrower's monthly payment lower.

This notice increases the Section 184 program annual premium to 0.25 percent of the remaining loan balance for all new case numbers assigned on or after December 1, 2016 until the unpaid principal balance, excluding the upfront loan guarantee fee, reaches 78 percent of the lower of the initial sales price or appraised value based on the initial amortization schedule.

This notice does not supersede HUD's guidance on the cancellation of the annual premium when the loan reaches the 78 percent loan-to-value ratio that was provided in the October 7, 2014 Notice (79 FR 60492).

IV. Tribal Consultation

HUD's policy is to consult with Indian tribes early in the process on matters that have tribal implications. Accordingly, on June 26, 2016, HUD sent letters to all tribal leaders participating in the Section 184 program, informing them of the nature of the forthcoming notice and soliciting comments. A summary of comments received and responses can be found on HUD's Web site at: *http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/homeownership/184.*

V. Environmental Impact

This notice involves the establishment of a rate or cost determination that does not constitute a development decision affecting the physical condition of specific project areas or building sites. Accordingly, under 24 CFR 50.19(c)(6), this notice is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (U.S.C. 4321).

Dated: October 24, 2016.

Lourdes Castro Ramirez,

Principal Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 2016–26331 Filed 10–31–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2016–N152]; [FXES11130400000C2–167–FF04E00000]

Endangered and Threatened Wildlife and Plants; Technical/Agency Draft Recovery Plan for the Chucky Madtom

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and request for public comment.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of the technical/agency draft recovery plan for the endangered chucky madtom, a fish. The draft recovery plan includes specific recovery objectives and criteria that must be met in order for us to reclassify this species to threatened status under the Endangered Species Act of 1973, as amended (Act). We request review and comment on this draft recovery plan from local, State, and Federal agencies, and the public.

DATES: In order to be considered, comments on the draft recovery plan must be received on or before January 3, 2017.

ADDRESSES: *Reviewing documents:* If you wish to review this technical/agency draft recovery plan, you may obtain a copy by contacting Mary E. Jennings, Field Supervisor, U.S. Fish and Wildlife Service, Tennessee Ecological Services Field Office, 446 Neal Street, Cookeville, TN 38501; tel. 931–528–6481; or by visiting the Service's Tennessee Field Office Web site at *http://www.fws.gov/cookeville.*

Submitting comments: If you wish to comment, you may submit your comments by one of the following methods:

1. You may submit written comments and materials to us, at the above address.

2. You may hand-deliver written comments to our Tennessee Field Office, at the above address, or fax them to 931–528–7075.

3. You may send comments by email to *mary_e_jennings@fws.gov.* Please include ''Chucky Madtom Draft Recovery Plan Comments'' on the subject line.

For additional information about submitting comments, see the ''Request for Public Comments'' section below.

FOR FURTHER INFORMATION CONTACT: Mary E. Jennings (see **ADDRESSES**).

SUPPLEMENTARY INFORMATION:

Background

We listed the chucky madtom (*Noturus crypticus;* a small fish) as endangered under the Act (16 U.S.C. 1531 *et seq.*) on August 9, 2011 (76 FR 48722). The chucky madtom grows to 2.9 inches (7.4 centimeters) total length and is endemic to the upper Tennessee River system in Tennessee. This fish is historically known from two creek systems, but only currently persists in Little Chucky Creek where only 14 individuals have ever been collected. All 14 have been collected at this site since 1991; however, none have been captured since 2004.

Chucky madtoms are currently known from a single tributary to the Nolichucky River in stream sections 5 to 7 meters (16 to 23 feet) wide in riffle and swim through streams lined by water willow (*Justicia americana*) beds with slow-to-moderate current over pea-sized gravel, cobble, or slab-rock substrates. In addition to habitat degradation, threats to the species include extreme curtailment of habitat and range, small population size and low numbers, inability to offset mortality with natural reproduction and recruitment, and their resulting vulnerability to natural or human induced catastrophic events (*e.g.,* droughts, pollution spills, etc.). Surviving populations are threatened by water quality and habitat deterioration. Another potential threat is introduced crayfishes (*Orconectes* sp.), which are thought to compete with chucky madtoms for access to the little habitat that is available in Little Chucky Creek.

Approximately 20 river miles (32 river kilometers) of stream channels in Little Chucky Creek, Greene County, Tennessee, have been designated as critical habitat for the chucky madtom (77 FR 63604). This fish has a recovery priority number of 5 which indicates the species faces a high degree of threat, but has a low recovery potential.

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of our endangered species program. To help guide the recovery effort, we prepare recovery plans for most listed species. Recovery plans describe actions considered necessary for conservation of the species, establish criteria for downlisting or delisting, and estimate time and cost for implementing recovery measures.

The Act requires the development of recovery plans for listed species, unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act requires us to provide public notice and an opportunity for public review and comment during recovery plan development. We will consider all information presented during a public comment period prior to approval of each new or revised recovery plan. We and other Federal agencies will take these comments into account in the course of implementing approved recovery plans.

Recovery Plan Components

The recovery objectives are to work to reduce threats in order to downlist the chucky madtom to threatened status. Defining reasonable delisting criteria is not possible at this time given the current low number of individuals, extreme curtailment of the species' range, extensive modification and fragment of habitat with the species' historical range, lack of information about the species' biology, and magnitude of other existing threats. Therefore, this recovery plan establishes only downlisting criteria for this catfish. Criteria will be reevaluated as new information becomes available.

Downlisting of chucky madtom will be considered when:

1. Suitable instream and riparian habitat, flows, and water quality for chucky madtom as defined by the best available science (to be refined by recovery actions), exist in occupied streams (addresses Factor A).

2. Population studies show that a viable chucky madtom population in Little Chucky Creek and at least 1 other stream (Dunn Creek, Jackson Branch; *e.g.,* the only known stream representing the historical range of the species) are naturally recruiting (consisting of two year classes in the fall months) and sustainable over a period of 20–30 years (10 generations) (addresses Factors A, C, and E).

Request for Public Comments

We request written comments on the draft recovery plan. We will consider all comments we receive by the date specified in **DATES** prior to final approval of the plan.

Public Availability of Comments

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.

Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: September 6, 2016.

Mike Oetker,

Acting Regional Director, Southeast Region.

[FR Doc. 2016–26330 Filed 10–31–16; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–LE–2016–N156; FF09L00200–FX–LE18110900000]

Freedom of Information Act; Notice of Lawsuit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: The U.S. Fish and Wildlife Service seeks information about potential objections to the public release of possibly confidential information regarding import and export activities tracked via the Service's Law Enforcement Management Information System. We issue this notice and solicit this information in response to a lawsuit under the Freedom of Information Act.

DATES: You must submit comments on or before November 22, 2016.

ADDRESSES: You may submit comments by one of the following methods:

- *Email: lawenforcement@fws.gov.*
- *Fax:* (703) 358–2271.
- *U.S. mail or hand-delivery:* U.S. Fish and Wildlife Service, Office of Law Enforcement (FOIA), 5275 Leesburg Pike (MS: OLE), Falls Church, VA 22041.

FOR FURTHER INFORMATION CONTACT: Michael Jenkins, Management Analyst Specialist, USFWS, Office of Law Enforcement, 5275 Leesburg Pike, Falls Church, VA 22041; telephone (703) 358–1949.

SUPPLEMENTARY INFORMATION: This notice is issued under part 2 of title 43 of the Code of Federal Regulations (CFR), which sets forth regulations for administration of the Freedom of Information Act (FOIA) by the U.S. Department of the Interior (''the Department'').

We, the U.S. Fish and Wildlife Service (''the Service''), hereby announce that information related to records for the import and export of all wildlife specimens to and from the United States may be disclosed under FOIA (43 CFR 2.27(b)).

Submitters of this type of information can contact the Service to review records subject to possible release. If you are a submitter of this information, the Service will presume that you do not object to the disclosure of your information if a response to this notice is not received by the date specified above in **DATES**.

I. Background

The Department is soliciting views from submitters with respect to whether certain records constitute ''trade secrets and commercial or financial information obtained from a person [that are] privileged or confidential'' information under the FOIA, 5 U.S.C. 552(b)(4). The records at issue concern information in the Service's Law Enforcement Management Information System (LEMIS) relating to the import and export of all wildlife specimens to and from the United States:

a. For the years 2002 through 2010, 2013, and 2014;

b. of any taxonomic class, whether live, dead, parts, or products; and

c. with the following variables to be included in the records: Control Number, Species Code, Class, Genus, Species, Subspecies, Generic Name, Specific Name, Wildlife Description, Quantity, Unit, Value, Country of Origin, Country Import/Export, Purpose, Source, Act, Disposition Code, Disposition Date, Shipment Date, Import/Export, Port Code, U.S. Importer/Exporter, and Foreign Importer/Exporter.

This notice relates to FOIA requests by Humane Society International (HSI) of June 2, 2014; August 21, 2014; June 3, 2015; and November 3, 2015. In response to these FOIA requests, the Service withheld the ''Declared Value of Wildlife'' and ''Foreign Importer/Exporter'' columns in their entirety under FOIA Exemption 4. The Service withheld additional information under Exemptions 6 and 7(C). The Service's response to these FOIA requests is now the subject of a lawsuit, *Humane Society Int'l* v. *U.S. FWS,* No. 16–720 (D.D.C., filed Apr. 18, 2016). A copy of HSI's three FOIA requests, as well as the complaint filed in the United States District Court for the District of Columbia, has been posted on: *https://www.fws.gov/le/businesses.html#FOIAMatters.* Upon request, the Service will provide submitters the relevant submitter information that the Service found to be responsive to HSI's requests.

II. Issues for Comment

The Department has been asked to release certain information in LEMIS for the years 2002 through 2010, 2013, and 2014 relating to the import and export of all wildlife specimens to and from the United States. This notice provides you with the opportunity to object to the public release of these records if they are exempt from disclosure under FOIA, 5 U.S.C. 552(b). Please reference *Humane Society Int'l* v. *U.S. FWS,* No. 16–720, in any communications regarding this matter.

If you wish to object to the disclosure of these records, the Department's FOIA regulations (''regulations'') require you to submit a ''detailed written statement'' setting forth the justification for withholding any portion of the information under any exemption of the FOIA. *See* 43 CFR 2.30.

Under FOIA's Exemption 4, 5 U.S.C. 552(b)(4), ''trade secrets and commercial or financial information obtained from a person and privileged or confidential'' are exempt from disclosure under the FOIA. When the Department has reason to believe that information that is responsive to a FOIA request may be exempt from disclosure under FOIA's Exemption 4, the regulations require the Department to provide notice to the submitter(s) of the responsive material and advise the submitter(s) of the procedures for objecting to the release of the requested material. This publication serves as notice.

Further, if you object to the public disclosure of the records (or any portions of records) at issue in *Humane Society* v. *U.S. FWS,* No. 16–720 (D.D.C., filed Apr. 18, 2016), on the basis that the information submitted is protected by FOIA Exemption 4, then the regulations require the ''detailed written statement'' referenced above to include a ''specific and detailed discussion'' of the following:

(i) Whether the Government required the information to be submitted and, if so, how substantial competitive or other business harm would likely result from release; or

(ii) Whether you provided the information voluntarily and, if so, how the information in question fits into a category of information that you customarily do not release to the public.

(iii) Certification that the information is confidential, that you have not disclosed the information to the public, and that the information is not routinely available to the public from other sources.

In order for information to qualify for protection under Exemption 4 as a ''trade secret,'' the information must be ''a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.'' *See Public Citizen Health Research Group* v. *FDA,* 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition requires there be a direct relationship between the information at issue and the productive process. *Id.* Should you wish to object to the disclosure of any of the information in the documents on the basis that such information is a trade secret, the specific and detailed discussion must explain how *each category* of information the objections are related to qualify for protection under Exemption 4 as a ''trade secret.'' The explanation must also identify a direct relationship between the information and the productive process.

In order for information to qualify for protection under the aspect of Exemption 4 that protects privileged or confidential commercial or financial information, the first requirement is that the information must be either ''commercial or financial.'' In determining whether documents are ''commercial or financial,'' the D.C. Circuit has firmly held that these terms should be given their ''ordinary meanings'' and that records are commercial so long as you have ''commercial interest'' in them. *See Public Citizen,* 704 F.2d at 1290 (citing *Washington Post Co.* v. *HHS,* 690 F.2d 252, 266 (D.C. Cir. 1982), and *Board of Trade* v. *Commodity Futures Trading Comm'n,* 627 F.2d 392, 403 (D.C. Cir. 1980)); *see also Nat'l Ass'n of Home Builders* v. *Norton,* 309 F.3d 26, 38 (D.C. Cir. 2002) (stating ''information is 'commercial' under [Exemption 4] if, 'in and of itself,' it serves a 'commercial function' or is of a 'commercial nature.' '').

The specific and detailed discussion that you provide must explain how the information relates to your commercial interest and the commercial function the information serves or the commercial nature of the information.

The test to determine if information is ''privileged'' or ''confidential'' under Exemption 4 depends on whether the submitter was required to provide the information to the Government or whether the submitter voluntarily disclosed the information to the Government. *Bartholdi Cable. Co.* v. *FCC,* 114 F.3d 274, 281 (D.C. Cir. 1997). Where you voluntarily provide information to the Government, the information will be considered confidential for the purposes of Exemption 4 ''if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.'' *Id.* (citing *Critical Mass Energy Project* v. *Nuclear Regulatory Commission,* 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*)). Alternatively, where the Government requires you to provide information (as is the case for the information at hand), then commercial or financial information generally is ''confidential'' under Exemption 4 ''if disclosure . . . is likely to have either of the following effects: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom it was obtained.'' *National Parks and Conservation Assoc.* v. *Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974). A showing of substantial competitive harm is necessary only where the information in question is required to be submitted to the Government.

You must explain whether you voluntarily provided the information in question or whether the Government required the information to be submitted. Should you assert that you voluntarily submitted the information, you must also explain how the information in question fits into a category of information that you customarily do not release to the public. If you assert that the Government required you to submit the information in question (as is the case for the information at hand), then you must explain how substantial competitive or other business harm would likely result from release.

To demonstrate that disclosure is likely to cause substantial competitive harm, there must be evidence that: (1) You face actual competition; and (2) substantial competitive injury would likely result from disclosure. *See Lions Raisins* v. *USDA,* 354 F.3d 1072, 1079 (9th Cir. 2004); *Inner City Press/Community on the Move* v. *Federal Reserve System,* 380 F. Supp. 2d 211, 220 (S.D.N.Y. 2005); *People for the Ethical Treatment of Animals* v. *USDA,* 2005 U.S. Dist. LEXIS 10586, at 15 (D.D.C. May 24, 2005); *National Parks & Conservation Association* v. *Kleppe,* 547 F.2d 673, 679 (D.C. Cir. 1976) (''*National Parks II*'').

In order for the Department to fully evaluate whether you are likely to suffer substantial competitive injury from disclosure of the withheld information, any objections on this basis must include a detailed explanation of who your competitors are and the nature of the competition. You must also explain with specificity how disclosure of *each category* of information that you object to disclosing on this basis would provide your competitors with valuable insights into your operation, give competitors pricing advantages over you, or unfairly give advantage to competitors in future business negotiations, or any other information that sufficiently explains the substantial competitive injury that would likely result from disclosure. *National Parks II,* 547 F.2d at 684; *Center for Public Integrity* v. *Dep't of Energy,* 191 F. Supp. 2d 187, 194 (D.D.C. 2002); *Judicial Watch, Inc.* v. *Export-Import Bank,* 108 F. Supp. 2d 19, 29 (D.D.C. 2000). Additionally, as noted above, you must also certify that any information you object to disclosing is confidential, you have not disclosed the information to the public, and the information is not routinely available to the public from other sources. *See* 43 CFR 2.30–2.31.

As a final matter, please be aware that the FOIA requires that ''any reasonably segregable portion of a record'' must be released after appropriate application of the FOIA's nine exemptions. *See* 5 U.S.C. 552(b) (discussion after exemptions). In addition, please note that, where a record contains both exempt and nonexempt material, the bureau will generally separate and release the nonexempt information when responding to a FOIA request. 43 CFR 2.25. You should be mindful of this segregability requirement in formulating any objections you may have to the disclosure of the information sought by HSI.

III. Submission of Objections

Should you wish to object to disclosure of any of the requested records (or portions thereof), the Department must receive from you all of the information requested above by no later than the date specified above in **DATES**.

If you do not submit any objections to the disclosure of the information (or portions thereof) to HSI on or before the date specified above in **DATES**, the Department will presume that you do not object to such disclosure and may release the information without redaction. Please note that the Department, not you, is responsible for deciding whether the information should be released or withheld. If we decide to release records over your objections, we will inform you at least 10 business days in advance of the intended release.

Please note that any comments you submit to the Department objecting to the disclosure of the documents may be subject to disclosure under the FOIA if the Department receives a FOIA request for them. In the event your comments contain commercial or financial information and a requester asks for the comments under the FOIA, the Department will notify you and give you an opportunity to comment on the disclosure of such information.

Dated: October 27, 2016.

Stephen Guestin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–26412 Filed 10–31–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

[FWS–R4–FHC–2016–N176; FVHC98220410150–XXX–FF04G01000]

Deepwater Horizon Oil Spill; Louisiana Trustee Implementation Group Draft Restoration Plan #1: Restoration of Wetlands, Coastal, and Nearshore Habitats; Habitat Projects on Federally Managed Lands; and Birds

AGENCY: Department of the Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: In accordance with the Oil Pollution Act of 1990 (OPA), the National Environmental Policy Act (NEPA), the Consent Decree, and the Final Programmatic Damage Assessment Restoration Plan and Final Programmatic Environmental Impact Statement (Final PDARP/PEIS), the Federal and State natural resource trustee agencies for the Louisiana Trustee Implementation Group (Trustees) have prepared a Draft Restoration Plan #1: Restoration of Wetlands, Coastal, and Nearshore Habitats; Habitat Projects on Federally Managed Lands; and Birds (Draft Restoration Plan 1) describing and proposing engineering and design activities for restoration projects intended to continue the process of restoring natural resources and services injured or lost as a result of the *Deepwater Horizon* oil spill, which occurred on or about April 20, 2010, in the Gulf of Mexico.

DATES: *Comments Due Date:* We will consider public comments received on or before November 28, 2016.

Public Meeting: If requested, the Trustees will schedule a public meeting to facilitate public review and comment process on the draft document.

ADDRESSES: *Obtaining Documents:* You may download the Louisiana Trustee Implementation Group Draft Restoration Plan 1: Restoration of Wetlands, Coastal, and Nearshore Habitats, Habitat Projects on Federally Managed Lands, and Birds draft restoration plan at any of the following sites:

- *http://www.gulfspillrestoration.noaa.gov*
- *http://www.doi.gov/deepwaterhorizon*
- *http://www.la-dwh.com*

Alternatively, you may request a CD of the Draft Restoration Plan 1 (see **FOR FURTHER INFORMATION CONTACT**). You may also view the document at any of the public facilities listed at *http://www.gulfspillrestoration.noaa.gov.*

Submitting Comments: You may submit comments on the draft document by one of following methods:

- *Via the Web: http://www.gulfspillrestoration.noaa.gov/restoration-areas/louisiana.*
- *Via U.S. Mail:* U.S. Fish and Wildlife Service, P.O. Box 49567, Atlanta, GA 30345.
- Louisiana Coastal Protection & Restoration Authority, ATTN: Liz Williams, P.O. Box 44027, Baton Rouge, LA 70804.

FOR FURTHER INFORMATION CONTACT: Liz Williams at *LATIG@la.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

On or about April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon,* which was being used to drill a well for BP Exploration and Production, Inc. (BP), in the Macondo prospect (Mississippi Canyon 252–MC252), experienced a significant explosion, fire, and subsequent sinking in the Gulf of Mexico, resulting in an unprecedented volume of oil and other discharges from the rig and from the wellhead on the seabed. The *Deepwater Horizon* oil spill is the largest oil spill in U.S. history, discharging millions of barrels of oil over a period of 87 days. In addition, well over 1 million gallons of dispersants were applied to the waters of the spill area in an attempt to disperse the spilled oil. An undetermined amount of natural gas was also released into the environment as a result of the spill.

The *Deepwater Horizon* State and Federal natural resource trustees (Trustees) conducted the natural resource damage assessment (NRDA) for the *Deepwater Horizon* oil spill under the Oil Pollution Act 1990 (OPA; 33 U.S.C. 2701 *et seq.*). Pursuant to OPA, Federal and State agencies act as trustees on behalf of the public to assess natural resource injuries and losses and to determine the actions required to compensate the public for those injuries and losses. OPA further instructs the designated trustees to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship, including the loss of use and services from those resources from the time of injury until the time of restoration to baseline (the resource quality and conditions that would exist if the spill had not occurred) is complete. The Trustees are:

- U.S. Department of the Interior (DOI), as represented by the National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management;
- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture (USDA);
- U.S. Environmental Protection Agency (USEPA);
- State of Louisiana Coastal Protection and Restoration Authority (CPRA), Oil Spill Coordinator's Office (LOSCO), Department of Environmental Quality (LDEQ), Department of Wildlife and Fisheries (LDFW), and Department of Natural Resources (LDNR);
- State of Mississippi Department of Environmental Quality;
- State of Alabama Department of Conservation and Natural Resources and Geological Survey of Alabama;
- State of Florida Department of Environmental Protection and Fish and Wildlife Conservation Commission; and
- For the State of Texas: Texas Parks and Wildlife Department, Texas General Land Office, and Texas Commission on Environmental Quality.

Upon completion of the NRDA, the Trustees reached and finalized a settlement of their natural resource damage claims with BP in a Consent Decree approved by the United States District Court for the Eastern District of Louisiana. Pursuant to that Consent Decree, restoration projects in Louisiana are now chosen and managed by the Louisiana Trustee Implementation Group (TIG). The Louisiana TIG is composed of the following Trustees:

- U.S. Department of the Interior (DOI), as represented by the National Park Service,

U.S. Fish and Wildlife Service, and Bureau of Land Management;

- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture (USDA);
- U.S. Environmental Protection Agency (USEPA);
- Louisiana Coastal Protection and Restoration Authority (CPRA);
- Louisiana Department of Natural Resources (LDNR);
- Louisiana Department of Environmental Quality (LDEQ);
- Louisiana Oil Spill Coordinator's Office (LOSCO); and,
- Louisiana Department of Wildlife and Fisheries (LDWF)

Overview of the Louisiana TIG Draft Restoration Plan 1: Restoration of Wetlands, Coastal, and Nearshore Habitats, Habitat Projects on Federally Managed Lands, and Birds (Draft Restoration Plan 1)

The Draft Restoration Plan 1 is being released in accordance with the Oil Pollution Act (OPA), the Natural Resources Damage Assessment (NRDA) regulations found in the Code of Federal Regulations (CFR) at 15 CFR 990, the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), the Consent Decree, and the Final PDARP/PEIS.

The total estimated cost for the proposed engineering and design activities for the six proposed restoration projects is $22,300,000. Details on the proposed engineering and design activities for the restoration projects are provided in the draft restoration plan.

Next Steps

As described above, the Trustees will consider holding public meetings to facilitate the public review and comment process, if requested. After the public comment period ends, the Trustees will consider and address the comments received before issuing a final restoration plan.

Consistent with the PDARP/PEIS, in this Draft Restoration Plan 1 the Louisiana TIG is proposing a preliminary phase of restoration planning to perform engineering and design evaluation for restoration projects to develop information needed to fully consider the implementation phase which will be proposed in a subsequent restoration plan. Although information gathered may inform future projects, the outcome of the preliminary phases does not commit the Trustees to future actions.

Invitation to Comment

The Trustees seek public review and comment on the proposed projects and supporting analysis included in the Draft Restoration Plan 1. 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.

Administrative Record

The documents comprising the Administrative Record for this Draft Restoration Plan can be viewed electronically at *http://www.doi.gov/deepwaterhorizon.*

Authority

The authority of this action is the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*) and the implementing Natural Resource Damage Assessment regulations found at 15 CFR part 990.

Kevin D. Reynolds,

Department of the Interior Deepwater Horizon Case Manager.

[FR Doc. 2016–26345 Filed 10–31–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NERO–CACO–22210; PPNECACOS0, PPMPSD1Z.YM0000]

Notice of December 12, 2016, Meeting for Cape Cod National Seashore Advisory Commission

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: This notice sets forth the date of the 305th meeting of the Cape Cod National Seashore Advisory Commission.

DATES: The public meeting of the Cape Cod National Seashore Advisory Commission will be held on Monday, December 12, 2016, at 1:00 p.m. (Eastern).

ADDRESSES: The Commission members will meet in the meeting room at park headquarters, 99 Marconi Site Road, Wellfleet, Massachusetts 02667.

The 305th meeting of the Cape Cod National Seashore Advisory Commission will take place on Monday, December 12, 2016, at 1:00 p.m., in the conference room at park headquarters, 99 Marconi Station Road, in Wellfleet, Massachusetts, to discuss the following:

1. Adoption of Agenda
2. Approval of Minutes of Previous Meeting (September 19, 2016)
3. Reports of Officers
4. Reports of Subcommittees
   Update of Pilgrim Nuclear Plant Emergency Planning Subcommittee
   Nickerson Fellowship
5. Superintendent's Report
   National Park Service Centennial
   Storm Damage/Erosion Update
   Shorebird Management Plan/Environmental Assessment—

Update
Overview of NPS Administrative Policies Related to Private Properties
Seashore Projects
Nauset Spit Update
Improved Properties/Town Bylaws
Herring River Wetland Restoration
Highlands Center Update
Ocean Stewardship Topics—Shoreline Change
Climate Friendly Parks
6. Old Business
Update on Horton's Campground Private Commercial Properties Related to Their Certificates of Suspension From Condemnation
Update From Army Corps of Engineers About the Phase III FUDS (Formerly Used Defense Sites) Project
Live Lightly Campaign Progress Report
7. New Business
8. Date and Agenda for Next Meeting
9. Public Comment
10. Adjournment

FOR FURTHER INFORMATION CONTACT: Further information concerning the meeting may be obtained from George E. Price, Jr., Superintendent, Cape Cod National Seashore, 99 Marconi Site, Wellfleet, Massachusetts 02667, or via telephone at (508) 771–2144 or by email at *george_price@nps.gov.*

SUPPLEMENTARY INFORMATION: The Commission was reestablished pursuant to Public Law 87–126, as amended by Public Law 105–280. The purpose of the Commission is to consult with the Secretary of the Interior, or her designee, with respect to matters relating to the development of Cape Cod National Seashore, and with respect to carrying out the provisions of sections 4 and 5 of the Act establishing the Seashore.

The meeting is open to the public. It is expected that 15 persons will be able to attend the meeting in addition to Commission members. Interested persons may make oral/written presentations to the Commission during the business meeting or file written statements. Such requests should be made to the park superintendent prior to the meeting. Before including your address, telephone 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 may 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.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–26307 Filed 10–31–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–SERO–RTCA–22228; PPMPSPD1T.Y00000; PPSESERO10]

Cancellation of November 9, 2016, Meeting of the Wekiva River System Advisory Management Committee

AGENCY: National Park Service, Interior.

ACTION: Cancellation of meeting.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act (5 U.S.C. Appendix 1–16) that the November 9, 2016, meeting of the Wekiva River System Advisory Management Committee previously announced in the **Federal Register**, Vol. 81, February 2, 2016, pp. 5481, is cancelled.

FOR FURTHER INFORMATION CONTACT: Jaime Doubek-Racine, Community Planner and Designated Federal Official, Rivers, Trails, and Conservation Assistance Program, Florida Field Office, Southeast Region, 5342 Clark Road, PMB #123, Sarasota, Florida 34233, or via telephone (941) 685–5912.

SUPPLEMENTARY INFORMATION: The Wekiva River System Advisory Management Committee was established by Public Law 106–299 to assist in the development of the comprehensive management plan for the Wekiva River System and provide advice to the Secretary of the Interior in carrying out management responsibilities of the Secretary under the Wild and Scenic Rivers Act (16 U.S.C. 1274).

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–26308 Filed 10–31–16; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–16–035]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: November 3, 2016 at 2:00 p.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. *Agendas for future meetings:* None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 701–TA–564 and 731–TA–1338–1340 (Preliminary) (Steel Concrete Reinforcing Bar (rebar) from Japan, Taiwan, and Turkey). The Commission is currently scheduled to complete and file its determinations on November 4, 2016; views of the Commission are currently scheduled to be completed and filed on November 14, 2016.
5. *Outstanding action jackets:* None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting. Earlier notification of this meeting was not possible.

By order of the Commission:

Dated: Issued: October 28, 2016.

William R. Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2016–26465 Filed 10–28–16; 4:15 pm]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–340–E and 340–H (Fourth Review)]

Solid Urea From Russia and Ukraine; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping duty orders on solid urea from Russia and Ukraine would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Effective November 1, 2016. To be assured of consideration, the deadline for responses is December 1, 2016. Comments on the adequacy of responses may be filed with the Commission by January 13, 2017.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.— On July 14, 1987, the Department of Commerce (''Commerce'') issued antidumping duty orders on imports of solid urea from the Union of Soviet Socialist Republics (''USSR'') (52 FR 26367). On June 29, 1992, following the division of the USSR in December 1991 into 15 independent states, Commerce divided the original antidumping duty order on solid urea from the USSR into 15 orders applicable to each independent state (57 FR 28828). Following first five-year reviews by Commerce and the Commission, effective November 17, 1999, Commerce issued a continuation of the antidumping duty orders on imports of solid urea from Russia and Ukraine (64 FR 62653). Following second five-year reviews by Commerce and the Commission, effective January 5, 2006, Commerce issued a continuation of the antidumping duty orders on imports of solid urea from Russia and Ukraine (71 FR 581). Following the third five-year reviews by Commerce and the Commission, effective December 20, 2011, Commerce issued a continuation of the antidumping duty orders on imports of solid urea from Russia and Ukraine (76 FR 78885). The Commission is now conducting fourth reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR parts 201, subparts A and B and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by the Department of Commerce.

(2) The *Subject Countries* in these reviews are Russia and Ukraine.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, its expedited first five-year review determinations, and its full second and third five-year review determinations, the Commission defined the *Domestic Like Product* as all forms of solid urea consistent with Commerce's scope of subject merchandise.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, its expedited first five-year review determinations, and its full second and third five-year review determinations, the Commission defined the *Domestic Industry* as all domestic producers of solid urea.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is December 1, 2016. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is January 13, 2017. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's Handbook on E-Filing, available on the Commission's Web site at *https://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing. Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117 0016/USITC No. 16–5–372, expiration date June 30, 2017. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information To Be Provided in Response to This Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandi*se, a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2010.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2015, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* after 2010, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (*Optional*) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: October 26, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–26264 Filed 10–31–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–540–541 (Fourth Review)]

Certain Welded Stainless Steel Pipe From Korea and Taiwan; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping duty orders on certain welded stainless steel pipe from Korea and Taiwan would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Effective November 1, 2016. To be assured of consideration, the deadline for responses is December 1, 2016. Comments on the adequacy of responses may be filed with the Commission by January 13, 2017.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On December 30, 1992, the Department of Commerce (''Commerce'') issued antidumping duty orders on imports of welded ASTM A–312 stainless steel pipe from Korea (57 FR 62301) and Taiwan (57 FR 62300). Following first five-year reviews by Commerce and the Commission, effective October 16, 2000, Commerce issued a continuation of the antidumping duty orders on imports of certain welded stainless steel pipe from Korea and Taiwan (65 FR 61143). Following second five-year reviews by Commerce and the Commission, effective August 28, 2006, Commerce issued a continuation of the antidumping duty orders on imports of welded ASTM A–312 stainless steel pipe from Korea and Taiwan (71 FR 53412, September 11, 2006). Following the third five-year reviews by Commerce and the Commission, effective December 19, 2011, Commerce issued a continuation of the antidumping duty orders on imports of welded ASTM A–312 stainless steel pipe from Korea and Taiwan (76 FR 78614). The Commission is now conducting fourth reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR parts 201, subparts A and B and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by the Department of Commerce.

(2) The *Subject Countries* in these reviews are Korea and Taiwan.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations and full first five-year review determinations, the Commission defined the *Domestic Like Product* as all welded stainless steel pipes and pressure tubes, excluding grade 409 tubes and mechanical tubes (also known as ornamental tubes). Thus, in addition to welded ASTM A–312 stainless steel pipe, the *Domestic Like Product* included such tubular products as ASTM A–778 and A–358 pipes and ASTM A–249, A–269, and A–270 pressure tubes. In its full second five-year review determinations and its expedited third five-year review determinations, the Commission found that a change from the original definition of the *Domestic Like Product* was appropriate and defined the *Domestic Like Product* as only welded ASTM A–312 and A–778 stainless steel pipes. For purposes of responding to this notice of institution in these fourth five-year reviews, please provide the requested information based on the Commission's most recent *Domestic Like Product* determinations: Welded ASTM A–312 and A–778 stainless steel pipes.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations and its full first five-year review determinations, the Commission defined the *Domestic Industry* as producers of welded stainless steel pipes and pressure tubes, excluding grade 409 tubes and mechanical tubes (also known as ornamental tubes). In its full second five-year review determinations and its expedited third five-year review determinations, the Commission defined the *Domestic Industry* as all U.S. producers of welded ASTM A–312 and A–778 stainless steel pipes. For purposes of responding to this notice of institution in these third five-year reviews, please provide the requested information based on the Commission's most recent *Domestic Industry* determinations: All domestic producers of welded ASTM A–312 and A–778 stainless steel pipes.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is December 1, 2016. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the

Commission should conduct expedited or full reviews. The deadline for filing such comments is January 13, 2017. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's Handbook on E-Filing, available on the Commission's Web site at *https://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing. Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117 0016/USITC No. 16–5–373, expiration date June 30, 2017. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information To Be Provided in Response to This Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2010.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2015, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of

Subject Merchandise from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* after 2010, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (Optional) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: October 26, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–26267 Filed 10–31–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–461 (Fourth Review)]

Gray Portland Cement and Cement Clinker From Japan; Institution of a Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted a review pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping duty order on gray portland cement and cement clinker from Japan would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Effective November 1, 2016. To be assured of consideration, the deadline for responses is December 1, 2016. Comments on the adequacy of responses may be filed with the Commission by January 13, 2017.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.— On May 10, 1991, the Department of Commerce issued an antidumping duty order on imports of gray portland cement and cement clinker from Japan (56 FR 21658). Following first five-year reviews by Commerce and the Commission, effective November 15, 2000, Commerce issued a continuation of the antidumping duty order on imports of gray portland cement and cement clinker from Japan (65 FR 68979). Following second five-year reviews by Commerce and the Commission, effective June 16, 2006, Commerce issued a continuation of the antidumping duty order on imports of gray portland cement and cement clinker from Japan (71 FR 34892). Following the third five-year reviews by Commerce and the Commission, effective December 16, 2011, Commerce issued a continuation of the antidumping duty order on imports of gray portland cement and cement clinker from Japan (76 FR 78240). The Commission is now conducting a fourth review pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the order would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR parts 201, subparts A and B and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct a full review or an expedited review. The Commission's determination in any expedited review will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to this review:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year review, as defined by the Department of Commerce.

(2) The *Subject Country* in this review is Japan.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determination, its full first five-year review determination, and its expedited second and third five-year review determinations, the Commission defined a single *Domestic Like Product* consisting of gray portland cement and cement clinker coextensive with Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determination, the Commission defined the *Domestic Industry* as producers of gray portland cement and cement clinker, including ''grinding only'' operations. The Commission also concluded in its original determination, its full first five-year review determination, and its expedited second and third five-year review determinations that appropriate circumstances existed for a regional industry analysis. In the original investigation, the Commission considered whether the Southern California region (defined as the counties of San Luis Obispo, Kern, Inyo, Mono, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, San Diego, and Imperial), as proposed by the petitioners, or a larger region, the State of California, was the appropriate region. In its original determination, the Commission determined that both regions satisfied the market isolation criteria but found the more appropriate region for its analysis was Southern California; one Commissioner found the regional industry to consist of producers in the State of California. In its full first five-year review determination, the Commission found that there had been integration of the Northern and Southern regions of California and defined the region as the State of California. The Commission also determined that the record in its expedited second and third five-year reviews supported a finding of a regional industry corresponding to the region of the State of California. For purposes of this notice, you should report information separately on each of the following *Domestic Industries:* (1) Producers of gray portland cement and cement clinker, including ''grinding only'' operations, located in the State of California and (2) producers of gray portland cement and cement clinker, including ''grinding only'' operations, located in the United States as a whole. Additionally, this notice uses the term *Domestic Market Area* to describe the area served by each *Domestic Industry.* Consequently, for purposes of this notice there are two *Domestic Market Areas:* (1) The State of California and (2) the United States.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is December 1, 2016. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct an expedited or full review. The deadline for filing such comments is January 13, 2017. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's Handbook on E-Filing, available on the Commission's Web site at *https://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing. Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117 0016/USITC No. 16–5–369, expiration date June 30, 2017. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determination in the review.

Information To Be Provided in Response to This Notice of Institution: Please provide the requested information separately for each *Domestic Industry*, as previously defined in this notice, and, as applicable, its corresponding *Domestic Market Area.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product*, a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise*, a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty order on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2010.

(7) A list of 3–5 leading purchasers in each *Domestic Market Area* for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product in each *Domestic Market Area* during calendar year 2015, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports into each *Domestic Market Area* and, if known, an estimate of the percentage of total U.S. imports into each *Domestic Market Area* of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments into each *Domestic Market Area* of *Subject*

Merchandise imported from the *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers into each *Domestic Market Area* of *Subject Merchandise* imported from the *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in the *Subject Country* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in each *Domestic Market Area* or in the market for the *Subject Merchandise* in the *Subject Country* after 2010, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country,* and such merchandise from other countries.

(13) (*Optional*) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: October 26, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–26265 Filed 10–31–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–624–625 (Fourth Review)]

Helical Spring Lock Washers From China and Taiwan; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping duty orders on helical spring lock washers from China and Taiwan would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Effective November 1, 2016. To be assured of consideration, the deadline for responses is December 1, 2016. Comments on the adequacy of responses may be filed with the Commission by January 13, 2017.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On June 28, 1993, the Department of Commerce (''Commerce'') issued an antidumping duty order on imports of helical spring lock washers from Taiwan (58 FR 34567). On October 19, 1993, Commerce issued an antidumping duty order on imports of helical spring lock washers from China (58 FR 53914). Following first five-year reviews by Commerce and the Commission, effective February 23, 2001, Commerce issued a continuation of the antidumping duty orders on imports of helical spring lock washers from China and Taiwan (66 FR 11255). Following second five-year reviews by Commerce and the Commission, effective July 3, 2006, Commerce issued a continuation of the antidumping duty orders on imports of helical spring lock washers from China and Taiwan (71 FR 37904). Following the third five-year reviews by Commerce and the Commission, effective December 5, 2011, Commerce issued a continuation of the antidumping duty orders on imports of helical spring lock washers from China and Taiwan (76 FR 75873). The Commission is now conducting fourth reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR parts 201, subparts A and B and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by the Department of Commerce.

(2) The *Subject Countries* in these reviews are China and Taiwan.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, its full first five-year review determinations, and its expedited second and third five-year review determinations, the Commission defined the *Domestic Like Product* as helical spring lock washers of all sizes and metals.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, its full first five-year review determinations, and its expedited second and third five-year review determinations, the Commission defined the *Domestic Industry* as all domestic producers of helical spring lock washers.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is December 1, 2016. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is January 13, 2017. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's Handbook on E-Filing, available on the Commission's Web site at *https://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing. Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117 0016/USITC No. 16–5–371, expiration date June 30, 2017. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information To Be Provided in Response to This Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2010.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2015, except as noted (report quantity data in pounds and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in pounds and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country*.

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in pounds and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have

occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* after 2010, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (*Optional*) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: October 26, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–26266 Filed 10–31–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–476 and 731–TA–1179 (Review)]

Multilayered Wood Flooring From China Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping and countervailing duty orders on multilayered wood flooring from China would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Effective November 1, 2016. To be assured of consideration, the deadline for responses is December 1, 2016. Comments on the adequacy of responses may be filed with the Commission by January 13, 2017.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On December 8, 2011, the Department of Commerce (''Commerce'') issued antidumping and countervailing duty orders on imports of multilayered wood flooring from China (76 FR 76690–76696). The Commission is conducting reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR parts 201, Subparts A and B and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Country* in these reviews is China.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, the Commission defined a single *Domestic Like Product* as multilayered wood flooring, coextensive with Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, the Commission defined the *Domestic Industry* as all U.S. producers of multilayered wood flooring. The Commission also determined that U.S. Floors merely engages in finishing operations and does not perform sufficient production-related activities to warrant inclusion in the *Domestic Industry.*

(5) The *Order Date* is the date that the antidumping and countervailing duty orders under review became effective. In these reviews, the *Order Date* is December 8, 2011.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of

18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is December 1, 2016. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is January 13, 2017. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's Handbook on E-Filing, available on the Commission's Web site at *https://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing. Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117 0016/USITC No. 16–5–370, expiration date June 30, 2017. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information To Be Provided in Response to This Notice of Institution: As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandis*e, a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date.*

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2015, except as noted (report quantity data in square feet and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in square feet and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from the *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in square feet and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in the *Subject Country* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country* since the *Order Date,* and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of Title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: October 26, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–26263 Filed 10–31–16; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Notice of Medical Necessity Criteria Under the Mental Health Parity and Addiction Equity Act of 2008

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employee Benefits Security Administration (EBSA) sponsored information collection request (ICR) titled, ''Notice of Medical Necessity Criteria under the Mental Health Parity and Addiction Equity Act of 2008,'' 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), Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before December 1, 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=201610-1210-002* (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–EBSA, 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.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Notice of Medical Necessity Criteria under the Mental Health Parity and Addiction Equity Act of 2008 information collection requirements codified in regulations 29 CFR 2590.712(d)(2) that provides for a plan administrator to disclose the criteria for medical necessity determinations with respect to mental health and substance use disorder benefits. Internal Revenue Code of 1986 section 9812, Employee Retirement Income Security Act of 1974 section 712, and Public Health Service Act section 2705 authorize this information collection. *See* 26 U.S.C. 9812, 29 U.S.C. 1185a, and 42 U.S.C. 300gg-5.

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 1210–0138.

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 November 30, 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 May 26, 2016 (81 FR 33550).

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 1210–0138. 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–EBSA.

Title of Collection: Notice of Medical Necessity Criteria under the Mental Health Parity and Addiction Equity Act of 2008.

OMB Control Number: 1210–0138.

Affected Public: Private Sector—businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 1,910,415.

Total Estimated Number of Responses: 1,910,415.

Total Estimated Annual Time Burden: 5,544 hours.

Total Estimated Annual Other Costs Burden: $3,424,759.

Dated: October 26, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–26338 Filed 10–31–16; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Ready To Work Partnership Grants Evaluation 18-Month Follow-up Survey

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the information collection request (ICR) proposal titled, ''Ready to Work Partnership Grants Evaluation 18-Month Follow-up Survey,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before December 1, 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=201605-1291-001* (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 (this is not a toll-free number) 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-OASAM, 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 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks PRA authority for the Ready to Work (RTW) Partnership Grants Evaluation 18-Month Follow-up Survey information collection. The DOL is conducting an evaluation of RTW Partnership Grants. The evaluation includes: (1) An implementation study that examines the operation of the programs and participation patterns of program enrollees in key program activities, and (2) an impact study that uses a random assignment research design to determine whether selected grantee programs increased participants' employment, earnings, and other outcomes. This submission seeks OMB approval for the impact evaluation 18-month follow-up survey of study participants. American Competitiveness and Workforce Improvement Act of 1998 section 414(c) authorizes this information collection. *See* 29 U.S.C. 2916a(7).

This proposed information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. For additional information, see the related notice published in the **Federal Register** on April 25, 2016 (81 FR 24131).

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 ICR Reference Number 201605–1291–001. 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-OASAM.

Title of Collection: Ready to Work Partnership Grants Evaluation 18-Month Follow-up Survey.

OMB ICR Reference Number: 201605–1291–001.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 1,339.

Total Estimated Number of Responses: 1,339.

Total Estimated Annual Time Burden: 897 hours.

Total Estimated Annual Other Costs Burden: $0.

Dated: October 26, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–26337 Filed 10–31–16; 8:45 am]

BILLING CODE 4510–HX–P

NATIONAL SCIENCE FOUNDATION

Extension of Comment Period on the Environmental Impact Statement for the Proposed Changes to Green Bank Observatory Operations

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation published a notice on October 19, 2016, at 81 FR 72124, seeking comments on identifying issues to be analyzed in the Environmental Impact Statement for the proposed changes to Green Bank Observatory operations. The original comment date was to end on November 19, 2016.

DATES: Comments on this notice will now be accepted through November 25, 2016.

ADDRESSES: Submit comments electronically to *envcomp-AST-greenbank@nsf.gov* or send by mail to National Science Foundation, Division of Astronomical Sciences, 4201 Wilson Blvd., Suite 1045, Arlington, VA 22230.

FOR FURTHER INFORMATION CONTACT: Elizabeth Pentecost, National Science Foundation, Division of Astronomical Sciences, 4201 Wilson Blvd., Suite 1045, Arlington, VA 22230; telephone: (703) 292–4907; email: *epenteco@nsf.gov.*

SUPPLEMENTARY INFORMATION: Comments on the scope of the preliminary proposed alternatives and resource areas to be studied may be submitted in writing through November 25, 2016. To be eligible for inclusion in the Draft EIS, all comments must be received prior to the close of the scoping period. NSF will provide additional opportunities for public participation upon publication of the Draft EIS. Information will be posted, throughout the EIS process, at *www.nsf.gov/AST.*

Dated: October 27, 2016.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2016–26343 Filed 10–31–16; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

Agenda

TIME AND DATE: 9:30 a.m., Tuesday, November 15, 2016

PLACE: NTSB Conference Center, 429 L'Enfant Plaza SW., Washington, DC 20594.

STATUS: The two items are open to the public.

MATTERS TO BE CONSIDERED:

8791 *ADMS Briefs on Two Midair Collisions*—July 7, 2015, accident involving a Cessna 150M and a Lockheed Martin F–16CM near Moncks Corner, South Carolina (ERA15MA259A/B); and August 16, 2015, accident involving a Cessna 172M and a North American Rockwell NA265–60SC Sabreliner near San Diego, California (WPR15MA243A/B); and Safety Alert—Preventing Midair Collisions: Don't Depend on Vision Alone

8737A *Highway Accident Report: Amphibious Passenger Vehicle* DUCK 6 *Lane Crossover Collision With Motorcoach on State Route 99, Aurora Bridge, Seattle, Washington, September 24, 2015* (HWY15MH011)

NEWS MEDIA CONTACT: *Telephone: (202) 314–6100.*

The press and public may enter the NTSB Conference Center one hour prior to the meeting for set up and seating.

Individuals requesting specific accommodations should contact Rochelle Hall at (202) 314–6305 or by email at *Rochelle.Hall@ntsb.gov* by Wednesday, November 9, 2016.

The public may view the meeting via a live or archived webcast by accessing a link under ''News & Events'' on the NTSB home page at *www.ntsb.gov.*

Schedule updates, including weather-related cancellations, are also available at *www.ntsb.gov.*

FOR MORE INFORMATION CONTACT: Candi Bing at (202) 314–6403 or by email at *bingc@ntsb.gov.*

FOR MEDIA INFORMATION CONTACT: Terry Williams at (202) 314–6100 or by email at *terry.williams@ntsb.gov,* or Peter Knudson at (202) 314–6100 or by email at *peter.knudson@ntsb.gov* for the aviation item.

Terry Williams at (202) 314–6100 or by email at *terry.williams@ntsb.gov,* or Keith Holloway at (202) 314–6100 or by email at *keith.holloway@ntsb.gov* for the highway item.

Dated: Thursday, October 27, 2016.

Candi R. Bing,

Federal Register Liaison Officer.

[FR Doc. 2016–26413 Filed 10–28–16; 11:15 am]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Fukushima; Notice of Meeting

The ACRS Subcommittee on Fukushima will hold a meeting on November 16, 2016, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland 20852.

The meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, November 16, 2016—1:00 p.m. until 5:00 p.m.

The Subcommittee will review the draft final Rulemaking Package for Mitigation of Beyond-Design-Basis Events (ML16292A018). The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Mike Snodderly (Telephone: 301–415–2241 or Email: *Michael.Snodderly@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2016 (81 FR 71543).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, Maryland 20852. After registering with Security, please contact Mr. Theron Brown (Telephone: 240–888–9835) to be escorted to the meeting room.

Dated: October 25, 2016.

Mark Banks,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2016–26358 Filed 10–31–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee On Reactor Safeguards (ACRS); Meeting Of The ACRS Subcommittee On Metallurgy & Reactor Fuels; Notice of Meeting

The ACRS Subcommittee on Metallurgy & Reactor Fuels will hold a meeting on November 16, 2016, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance with the exception of portions that may be closed to protect information that is proprietary pursuant to 5 U.S.C. 552b(c)(4). The agenda for the subject meeting shall be as follows: Wednesday, November 16, 2016—8:30 a.m. until 12:00 p.m.

The Subcommittee will review and discuss the Baffle-Former Bolts Degradation issue. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Christopher Brown (Telephone 301–415–7111 or Email: *Christopher.Brown@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2016 (81 FR 71543).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: October 25, 2016.

Mark Banks,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2016–26365 Filed 10–31–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–387, 50–388, and 72–28; ASLBP No. 16–949–01–LT–BD01]

Susquehanna Nuclear, LLC; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission, *see* 37 FR 28,710 (Dec. 29, 1972), and the Commission's regulations, *see* 10 CFR 2.104, 2.105, 2.309, 2.313, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over an appeal from the NRC Staff's denial of a request for access to sensitive unclassified non-safeguards information (SUNSI) in the following proceeding:

Susquehanna Nuclear, LLC (Susquehanna Steam Electric Station, Units 1 and 2)

This appeal arises from an ''Order Imposing Procedures for Access to [SUNSI] and Safeguards Information for Contention Preparation'' that was included as part of a **Federal Register** notice providing an opportunity to petition for leave to intervene in a hearing on the application for an indirect license transfer of the interests of Susquehanna Nuclear, LLC (SN), in the operating licenses of Susquehanna Steam Electric Station, Units 1 and 2 (SSES) and the general license for the SSES independent spent fuel storage installation from current SN parent holder Talen Energy Corporation to Riverstone Holdings, LLC. *See* 81 FR 68,462, 68,465 (Oct. 4, 2016). By email dated October 11, 2016, Mr. Sabatini Monatesti requested access to SUNSI material, and he supplemented the request with another email dated October 17, 2016. By letter dated October 20, 2016, the NRC Staff denied the requests. On October 23, 2016, Mr. Sabatini appealed the Staff's determination by sending an email directly to the NRR Staff. He repeated his appeal and supplemented it by two additional emails sent to all parties on October 24, 2016.

The Board is comprised of the following Administrative Judges:

William J. Froehlich, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

G. Paul Bollwerk, III, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Dr. Gary S. Arnold, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule. *See* 10 CFR 2.302.

Rockville, Maryland.

Dated: October 26, 2016.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2016–26362 Filed 10–31–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Plant License Renewal; Notice of Meeting

The ACRS Subcommittee on Plant License Renewal will hold a meeting on November 17, 2016, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows: Thursday, November 17, 2016—8:30 a.m. until 12:00 p.m.

The Subcommittee will review the safety evaluation report with open items regarding the South Texas Project Units 1 and 2, License Renewal Application. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff, South Texas Project Nuclear Operating Company, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Kent Howard (Telephone 301–415–2989 or Email: *Kent.Howard@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2016 (81 FR 71543).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: October 19, 2016.

Mark L. Banks,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2016–26360 Filed 10–31–16; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2017–28; MC2017–13 and CP2017–29]

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:* November 3, 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

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).:* CP2017–28; *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 26, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Curtis E. Kidd; *Comments Due:* November 3, 2016.

2. *Docket No(s).:* MC2017–13 and CP2017–29; *Filing Title:* Request of the United States Postal Service to Add Priority Mail & Parcel Select Contract 2 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* October 26, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Curtis E. Kidd; *Comments Due:* November 3, 2016.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–26379 Filed 10–31–16; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date* November 1, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 25, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 249 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–7, CP2017–22.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–26282 Filed 10–31–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 1, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 25, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 253 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–11, CP2017–26.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–26276 Filed 10–31–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal

Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 1, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 25, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Express Contract 43 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–12, CP2017–27.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–26274 Filed 10–31–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 1, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 25, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 252 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–10, CP2017–25.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–26278 Filed 10–31–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 1, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 25, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 251 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–9, CP2017–24.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–26281 Filed 10–31–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 1, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 25, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 250 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–8, CP2017–23.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–26277 Filed 10–31–16; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79163; File No. SR–NASDAQ–2016–141]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend Rule 4702 To Adopt a New Retail Post-Only Order

October 26, 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 13, 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 Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 4702 (Order Types) [sic] adopt a New Retail Post-Only Order. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend Rule 4702 (Order Types) to adopt a new Retail Post-Only Order type. Although based on the Post-Only Order, the Retail Post-Only Order differs from the Post-Only Order in two ways. First, the Retail Post-Only Order can only be used in connection with orders sent on behalf of retail customers, whereas a Post-Only Order is available for use by any market participant. Second, if a Retail Post Only Order would remove liquidity or if posting the order would require an adjustment to the price of the order for any reason, the order will be cancelled. In contrast, a Post-Only Order is designed to have its price adjusted as needed, for example, in order to avoid locking or crossing a Protected Quotation. With the Retail Post-Only Order, Nasdaq is providing firms with another way of managing their retail customer order flow. Currently, if a firm does not want a retail customer order to remove liquidity from the Exchange upon entry, the firm can select the RTFY routing option, which routes the order to destinations in the System routing table instead of immediately removing liquidity from the Exchange order book.[3] Some firms, however, prefer to use their own routing infrastructure in seeking execution of a customer order rather than allowing that order to remove liquidity from the Exchange upon entry or instructing the Exchange to make a routing determination. In cancelling the order for any reason instead of adjusting its price, the Retail Post-Only Order will therefore provide firms with an alternative for handing [sic] retail customer orders.

As noted above, the first key feature of the Retail Post-Only Order is that it is designed for use by retail customers. Accordingly, a Retail Post-Only Order must meet the criteria of a Designated Retail Order, as defined in Rule 7018, in addition to the criteria set forth in Rule 4702(b)(14).[4] Nasdaq believes that defining a retail customer by reference to Rule 7018 is appropriate because this definition is already used in connection with other Nasdaq programs and fees, including the RTFY routing option, and defining a retail customer by reference to Rule 7018 will therefore keep the concept of ''retail''—either as applied to a type of order or to a type of customer—consistent across the Exchange. Nasdaq is offering this Order to retail customers because it will provide firms that handle retail customer order flow with an alternative to the methods of handling retail order flow that currently exist on the Exchange.[5] By offering firms that handle retail order flow an additional choice, Nasdaq believes that the proposal could stimulate competition by attracting additional retail customer order flow to the Exchange.

The second key feature of the Retail Post-Only Order is that it will cancel if the price of the Order would otherwise adjust for any reason. Rule 4702(b)(14) therefore states that when a new Retail Post-Only order is received, it will attempt to post on the Exchange Book. A Retail Post-Only order that cannot post to the Nasdaq Book at its limit price without having its price adjusted or removing liquidity will be cancelled.[6]

The Retail Post-Only Order is based on the Post-Only Order, and will therefore share most of the attributes of a Post-Only Order.[7] For example, a Retail Post-Only Order may be entered with reserve size. As with the Post-Only Order, a Retail Post-Only Order may be entered in any whole share size between one share and 999,999 shares. Orders for fractional shares are not permitted.

With respect to Time-in-Force (the period of time that the Nasdaq Market Center will hold the Order for potential execution), the Retail Post-Only Order may be entered with all times permitted by Time-in-Force;[8] however, a Retail Post-Only Order that is entered as ''Immediate or Cancel'' will be canceled (because an Immediate or Cancel order is incapable of posting to the Nasdaq Book).

Unlike the Post-Only Order, Retail Post-Only Orders cannot be designated as Intermarket Sweep Orders (''ISO''). The purpose of the Order is to allow firms to utilize their own routing infrastructure in deciding how to execute a retail customer order. Retail Post Only orders will therefore not route and have no routing strategies used in conjunction with the order, and will also not support the ISO attribute. Unlike the Post-Only Order, the Retail Post-Only Order will also not utilize the ''display'' attribute, since a Retail Post-Only Order may be either displayed or non-displayed.

As with Post-Only Orders, Retail Post-Only Orders will support attribution, which permits a Participant to designate that the price and size of the Order will be displayed next to the Participant's MPID in market data disseminated by Nasdaq. A Retail Post-Only order may also participate in the Nasdaq Opening Cross and/or the Nasdaq Closing Cross.

As with Post-Only Orders, Retail Post Only Orders will not support pegging (the attribute by which the price of the Order is automatically set with

---

3 *See* Nasdaq Rule 4738(a)(1)(A)(v)(b); *see also* Securities Exchange Act Release No. 76718 (December 21, 2015), 80 FR 80847 (December 28, 2015) (SR–NASDAQ–2015–112).

4 Rule 7018 provides that a Designated Retail Order is ''an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 and that originates from a natural person and is submitted to Nasdaq by a member that designates it pursuant to this rule, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. An order from a 'natural person' can include orders on behalf of accounts that are held in a corporate legal form—such as an Individual Retirement Account, Corporation, or a Limited Liability Company—that has been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual. Members must submit a signed written attestation, in a form prescribed by Nasdaq, that they have implemented policies and procedures that are reasonably designed to ensure that substantially all orders designated by the member as 'Designated Retail Orders' comply with these requirements. Orders may be designated on an order-by-order basis, or by designating all orders on a particular order entry port as Designated Retail Orders.''

5 As noted above, there are various options a member may currently use to efficiently manage its order flow, such as utilizing the RTFY routing option or allowing that order to have its price adjusted and potentially remove liquidity.

6 An order may have its price adjusted, for example, to satisfy a regulatory obligation, such as the prohibition under Regulation NMS against locking or crossing a Protected Quotation. *See* 17 CFR 242.610(d). Another scenario where the price of an order may have to be adjusted for purposes of regulatory compliance is Rule 201 of Regulation SHO, which requires trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order at a price at or below the current National Best Bid under certain circumstances. *See* 17 CFR 242.201.

7 As defined in Rule 4703, the potential attributes that may apply to an order are (1) time-in-force; (2) size; (3) price; (4) pegging; (5) minimum quantity; (6) routing; (7) discretion; (8) reserve size; (9) attribution; (10) Intermarket Sweep Order; (11) display; and (12) participation in the Nasdaq Opening Cross or the Nasdaq Closing Cross.

8 Under Rule 4703(a), Participants specify an Order's Time-in-Force by designating a time at which the Order will become active and a time at which the Order will cease to be active. The available times for activating Orders are (1) time of the Order's receipt by the Nasdaq Market Center; (2) the Nasdaq Opening Cross (or 9:30 a.m. ET in the case of a security for which no Nasdaq Opening Cross occurs); (3) Market Hours, beginning after the completion of the Nasdaq Opening Cross (or at 9:30 a.m. ET in the case of a security for which no Nasdaq Opening Cross occurs); (4) the Nasdaq Closing Cross (or the end of Market Hours in the case of a security for which no Nasdaq Closing Cross occurs); (5) 8:00 a.m. ET, in the case of an Order using the SCAN or RTFY routing strategy that is entered prior to 8:00 a.m. ET; (6) the beginning of the Display-Only Period, in the case of a security that is the subject of a trading halt and for which trading will resume pursuant to a halt cross; and (7) the resumption of trading, in the case of a security that is the subject of a trading halt and for which trading resumes without a halt cross.

reference to the National Best Bid or Offer), since the purpose of this Order is to cancel if the price of the Order needs to be adjusted. For the same reason, Retail Post Only Orders will also not support discretion (where an order has a non-displayed discretionary price range within which the entering Participant is willing to trade).

The Retail Post-Only Order will be available for entry through Nasdaq's RASH, FIX and QIX order entry protocols. Nasdaq notes that almost all Designated Retail Orders received by the Exchange are entered through the RASH and FIX protocols. A user may also enter a Retail Post-Only Order during Pre-Market and Post-Market Hours.[9] During these times, a Retail Post-Only Order will be processed in a manner identical to Market Hours.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes that this proposal is consistent with the Act because it will add a new functionality (cancelling an order for any reason instead of adjusting its price) that is not currently available on the Exchange. The Exchange believes that this new functionality is consistent with the Act because it will allow firms that use this Order to utilize their own routing infrastructure in determining how to execute a retail customer order, which will facilitate the efficient execution of those orders. Nasdaq believes that it is reasonable to offer this Order to retail customers only, as this Order will provide firms that handle retail customer orders with an alternative to the functionality for handling retail order flow that currently exists on the Exchange. The Exchange also notes that it already offers functionalities that are tailored to retail customer order flow, such as the RTFY routing option. In offering firms that handle retail customer orders an alternative to the functionality that currently exists on Nasdaq for retail customer orders, the Exchange believes that it may attract additional retail customer order flow to the Exchange, which would increase the diversity of order flow on the Exchange and enhance the Exchange's market quality.

Nasdaq believes that the attributes of the Retail Post-Only Order are also consistent with the Act. Nasdaq notes that some of the Order's attributes, such as size and attribution, are the same as the attributes of the Post-Only Order, upon which the Retail Post-Only Order is based. Nasdaq also notes that the Order's attributes reflect the functionality of the Retail Post-Only Order. For example, pegging will not be offered as an order attribute, given that the purpose of the Order is to cancel rather than have its price adjusted.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Retail Post-Only Order is an optional order type that will be available for entry through Nasdaq's order entry protocols that are most commonly used to submit retail customer orders. The Retail Post-Only Order will provide retail customers with an order type and a resulting functionality that is not currently available on the Exchange. Although the Retail Post-Only Order will be offered to retail customers only, Nasdaq believes that this does not impose a burden on competition that is not necessary or appropriate. In providing an alternative to the Exchange's current methods of handling retail customer orders, Nasdaq believes that the proposal could stimulate competition by attracting additional retail customer order flow to the Exchange, which would increase the diversity of order flow on the Exchange and enhance the Exchange's market quality.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

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–2016–141 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–2016–141. 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

[9] The term "Market Hours" means the period of time beginning at 9:30 a.m. ET and ending at 4:00 p.m. ET (or such earlier time as may be designated by Nasdaq on a day when Nasdaq closes early). The term "Pre-Market Hours" means the period of time beginning at 4:00 a.m. ET and ending immediately prior to the commencement of Market Hours. The term "Post-Market Hours" means the period of time beginning immediately after the end of Market Hours and ending at 8:00 p.m. ET. *See* Rule 4701(g).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

available publicly. All submissions should refer to File Number SR–NASDAQ–2016–141 and should be submitted on or before November 22, 2016

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Brent J. Fields,

Secretary.

[FR Doc. 2016–26301 Filed 10–31–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79165; File Nos. SR–DTC–2016–007; SR–FICC–2016–005; SR–NSCC–2016–003]

Self-Regulatory Organizations; The Depository Trust Company; Fixed Income Clearing Corporation; National Securities Clearing Corporation; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Changes Relating to Clearing Agency Investment Policy

October 26, 2016.

On August 25, 2016, The Depository Trust Company (''DTC''), Fixed Income Clearing Corporation (''FICC''), and National Securities Clearing Corporation (''NSCC'', and together with DTC and FICC, the ''Clearing Agencies'') filed with the Securities and Exchange Commission (''Commission'') proposed rule changes SR–DTC–2016–007, SR–FICC–2016–005, and SR–NSCC–2016–003 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] to adopt the Clearing Agency Investment Policy, which governs the investment of funds of the Clearing Agencies. The proposed rule changes were published for comment in the **Federal Register** on September 13, 2016.[3] To date, the Commission has not received any comments on the proposed rule changes.

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 these proposed rule changes is October 28, 2016. The Commission is extending this 45-day time period.

In order to provide the Commission with sufficient time to consider the proposed rule changes, the Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule changes. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates December 12, 2016 as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule changes (File Nos. SR–DTC–2016–007; SR–FICC–2016–005; SR–NSCC–2016–003).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Brent J. Fields,

Secretary.

[FR Doc. 2016–26302 Filed 10–31–16; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78778 (September 7, 2016), 81 FR 62963 (September 13, 2016) (SR–DTC–2016–007; SR–FICC–2016–005; SR–NSCC–2016–003).

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79159; File No. TP 16–14]

Order Granting Limited Exemptions From Exchange Act Rule 10b–17 and Rules 101 and 102 of Regulation M to Premise Capital Frontier Advantage Diversified Tactical ETF Pursuant to Exchange Act Rule 10b–17(b)(2) and Rules 101(d) and 102(e) of Regulation M

October 26, 2016.

By letter dated October 26, 2016 (the ''Letter''), as supplemented by conversations with the staff of the Division of Trading and Markets, counsel for ETF Series Solutions (the ''Trust''), on behalf of the Trust, Premise Capital Frontier Advantage Diversified Tactical ETF (the ''Fund''), any national securities exchange on or through which shares of the Fund (''Shares'') are listed and may subsequently trade, Quasar Distributors, LLC (the ''Distributor''), and persons engaging in transactions in Shares (collectively, the ''Requestors''), requested exemptions, or interpretive or no-action relief, from Rule 10b-17 of the Securities Exchange Act of 1934, as amended (''Exchange Act''), and Rules 101 and 102 of Regulation M, in connection with secondary market transactions in Shares and the creation or redemption of aggregations of Shares of 50,000 shares (''Creation Units'').

The Trust is registered with the Securities and Exchange Commission (''Commission'') under the Investment Company Act of 1940, as amended (''1940 Act''), as an open-end management investment company. The Fund seeks to track the performance of an underlying index, the Premise Capital Frontier Advantage Diversified Tactical Index (the ''Underlying Index''). The Underlying Index seeks to provide exposure to major U.S. and non-U.S. equity and fixed income asset classes.

The Fund will seek to track the performance of its Underlying Index by normally investing at least 80% of its total assets in the ETFs that comprise the Underlying Index.[1] Except for the fact that the Fund will operate as an ETF of ETFs, the Fund will operate in a manner identical to the underlying ETFs.

The Requestors represent, among other things, the following:

- Shares of the Fund will be issued by the Trust, an open-end management investment company that is registered with the Commission;
- Creation Units will be continuously redeemable at the net asset value (''NAV'') next determined after receipt of a request for redemption by the Fund, and the secondary market price of the Shares should not vary substantially from the NAV of such Shares;
- Shares of the Fund will be listed and traded on BATS Exchange, Inc., or another exchange in accordance with exchange listing standards that are, or will become, effective pursuant to Section 19(b) of the Exchange Act (the ''Listing Exchange''); [2]
- All ETFs in which the Fund is invested will meet all conditions set forth in one or more class relief letters, will have received individual relief from the Commission, will be able to rely upon individual relief even though they are not named parties, or will be able to

[1] The remaining 20% of the Fund's total assets may be invested in securities (including other underlying funds) not included in the Underlying Index and in cash, money market instruments, or funds that invest exclusively in money market instruments, subject to applicable limitations under the 1940 Act.

[2] Further, Requestors represent in the Letter that should the Shares also trade on a market pursuant to unlisted trading privileges, such trading will be conducted pursuant to self-regulatory organization rules that are, or will become, effective pursuant to Section 19(b) of the Exchange Act.

rely on applicable class relief for actively-managed ETFs;

- At least 70% of the Fund is comprised of component securities that will meet the minimum public float and minimum average daily trading volume thresholds under the ''actively-traded securities'' definition found in Regulation M for excepted securities during each of the previous two months of trading prior to formation of the Fund;
- The Fund seeks to track the performance of the Underlying Index, all of the components of which will have publicly available last sale trade information;
- The intraday proxy value of the Fund per share and the value of the Index will be publicly disseminated by a major market data vendor throughout the trading day;
- On each business day before the opening of business on the Listing Exchange, the Fund will cause to be published through the National Securities Clearing Corporation the list of the names and the quantities of securities and other assets of the Fund's portfolio that will be applicable that day to creation and redemption requests;
- The Listing Exchange will disseminate continuously every 15 seconds throughout the trading day, through the facilities of the Consolidated Tape Association, the market value of a Share;
- The Listing Exchange, market data vendors, or other information providers will disseminate, every 15 seconds throughout the trading day, a calculation of the intraday indicative value of a Share;
- The Fund will invest in securities that will facilitate an effective and efficient arbitrage mechanism and the ability to create workable hedges;
- The arbitrage mechanism will be facilitated by the transparency of the Fund's portfolio and the availability of the intraday indicative value, the liquidity of securities held by the Fund, the ability to acquire such securities, as well as arbitrageurs' ability to create workable hedges;
- The Fund will invest solely in liquid securities;
- The Trust believes that arbitrageurs are expected to take advantage of price variations between the Fund's market price and its NAV; and
- A close alignment between the market price of Shares and the Fund's NAV is expected.

Regulation M

While redeemable securities issued by an open-end management investment company are excepted from the provisions of Rules 101 and 102 of Regulation M, the Requestors may not rely upon those exceptions for the Shares.[3] However, we find that it is appropriate in the public interest and is consistent with the protection of investors to grant a conditional exemption from Rules 101 and 102 to persons who may be deemed to be participating in a distribution of Shares of the Fund as described in more detail below.

Rule 101 of Regulation M

Generally, Rule 101 of Regulation M is an anti-manipulation rule that, subject to certain exceptions, prohibits any ''distribution participant'' and its ''affiliated purchasers'' from bidding for, purchasing, or attempting to induce any person to bid for or purchase any security that is the subject of a distribution until after the applicable restricted period, except as specifically permitted in the Rule. Rule 100 of Regulation M defines ''distribution'' to mean any offering of securities that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods. The provisions of Rule 101 of Regulation M apply to underwriters, prospective underwriters, brokers, dealers, or other persons who have agreed to participate or are participating in a distribution of securities. The Shares are in a continuous distribution, and, as such, the restricted period in which distribution participants and their affiliated purchasers are prohibited from bidding for, purchasing, or attempting to induce others to bid for or purchase extends indefinitely.

Based on the representations and facts presented in the Letter, particularly that the Trust is a registered open-end management investment company, that Creation Unit size aggregations of the Shares of the Fund will be continuously redeemable at the NAV next determined after receipt of a request for redemption by the Fund, and that a close alignment between the market price of Shares and the Fund's NAV is expected, the Commission finds that it is appropriate in the public interest and consistent with the protection of investors to grant the Trust an exemption under paragraph (d) of Rule 101 of Regulation M with respect to the Fund, thus permitting persons participating in a distribution of Shares of the Fund to bid for or purchase such Shares during their participation in such distribution.[4]

Rule 102 of Regulation M

Rule 102 of Regulation M prohibits issuers, selling security holders, and any affiliated purchaser of such person from bidding for, purchasing, or attempting to induce any person to bid for or purchase a covered security during the applicable restricted period in connection with a distribution of securities effected by or on behalf of an issuer or selling security holder.

Based on the representations and facts presented in the Letter, particularly that the Trust is a registered open-end management investment company, that Creation Unit size aggregations of the Shares of the Fund will be continuously redeemable at the NAV next determined after receipt of a request for redemption by the Fund, and that a close alignment between the market price of Shares and the Fund's NAV is expected, the Commission finds that it is appropriate in the public interest and consistent with the protection of investors to grant the Trust an exemption under paragraph (e) of Rule 102 of Regulation M with respect to the Fund, thus permitting the Fund to redeem Shares of the Fund during the continuous offering of such Shares.

Rule 10b–17

Rule 10b–17, with certain exceptions, requires an issuer of a class of publicly traded securities to give notice of certain specified actions (for example, a dividend distribution) relating to such class of securities in accordance with Rule 10b–17(b). Based on the representations and facts in the Letter, and subject to the conditions below, the Commission finds that it is appropriate in the public interest and consistent with the protection of investors to grant the Trust a conditional exemption from Rule 10b–17 because market participants will receive timely notification of the existence and timing of a pending distribution, and thus the concerns that the Commission raised in adopting Rule 10b–17 will not be implicated.[5]

[3] While ETFs operate under exemptions from the definitions of ''open-end company'' under Section 5(a)(1) of the 1940 Act and ''redeemable security'' under Section 2(a)(32) of the 1940 Act, the Fund and its securities do not meet those definitions.

[4] Additionally, we confirm the interpretation that a redemption of Creation Unit size aggregations of Shares of the Fund and the receipt of securities in exchange by a participant in a distribution of Shares of the Fund would not constitute an ''attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period'' within the meaning of Rule 101 of Regulation M and therefore would not violate that rule.

[5] We also note that timely compliance with Rule 10b–17(b)(1)(v)(a) and (b) would be impractical in light of the nature of the Fund. This is because it is not possible for the Fund to accurately project ten days in advance what dividend, if any, would be

Conclusion

It is hereby ordered, pursuant to Rule 101(d) of Regulation M, that the Trust, based on the representations and facts presented in the Letter, is exempt from the requirements of Rule 101 with respect to the Fund, thus permitting persons who may be deemed to be participating in a distribution of Shares of the Fund to bid for or purchase such Shares during their participation in such distribution.

It is further ordered, pursuant to Rule 102(e) of Regulation M, that the Trust, based on the representations and the facts presented in the Letter, is exempt from the requirements of Rule 102 with respect to the Fund, thus permitting the Fund to redeem Shares of the Fund during the continuous offering of such Shares.

It is further ordered, pursuant to Rule 10b–17(b)(2), that the Trust, based on the representations and the facts presented in the Letter and subject to the conditions below, is exempt from the requirements of Rule 10b–17 with respect to transactions in the shares of the Fund.

This exemptive relief is subject to the following conditions:

- The Trust will comply with Rule 10b–17, except for Rule 10b–17(b)(1)(v)(a) and (b); and
- The Trust will provide the information required by Rule 10b–17(b)(1)(v)(a) and (b) to the Listing Exchange as soon as practicable before trading begins on the ex-dividend date, but in no event later than the time when the Listing Exchange last accepts information relating to distributions on the day before the ex-dividend date.

This exemptive relief is subject to modification or revocation at any time the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. This exemption is based on the facts presented and the representations made in the Letter. Any different facts or representations may require a different response. Persons relying upon this exemptive relief shall discontinue transactions involving the Shares of the Fund, pending presentation of the facts for the Commission's consideration, in the event that any material change occurs with respect to any of the facts or representations made by the Requestors, and, as is the case with all preceding letters, particularly with respect to the close alignment between the market price of Shares and the Fund's NAV. In addition, persons relying on this exemption are directed to the anti-fraud and anti-manipulation provisions of the Exchange Act, particularly Sections 9(a), 10(b), and Rule 10b–5 thereunder.

Responsibility for compliance with these and any other applicable provisions of the federal securities laws must rest with the persons relying on this exemption. This Order should not be considered a view with respect to any other question that the proposed transactions may raise, including, but not limited to, the adequacy of the disclosure concerning, and the applicability of other federal or state laws to, the proposed transactions.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Brent J. Fields,

Secretary.

[FR Doc. 2016–26299 Filed 10–31–16; 8:45 am]

BILLING CODE 8011–01–P

paid on a particular record date. Further, the Commission finds, based upon the representations of the Requestors in the Letter, that the provision of the notices as described in the Letter and subject to the conditions of this Order would not constitute a manipulative or deceptive device or contrivance comprehended within the purpose of Rule 10b–17.

[6] 17 CFR 200.30–3(a)(6) and (9).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79172; File No. SR–OCC–2016–014]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change Related to Compliance With Section 871(m) of the Internal Revenue Code

October 27, 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 18, 2016, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of this proposed rule change is to amend OCC's By-Laws and Rules to address the implementation of Section 871(m) of the Internal Revenue Code of 1986, as amended (''I.R.C.''),[3] and the Treasury Regulations thereunder as they will apply to listed options transactions. The proposed amendments to OCC's By-Laws and Rules can be found on OCC's public Web site.[4] All capitalized terms not defined herein have the same meaning as set forth in OCC's By-Laws and Rules.[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

Background

OCC is proposing to modify its By-Laws and Rules to address the application of I.R.C. Section 871(m) (''Section 871(m)'')[6] to listed options transactions commencing on January 1, 2017. The proposed modifications are designed to ensure that OCC will not be liable for U.S. withholding tax with respect to certain options transactions entered into by OCC's Clearing Members that are treated as non-U.S. persons for federal income tax purposes.

Section 871(m), which was enacted in 2010, imposes a 30% withholding tax on ''dividend equivalent'' payments that are made or deemed to be made to non-U.S. persons with respect to certain derivatives (such as total return swaps) that reference equity of a U.S. issuer. In enacting Section 871(m), Congress was attempting to address the ability of foreign persons to obtain the economics of owning dividend-paying stock through a derivative while avoiding the withholding tax that would apply to dividends paid on the stock if the foreign person owned the stock directly.[7]

In September 2015, the Treasury Department adopted final regulations (the ''Final Section 871(m)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 26 U.S.C. 871(m).

[4] OCC's By-Laws and Rules can be found on OCC's public Web site: *http://optionsclearing.com/about/publications/bylaws.jsp.*

[5] *Id.*

[6] 26 U.S.C. 871(m).

[7] *See* 26 U.S.C. 871(a)(1)(A) (30% tax on dividends paid to non-resident aliens).

Regulations'')[8] based on a proposal issued in December 2013 expanding the types of derivatives to which Section 871(m) applies to include certain listed options transactions with an effective date of January 1, 2017. While actual dividends paid to foreign owners of U.S. equities have been subject to withholding tax for over 80 years, transactions by foreign persons in listed options referencing U.S. equities have not previously given rise to withholding tax. The application of Section 871(m) to listed options, as provided in the Final Section 871(m) Regulations, thus introduces new tax obligations and associated risks for OCC and its Clearing Members.

Under the Final Section 871(m) Regulations, any equity option entered into by a non-U.S. person with an initial delta of .8 or above is considered a ''Section 871(m) Transaction'' and can potentially give rise to a dividend equivalent subject to withholding tax.[9] A dividend equivalent is deemed to arise if a dividend is paid on the underlying stock while such an option is outstanding even though no corresponding payment is made on the option. A complex set of rules and exceptions in the Final Section 871(m) Regulations must be followed in order for the withholding agent (as defined in 26 CFR 1.1441–7) to determine if the withholding tax in fact applies, and, if so, the amount of the dividend equivalent subject to withholding tax.

Two separate but overlapping U.S. withholding tax regimes will apply to dividend equivalents on listed options that are Section 871(m) Transactions. The first regime, sometimes referred to as ''Chapter 3 Withholding,'' is the basic U.S. income tax withholding regime under Chapter 3 subtitle A of the Internal Revenue Code (''Chapter 3''), which has existed for many years.[10] The second regime, known as ''FATCA,''[11] was enacted in 2010 and, subject to transition rules, first applied to withholdable payments (such as dividends and interest) made after June 30, 2014. The Treasury Department has issued extensive regulations under FATCA (the ''FATCA Regulations'').[12]

The two withholding tax regimes serve very different purposes. Chapter 3 Withholding requires a withholding agent to withhold 30% of a withholdable payment and remit it to the Internal Revenue Service (''IRS'').[13] The withholding tax is the mechanism by which the non-U.S. person receiving the payment satisfies its tax liability to the United States.

FATCA, on the other hand, was enacted with the purpose of curbing tax evasion by U.S. citizens and residents through the use of offshore bank accounts. FATCA imposes a 30% withholding tax (''FATCA Withholding'') on U.S.-source dividends and other withholdable payments (including dividend equivalents)[14] made by a U.S. withholding agent to a foreign financial institution (''FFI''), such as a bank or brokerage firm, unless the financial institution agrees to provide information to the IRS about its U.S. account holders. The purpose of FATCA Withholding is thus to force FFIs to provide the required information about U.S. account holders to the IRS. FFIs that enter into the required agreement with the IRS are referred to as ''Participating FFIs,'' and those that do not are referred to as ''Nonparticipating FFIs.'' The 30% FATCA Withholding applies to withholdable payments made to a Nonparticipating FFI whether the Nonparticipating FFI is the beneficial owner of the payment or acting as a broker, custodian or other intermediary with respect to the payment. To the extent that withholdable payments are made to a Nonparticipating FFI in any capacity, a U.S. withholding agent, such as OCC or its U.S. Clearing Members, transmitting these payments to the Nonparticipating FFI will be liable to the IRS for any amounts of FATCA Withholding that the U.S. withholding agent should, but does not, withhold and remit to the IRS.

The Treasury Department has provided alternative means of complying with FATCA for FFIs that are resident in foreign jurisdictions that enter into an intergovernmental agreement (''IGA'') with the United States (each such foreign jurisdiction being referred to as a ''FATCA Partner''). An FFI resident in a FATCA Partner jurisdiction must either transmit the information required by FATCA to its local tax authority, which in turn would transmit the information to the IRS pursuant to a tax treaty or information exchange agreement (referred to as a ''Model 1 IGA''), or the FFI must be authorized or required by FATCA Partner law to enter into an FFI agreement and to transmit FATCA reporting directly to the IRS (referred to as a ''Model 2 IGA''). Under both IGA models, payments to such FFIs would not be subject to FATCA Withholding so long as the FFI complies with the FATCA Partner's laws as mandated in the IGA. OCC currently has eight non-U.S. Clearing Members, all of which are Canadian firms. Canada entered into a Model 1 IGA with the United States on February 5, 2014, as a result of which OCC's Canadian Clearing Members that comply with the Canadian laws mandated in such Model 1 IGA are ''Reporting Model 1 FFIs'' and are exempt from FATCA Withholding.

Because OCC does not make payments of U.S.-source interest and dividends to its Clearing Members, OCC's transactions with its Clearing Members have not to date given rise to payments subject to Chapter 3 Withholding or to FATCA Withholding. Both Chapter 3 Withholding and FATCA Withholding will become applicable to OCC and its Clearing Members, however, once Section 871(m) applies to listed options commencing January 1, 2017.

Impact on OCC and its Clearing Members

The application of Section 871(m) to listed options transactions that are Section 871(m) Transactions in combination with Chapter 3 Withholding and FATCA Withholding will have significant implications for OCC and its Clearing Members. These implications differ depending upon whether the Clearing Member involved in the transaction is a U.S. firm or a non-U.S. firm. When a U.S. Clearing Member is involved, Section 871(m) is relevant if the Clearing Member is acting (directly or indirectly) on behalf of a

[8] *See* T.D. 9734, 80 FR 56866 (Sept. 18, 2015).

[9] Under the regulations, ''delta'' refers to the ratio of the change in the fair market value of an option to a small change in the fair market value of the number of shares of the underlying security referenced by the option. *See* 26 CFR 1.871–15(g)(1). Individual options entered into ''in connection with each other'' must generally be combined and tested against the .8 delta threshold on a combined basis (the ''Combination Rule''). *See* 26 CFR 1.871–15(n). For example, if a non-U.S. person buys a call option and writes a put option on the same stock, and the options are entered into in connection with each other, the delta of the call and the delta of the put are added together. If the sum is .8 or higher, the two transactions are treated as Section 871(m) Transactions.

[10] *See* 26 U.S.C. 1441–1446.

[11] *See* 26 U.S.C. 1471–1474. FATCA stands for the Foreign Account Tax Compliance Act, which is found in Chapter 4 of subtitle A of Title 26. References in this filing to ''Chapter 4'' are references to FATCA, and vice versa.

[12] *See* 26 CFR 1.1471–0 through 1.1474–1.1474–7.

[13] Withholdable payments include U.S. source dividends, as defined in 26 U.S.C. 1441(b), and dividend equivalents are treated as U.S. source dividends for this purpose. 26 U.S.C. 871(m)(1).

[14] The types of payments subject to FATCA Withholding are generally the same as those subject to Chapter 3 Withholding, although FATCA Withholding also applies to gross proceeds from the sale or other disposition of any instrument that gives rise to such payments. *See* 26 U.S.C. 1473(1). Gross proceeds withholding under FATCA is scheduled to become effective in 2019.

non-U.S. customer.[15] When a U.S. Clearing Member is acting for a foreign customer, the U.S. Clearing Member will need to determine whether the transaction is a Section 871(m) Transaction, and, if so, the amount of any dividend equivalents subject to withholding. Under Chapter 3 and Chapter 4, withholding tax will need to be collected by the U.S. Clearing Member on any such dividend equivalent and remitted to the IRS.[16] Reporting by the U.S. Clearing Member with respect to such amounts on IRS Forms 1042 and 1042–S would also be required.[17]

OCC will not be obligated to withhold on any dividend equivalents associated with listed options that are Section 871(m) Transactions when the Clearing Member involved is a U.S. firm. Under the applicable Treasury Regulations, because OCC is treated as making such payments to a U.S. financial institution, OCC is not required to withhold. Rather, the withholding obligation falls on the U.S. Clearing Member if the member is acting directly for a non-U.S. person, or potentially on another broker or custodian with a closer connection to the non-U.S. person. Similarly, OCC will not have any tax reporting obligations. Those obligations will typically fall on the broker that has the obligation to withhold. In general terms, OCC is relieved of the obligation to withhold and to report dividend equivalents in this situation because the U.S. Clearing Member, and not OCC, is the last U.S. person with custody or control over the relevant payment or funds before they leave the United States. Without regard to the proposed rule change described herein, therefore, Section 871(m) will require OCC's U.S. Clearing Members with foreign customers to develop and maintain systems (i) to identify options transactions that are Section 871(m) Transactions (including under the Combination Rule),[18] (ii) to determine the amount of any dividend equivalents, and (iii) to effectuate withholding. Developing these systems will be challenging and costly.

The situation is very different when the Clearing Member involved is a non-U.S. firm. (As noted above, OCC currently has eight non-U.S. clearing members, all of which are Canadian firms.) Under the Final Section 871(m) Regulations, OCC itself is a withholding agent when a non-U.S. Clearing Member enters into a transaction on behalf of a customer or for its own account.[19] In this situation, OCC is the last U.S. person treated as having custody or control over the payment or funds before they leave the United States. Unless the non-U.S. Clearing Members enter into certain agreements with the IRS (described below), under which they assume primary responsibility for Chapter 3 Withholding tax and are FATCA Compliant, OCC would be required to withhold on dividend equivalents with respect to transactions that are Section 871(m) Transactions.[20] In order to carry out these responsibilities, OCC would need to develop and maintain systems (i) to identify transactions that are Section 871(m) Transactions, (ii) to determine the amount of any dividend equivalents, (iii) to effectuate withholding, and (iv) to remit the withheld tax to the IRS. The non-U.S. Clearing Members in this situation generally would not be required to withhold or to report because they already would have been subject to withholding by OCC. Without the proposed rule change, therefore, Section 871(m) by default would impose on the U.S. Clearing Members and OCC—but not on the non-U.S. Clearing Members—the responsibility for withholding and reporting on dividend equivalents. The proposed rule change would transfer OCC's obligations with respect to the non-U.S. Clearing Members to those members, so that they would be treated in a manner analogous to the U.S. Clearing Members, who themselves will be required to withhold and report on dividend equivalents when Section 871(m) becomes effective with respect to listed options.

To address OCC's potential Chapter 3 Withholding and reporting obligations, the agreements that non-U.S. Clearing Members can enter into with the IRS to relieve OCC of these obligations are as follows:

- With respect to transactions that the Clearing Member enters into on behalf of customers (that is, as an intermediary), the Clearing Member can enter into a ''qualified intermediary agreement'' with the IRS under which the Clearing Member assumes primary withholding responsibility. If a Clearing Member has such an agreement in place (such member being a ''Qualified Intermediary Assuming Primary Withholding Responsibility''), OCC is relieved of its obligation to withhold under Chapter 3 with respect to the Clearing Member's customer transactions.
- With respect to transactions the Clearing Member enters into for its own account (that is, as a principal), the Clearing Member will be able to enter into a qualified intermediary agreement with the IRS (as described above) in which it further agrees, *inter alia,* to assume primary withholding responsibility with respect to all dividends and dividend equivalents it receives and makes.[21] Entities entering into such agreements are referred to as ''Qualified Derivatives Dealers.''

The Treasury Regulations regarding Qualified Derivatives Dealers are currently in temporary form and are subject to change. Treasury and the IRS recently issued Notice 2016–42, which has proposed changes to the ''qualified intermediary agreement'' necessary to expand the Qualified Derivatives Dealer exception to include all transactions in which a Qualified Derivatives Dealer acts as a principal for its own account, regardless of whether it does so in its dealer capacity.[22] If these changes are incorporated into the final qualified intermediary agreement, and if the Clearing Members timely enter into such agreements, OCC does not believe, based on IRS Notice 2016–42, that OCC will be obligated to withhold under Chapter 3 on any transactions entered into by the Clearing Member for its own account.

With respect to FATCA Withholding, OCC would not be required to withhold if the non-U.S. Clearing Member has entered into an agreement with the IRS to provide information about its U.S. account holders or if the Clearing Member is a resident of a country that has entered into an IGA and the member complies with its reporting responsibilities under the local legislation implementing the IGA.

Even if OCC's non-U.S. Clearing Members enter into the agreements with the IRS described above (or with respect to FATCA are resident in a country with

[15] Section 871(m) is not relevant if the U.S. Clearing Member is acting on behalf of a U.S. customer or for its own account.

[16] The obligation to withhold arises under both Chapter 3 and Chapter 4 (*i.e.,* FATCA), but duplicate withholding is not required. Under Section 1474(d) and 26 CFR 1.1474–6T(b)(1), amounts withheld under FATCA are credited against amounts required to be withheld under chapter 3.

[17] *See* 26 CFR 1.1461–1(c)(2)(i)(L).

[18] *See supra* note 9.

[19] *See* 26 CFR 1.1441–7(a)(3) (Example 7).

[20] As proposed, the term ''FACTA [sic] Compliant'' would mean that a FFI Clearing Member has qualified under such procedures promulgated by the IRS as are in effect from time to time to establish an exemption from withholding under FATCA such that OCC will not be required to withhold any amount with respect to any payment or deemed payment to such FFI Clearing Member under FATCA.

[21] *See* 26 CFR 1.1441–1T(e)(6); Notice 2016–42, 2016–29 I.R.B. (July 1, 2016).

[22] The concept of dealer in the tax context is different than in the securities regulatory context, where dealer activity would include both principal trading to facilitate customer activity as well as principal trading solely on behalf of the firm.

an IGA), OCC would still be required to report to the IRS the amounts of dividend equivalents it is treated as paying to those Clearing Members.[23]

Preparing for Implementation of Section 871(m) as Applied to Listed Options

Beginning on January 1, 2017, the Final Section 871(m) Regulations would treat OCC as paying dividend equivalents subject to both Chapter 3 Withholding and FATCA Withholding—even though no actual payments are made—when a non-U.S. Clearing Member enters into a listed equity option with an initial delta of .8 or higher. OCC has evaluated its existing systems and services to determine whether and how it may comply with such withholding obligations. As a result of this evaluation, OCC has determined that its existing systems are not capable of effectuating withholding with regard to the transactions processed by OCC. OCC does not have access to the necessary transaction-specific information to determine whether a particular transaction triggers withholding, nor the systems to obtain such information. For example, OCC cannot associate options transactions in a Clearing Member's customer account with any particular customer. Similarly, when an option contract in a Clearing Member's customer account is closed out, OCC cannot determine the specific contract that is closed out when there are multiple identical contracts in the Clearing Member's customer account.[24]

Even if OCC had access to all necessary information, the daily net settlement process in which OCC engages would not permit OCC to effectuate withholding without introducing significant settlement and liquidity risk, particularly since dividend equivalents on listed options do not involve an actual cash payment to the Clearing Member from which amounts could be withheld. OCC nets credits and debits per Clearing Member for daily settlement. Given OCC's netting, effectuating withholding could require OCC in certain circumstances to apply its own funds in order to remit withholding taxes to the IRS whenever the net credit owed to a non-U.S. Clearing Member is less than the withholding tax. In addition, if a non-U.S. Clearing Member has dividend equivalent payments aggregating $50 million, but the member is in a net debit settlement position for that day because of OCC's daily net crediting and debiting, there would be no payment to this Clearing Member from which OCC could withhold. In this example, OCC would likely need to fund the $15 million withholding tax (30% of $50 million) until such time as the Clearing Member could reimburse OCC. Furthermore, the cost of implementing a withholding system for the small number of Clearing Members that are non-U.S. firms (currently eight out of 115 Clearing Members) would be substantial and disproportionate to the related benefit. Since the cost of developing and maintaining a complex withholding system would be passed on to OCC's Clearing Members at large, it would burden both U.S. Clearing Members and non-U.S. Clearing Members that have entered into the requisite agreements with the IRS and are FATCA Compliant.

Section 871(m) requires OCC's U.S. Clearing Members with foreign customers to build and maintain systems in order to carry out their withholding responsibilities under Chapter 3 and Chapter 4 for dividend equivalents in connection with transactions with their foreign customers. Absent the proposed rule change, OCC's non-U.S. Clearing Members could decide not to develop similarly appropriate systems. Such a decision would force OCC to be in a position to comply with withholding obligations on Section 871(m) Transactions under Chapter 3 and Chapter 4 with regard to its non-U.S. Clearing Members, which, as noted above, OCC cannot do based on the way its settlement process and systems work. If such a situation were to theoretically occur, the resulting compliance costs would be shifted from the non-U.S. Clearing Members to OCC, and would cause such costs to be borne indirectly by OCC's U.S. Clearing Members, which already would be bearing their own compliance costs with regard to Section 871(m) Transactions. Moreover, as noted, the non-U.S. Clearing Members are in a better position than OCC to comply with Chapter 3 and Chapter 4 reporting and withholding requirements for Section 871(m) Transactions because they have customer information that OCC lacks. Under the proposed rule change, the costs associated with developing and maintaining the required systems would be moved back to the non-U.S. Clearing Members, who would essentially be placed in the same position as U.S. Clearing Members in terms of having to incur their own U.S. tax compliance costs.

For the reasons explained above, OCC is proposing amendments to its Rules, as described below, to implement prudent, preventive measures that would require all of OCC's non-U.S. Clearing Members to enter into agreements with the IRS under which they assume primary withholding responsibility, to become Qualified Derivatives Dealers, and to be FATCA Compliant, so as to permit OCC to make payments (and deemed payments of dividend equivalents) to such Clearing Members free from U.S. withholding tax. In preparation for the proposed rule change and the implementation of Section 871(m) as applied to listed options, OCC has asked its non-U.S. Clearing Members to provide OCC with tax documentation certifying their tax status for purposes of both FATCA and Chapter 3 Withholding. All of these Clearing Members are Canadian firms and, in response to OCC's request, each of them has provided documentation certifying that it is a Reporting Model 1 FFI under the IGA with Canada, and therefore FATCA Compliant. Each has also certified that for Chapter 3 Withholding purposes, it is a Qualified Intermediary Assuming Primary Withholding Responsibility. None of these Clearing Members are currently Qualified Derivatives Dealers because the IRS has not yet finalized the relevant regulations and the associated agreement that must be entered into with the IRS. The IRS is expected to finalize the regulations and provide the agreement language before January 1, 2017. If the IRS does not take any further action before January 1, 2017, then the regulations will go into effect, as they are currently written, on January 1, 2017. In that case, FFI Clearing Members would become subject to withholding by OCC with respect to Section 871(m) Transactions in which the FFI Clearing Members are acting as a principal (*i.e.,* transactions for the member's own account). Because of the practical difficulty OCC would encounter in attempting to distinguish dealer transactions in which the FFI Clearing Member is acting as an intermediary versus those in which it is acting as a principal, OCC will not allow the FFI Clearing Members to clear any dealer trades in the absence of final guidance or the ability of OCC's FFI Clearing Members to distinguish intermediary versus principal transactions in a manner that would allow OCC to process intermediary transactions free of any withholding obligations under Section 871(m). As

[23] *See* 26 CFR 1.1461–1(c)(2)(i)(L).

[24] Contracts with identical terms but entered into on different days or at different times will have different initial deltas. As a result, some (those with initial deltas above .8) may be Section 871(m) Transactions, while others may not be. It is thus critical to know which specific contract is closed out for purposes of determining if dividend equivalents arise with respect to a particular contract that is a Section 871(m) Transaction.

discussed above, however, OCC expects the IRS to finalize the regulations and to provide the relevant agreement language before January 1, 2017.

Proposed Amendments to OCC's By-Laws and Rules

For the reasons discussed above, OCC is proposing a number of amendments to its By-Laws and Rules designed to require that, as a general requirement for membership, all existing and future Clearing Members that are treated as non-U.S. entities for U.S. federal income tax purposes must enter into appropriate agreements with the IRS and be FATCA Compliant, such that OCC will not be responsible for withholding on dividend equivalents under Section 871(m). Specifically, OCC proposes to amend Article I of its By-Laws to include the following defined terms. The term ''FFI Clearing Member'' would mean any Clearing Member that is treated as a non-U.S. entity for U.S. federal income tax purposes. The term ''Dividend Equivalent'' would be defined as having the meaning provided in Section 871(m) of the I.R.C. and related Treasury Regulations and other official interpretations thereof. The term ''FATCA'' would be defined as meaning: (i) the provisions of Sections 1471 through 1474 of the Internal Revenue Code of 1986, as amended, which were enacted as part of The Foreign Account Tax Compliance Act (or any amendment thereto or successor sections thereof), and related Treasury Regulations and other official interpretations thereof, as in effect from time to time, and (ii) the provisions of any intergovernmental agreement to implement The Foreign Account Tax Compliance Act as in effect from time to time between the United States and the jurisdiction of the FFI Clearing Member's residency. The term ''FATCA Compliant'' would mean, with respect to an FFI Clearing Member, that such FFI Clearing Member has qualified under such procedures promulgated by the IRS as are in effect from time to time to establish exemption from withholding under FATCA such that OCC will not be required to withhold any amount with respect to any payment or deemed payment to such FFI Clearing Member under FATCA. The term ''Qualified Intermediary Assuming Primary Withholding Responsibility'' would mean an FFI Clearing Member that has entered into an agreement with the IRS to be a qualified intermediary and to assume primary responsibility for reporting and for collecting and remitting withholding tax under Chapter 3 and Chapter 4 of subtitle A, and Chapter 61 and Section 3406, of the I.R.C. with respect to any income (including Dividend Equivalents) arising from transactions entered into by the Clearing Member with OCC as an intermediary, including transactions entered into on behalf of such Clearing Member's customers. The term ''Qualified Derivatives Dealer'' would be defined as an FFI Clearing Member that has entered into an agreement with IRS that permits OCC to make Dividend Equivalent payments to such clearing member free from U.S. withholding tax under Chapter 3 and Chapter 4 of subtitle A, and Chapter 61 and Section 3406, of the I.R.C. with respect to transactions entered into by such clearing member with OCC as a principal for such Clearing Member's own account. ''Section 871(m) Effective Date'' would be defined as meaning January 1, 2017, or, if later, the date on which Section 871(m) and related Treasury Regulations and other official interpretations thereof, first apply to listed options transactions. Finally, ''Section 871(m) Implementation Date'' would mean December 1, 2016, or, if later, the date that is 30 days before the Section 871(m) Effective Date.[25]

The proposed rule change also would add Section 1(e) to Article V of OCC's By-Laws, which would require any applicant, that if admitted to membership would be an FFI Clearing Member, to be a Qualified Intermediary Assuming Primary Withholding Responsibility and to be FATCA Compliant beginning on the Section 871(m) Implementation Date. In addition, if the applicant intends to trade for its own account, the applicant would be required to be a Qualified Derivatives Dealer.

Furthermore, the proposed rule change would impose additional requirements on FFI Clearing Members. Specifically, proposed Rule 310(d)(1) would prohibit FFI Clearing Members from conducting any transaction or activity through OCC unless the Clearing Member is a Qualified Intermediary Assuming Primary Withholding Responsibility and FATCA Compliant, beginning on the Section 871(m) Effective Date. In addition, FFI Clearing Members would not be permitted to enter into a transaction for their own accounts unless such Clearing Member is a Qualified Derivatives Dealer and such transaction is within the scope of the exemption from withholding tax for Dividend Equivalents paid to Qualified Derivatives Dealers.

Proposed Rule 310(d)(2) would require each FFI Clearing Member to certify annually to OCC, beginning on the Section 871(m) Implementation Date, that it satisfies the above requirements and also to update its certification to OCC (*viz.,* a completed Form W–8IMY electing primary withholding responsibility and Qualified Derivatives Dealer status) if required by applicable law or administrative guidance or if its certification is no longer accurate. Proposed Rule 310(d)(3) also would require each FFI Clearing Member to provide OCC with the information it needs relating to Dividend Equivalents, in sufficient detail and in a sufficiently timely manner, for OCC to comply with its obligation under Chapters 3 and 4 to make required reports to the IRS regarding Dividend Equivalents and the transactions giving rise to same between OCC and the FFI Clearing Member.

Additionally, proposed Rule 310(d)(4) would require each FFI Clearing Member to inform OCC promptly if it is not, or has reason to know that it will not be, in compliance with Rule 310(d) within 2 days of knowledge thereof This rule ensures that OCC will be notified in a timely manner in the event that an FFI Clearing Member no longer maintains the appropriate arrangements described above to ensure that all withholding and reporting obligations with respect to Dividend Equivalents under Section 871(m) and Chapter 3 and 4 are being fulfilled.

Finally, proposed Rule 310(d)(5) would require each FFI Clearing Member to indemnify OCC for any loss, liability, or expense sustained by OCC resulting from such member's failure to comply with proposed Rule 310(d). As discussed above, a Dividend Equivalent is deemed to arise if a dividend is paid on the underlying stock while an option is outstanding, even though no corresponding payment is made on the option. Due to the nature of OCC's settlement process, there may be no actual payments to the FFI Clearing Member from which OCC could withhold in order to address a liability or expense incurred by OCC arising from a member's failure to comply with the proposed rules. As a result, if OCC were required to satisfy any liability or expense caused by such member's failure to comply out of OCC's own funds, OCC would look to the FFI

[25] Although withholding with regard to Dividend Equivalent payments to non-U.S. clearing members is scheduled take effect beginning January 1, 2017, the proposed amendments to the By-Laws and Rules would require existing non-U.S. clearing members to provide documentation certifying their compliance with the requirements of Rule 310(d) 30 days prior to January 1, 2017, in order for OCC to review the certification materials and to address in a timely manner any potential non-compliance, in accordance with its Rules.

Clearing Member to indemnify OCC for such losses.

(2) Statutory Basis

OCC believes the proposed rule change is consistent with Section 17A of the Securities Exchange Act of 1934, as amended (''Act''),[26] and the rules thereunder applicable to OCC. Section 17A(b)(3)(F) of the Act[27] requires, among other things, that the rules of a clearing agency: (i) Promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions; (ii) assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible; (iii) in general, protect investors and the public interest; and (iv) are not designed to permit unfair discrimination among participants in the use of the clearing agency. OCC believes that the proposed rule change is designed to promote the prompt and accurate clearance and settlement of securities and derivatives transactions, assure the safeguarding of securities and funds at OCC, and protect investors and the public interest because it would eliminate the uncertainty in funds settlement that otherwise would arise if OCC were subject to withholding obligations with respect to Dividend Equivalents under Section 871(m). As noted above, the daily net settlement process in which OCC engages would not permit OCC to effectuate the necessary withholdings, particularly since Dividend Equivalents on listed options do not involve an actual cash payment to the Clearing Member from which amounts could be withheld. In addition, OCC lacks the customer information necessary determine the correct amounts subject to withholding. The introduction of withholding responsibilities on OCC therefore would introduce new complications and risks into OCC's clearance and settlement process and could create uncertainty around the settlement of funds at OCC. For these reasons, OCC does not believe that it is situated to accept the liability associated with Dividend Equivalent withholding responsibilities.

The proposed rule change would implement prudent, preventive measures to protect OCC against the obligation for any such withholding (and any resulting liability) by requiring FFI Clearing Members to enter into certain agreements with the IRS under which the FFI Clearing Member assumes primary withholding responsibilities with respect to transactions that it enters into on behalf of customers (*i.e.,* as an intermediary) or for its own account (*i.e.,* as a principal) and to be FATCA Compliant. The proposed rule change would eliminate potential risks and uncertainty in the daily settlement of funds at OCC otherwise imposed by Section 871(m)'s new mandate. Thus, OCC believes the proposed rule change is designed to promote the prompt and accurate clearance and settlement of securities and derivatives transactions, the safeguarding of securities and funds at OCC, and the protection of securities investors and the public interest in accordance with Section 17A(b)(3)(F) of the Act.[28]

Moreover, OCC believes that the proposed rule change does not unfairly discriminate among participants in the use of the clearing agency. While the proposed rule change would impose additional requirements and/or restrictions on FFI Clearing Members, the proposed rules are intended to address specific issues and potential risks to OCC arising from those FFI Clearing Members whose membership creates potential withholding obligations for OCC. Additionally, as described above, Section 871(m) will impose similar withholding and reporting obligations on OCC's U.S. Clearing Members with respect to their foreign customers. Once Section 871(m) withholding becomes effective, OCC's U.S. Clearing Members will be subject to similar withholding and reporting requirements under Chapters 3 and 4, and they would need to develop and maintain appropriate systems to effectuate the required withholdings. The proposed rule change by OCC would require OCC's non-U.S. Clearing Members to develop and maintain similar systems to effectuate the necessary U.S. tax withholding.

OCC believes it is appropriate to impose these additional requirements on FFI Clearing Members because providing clearing services for these FFI Clearing Members would subject OCC to the additional withholding obligations discussed above, which do not arise when OCC performs clearing services for its U.S. Clearing Members. In the absence of the proposed rules, OCC would need to be in a position to comply with withholding obligations on Section 871(m) Transactions under Chapter 3 and Chapter 4 with regard to its FFI Clearing Members, which as noted above OCC cannot do based on the way its settlement process and systems work. If such a situation were to theoretically occur, the resulting compliance costs would be shifted from the non-U.S. Clearing Members to OCC, and would cause such costs to be borne indirectly by OCC's U.S. Clearing Members, which already would be bearing their own compliance costs with regard to Section 871(m) Transactions. Since the cost of developing and maintaining a complex withholding system would be passed on to OCC's Clearing Members at large, OCC believes it would be an unfair burden on U.S. Clearing Members, as well as any non-U.S. Clearing Members that have entered into the requisite agreements with the IRS and are FATCA Compliant. Finally, OCC understands that its non-U.S. Clearing Members already have agreed to act as Qualified Intermediaries that accept primary withholding responsibility for Chapter 3 and Chapter 4 purposes more generally, which may limit to some degree the incremental burden they would be required to undertake as Qualified Derivatives Dealers once the Section 871(m) withholding rules take effect. Therefore, OCC believes that the proposed rule change is not unfairly discriminatory among participants in the use of the clearing agency and is therefore consistent with Section 17A(b)(3)(F) of the Act.[29] The proposed rule change is not inconsistent with any rules of OCC, including those rules proposed to be amended.

(B) Clearing Agency's Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[30] The proposed rule change could potentially impact or burden competition by requiring any applicant for clearing membership or existing Clearing Member that would be an FFI Clearing Member to be a Qualified Intermediary Assuming Primary Withholding Responsibility in order to conduct any transaction or activity through OCC. This requirement could impose burdens on such an applicant or member because it would require them to develop systems and processes to collect the information necessary to determine which of its cleared options transactions are Section 871(m) Transactions and to calculate and effectuate the required withholdings and reporting. Additionally, the proposed rule change would require such an applicant or

[26] 15 U.S.C. 78q–1.

[27] 15 U.S.C. 78q–1(b)(3)(F).

[28] 15 U.S.C. 78q–1(b)(3)(F).

[29] 15 U.S.C. 78q–1(b)(3)(F).

[30] 15 U.S.C. 78q–1(b)(3)(I).

member to be FATCA Compliant, which would require it to develop processes and procedures to gather information from clients necessary to fulfill its reporting obligations under FATCA. Moreover, in order to engage in activity for its own account, such applicant or member would need to be a Qualified Derivatives Dealer, which would entail the development of additional systems and processes for identifying any residual Section 871(m) Transactions it has entered into for its own account. The development of these systems and processes remain subject to some uncertainty, due to remaining questions regarding regulatory guidance under Section 871(m).[31] In the absence of the proposed rule change, however, the non-U.S. Clearing Members themselves would become subject to withholding by OCC on dividend equivalents. The proposed rule thus reduces a direct economic burden on transactions between OCC and its non-U.S. Clearing Members that would apply absent compliance with the proposed rules.

Furthermore, OCC does not believe the proposed rule change would impose a significant burden on competition for FFI Clearing Members as compared to OCC's U.S. Clearing Members. As described above, Section 871(m) imposes similar withholding and reporting obligations on OCC's U.S. Clearing Members with foreign customers. OCC's U.S. Clearing Members also will need to develop and maintain appropriate systems to identify Section 871(m) Transactions and to effectuate the required withholding. The proposed rule change by OCC would impose comparable requirements on OCC's non-U.S. Clearing Members.

The proposed rule change also is narrowly tailored. It addresses the specific issues and potential risks to OCC arising from those firms whose membership creates potential withholding obligations for OCC. The proposed requirements for FFI Clearing Members are designed to eliminate any uncertainty in funds settlement that would arise if OCC were subject to withholding obligations with respect to Dividend Equivalents under Section 871(m). As discussed further above, OCC believes that the proposed rule change is necessary to eliminate potential complications and risk to its clearance and settlement process that would be presented by OCC's potential withholding responsibilities under Chapter 3 and Chapter 4 (and which would be a direct consequence of providing its clearance and settlement services for these FFI Clearing Members). OCC believes the proposed rule change is necessary to promote the prompt and accurate clearance and settlement of securities and derivatives transactions, to assure the safeguarding of securities and funds in the custody or control of OCC or for which it is responsible, and in general, to protect investors and the public interest in accordance with Section 17A(b)(3)(F) of the Act.[32] Any burden on competition that this proposed change could be regarded as imposing would not be unreasonable or inappropriate under the Act. Furthermore, as stated above, all of OCC's current non-U.S. Clearing Members are already Qualified Intermediaries Assuming Primary Withholding Responsibility and FATCA Compliant.

OCC does not believe that the ongoing certification and reporting provisions of proposed Rules 310(d)(2)–(4) would have any impact on competition. As a matter of standard practice, Clearing Members are required to inform OCC of material changes in, for example, their formal organization, ownership structure, or financial condition [33] and are subject to ongoing financial reporting requirements.[34] OCC believes the proposed rule change would impose reasonable reporting and notification requirements with respect to FFI Clearing Members' tax compliance status similar to those rules referenced above. Moreover, OCC does not believe the indemnification provision in proposed Rule 301(d)(5) would present a burden on competition as it would only be imposed in the event that an FFI Clearing Member failed to comply with the proposed rule change and such failure resulted in a loss or expense to OCC.

For the foregoing reasons, OCC believes that the proposed rule change is in the public interest, would be consistent with the requirements of the Act applicable to registered clearing agencies, and would not impose a burden on competition that is unnecessary or inappropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments on the proposed rule change were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

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–OCC–2016–014 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–OCC–2016–014. 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

[31] OCC believes, however, that theses burdens will be alleviated when the Treasury Department and IRS issue further guidance and provide additional clarity around outstanding questions and issues concerning the Final Section 871(m) Regulations. *See generally* Letter to the U.S. Department of the Treasury and IRS from Craig S. Donohue, Executive Chairman, OCC, on behalf of the U.S. Securities Markets Coalition regarding Final Section 871(m) Regulations Effective Date available at *http://www.optionsclearing.com/components/docs/about/newsroom/comment-letters/August-16-OCC-Request-for-Postponement-871(m)-2016.pdf.*

[32] 15 U.S.C. 78q–1(b)(3)(F).

[33] *See, e.g.,* OCC Rules 201 and 303.

[34] *See* OCC Rule 306.

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 filings also will be available for inspection and copying at the principal office of OCC and on OCC's Web site at *http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_16_014.pdf.*

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–OCC–2016–014 and should be submitted on or before November 22, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Brent J. Fields,

Secretary.

[FR Doc. 2016–26382 Filed 10–31–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold a closed meeting on Thursday, November 3, 2016 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or her designee, has certified that, in her opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(7), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matter at the closed meeting.

Commissioner Stein, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Adjudicatory matters; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed; please contact Brent J. Fields from the Office of the Secretary at (202) 551–5400.

Dated: October 27, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016–26506 Filed 10–28–16; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32338; File No. 812–14652]

Hartford Mutual Funds Inc., et al.; Notice of Application

October 26, 2016.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order pursuant to: (a) Section 6(c) of the Investment Company Act of 1940 (''Act'') granting an exemption from sections 18(f) and 21(b) of the Act; (b) section 12(d)(1)(J) of the Act granting an exemption from section 12(d)(1) of the Act; (c) sections 6(c) and 17(b) of the Act granting an exemption from sections 17(a)(1), 17(a)(2) and 17(a)(3) of the Act; and (d) section 17(d) of the Act and rule 17d–1 under the Act to permit certain joint arrangements and transactions. Applicants request an order that would permit certain registered open-end management investment companies to participate in a joint lending and borrowing facility.

Applicants: The Hartford Mutual Funds, Inc., The Hartford Mutual Funds II, Inc., Hartford Series Fund, Inc. and Hartford HLS Series Fund II, Inc. (each a ''Corporation'' and collectively, the ''Corporations''), each a Maryland corporation registered under the Act as an open-end management investment company with multiple series and Hartford Funds Management Company, LLC (the ''Initial Adviser''), a Delaware limited liability company registered as an investment adviser under the Investment Advisers Act of 1940.

Filing Dates: The application was filed on May 20, 2016, and amended on August 26, 2016.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail.

Hearing requests should be received by the Commission by 5:30 p.m. on November 21, 2016 and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to Rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants: 5 Radnor Corporate Center, 100 Matsonford Road, Suite 300, Radnor, PA 19087.

FOR FURTHER INFORMATION CONTACT: Jessica Shin, Attorney-Adviser, at (202) 551–5921 or David J. Marcinkus, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application:

1. Applicants request an order that would permit the applicants to participate in an interfund lending facility where each Fund could lend money directly to and borrow money directly from other Funds to cover unanticipated cash shortfalls, such as unanticipated redemptions or trade fails.[1] The Funds will not borrow under the facility for leverage purposes and

[35] 17 CFR 200.30–3(a)(12).

[1] Applicants request that the order apply to the applicants and to any existing or future registered open-end management investment company or series thereof for which the Initial Adviser or any successor thereto or an investment adviser controlling, controlled by, or under common control with the Initial Adviser or any successor thereto serves as investment adviser (each a ''Fund'' and collectively the ''Funds'' and each such investment adviser an ''Adviser''). For purposes of the requested order, ''successor'' is limited to any entity that results from a reorganization into another jurisdiction or a change in the type of a business organization.

the loans' duration will be no more than 7 days.[2]

2. Applicants anticipate that the proposed facility would provide a borrowing Fund with a source of liquidity at a rate lower than the bank borrowing rate at times when the cash position of the Fund is insufficient to meet temporary cash requirements. In addition, Funds making short-term cash loans directly to other Funds would earn interest at a rate higher than they otherwise could obtain from investing their cash in repurchase agreements or certain other short term money market instruments. Thus, applicants assert that the facility would benefit both borrowing and lending Funds.

3. Applicants agree that any order granting the requested relief will be subject to the terms and conditions stated in the application. Among others, the Adviser, through a designated committee, would administer the facility as a disinterested fiduciary as part of its duties under the investment management agreements with the Funds and would receive no additional fee as compensation for its services in connection with the administration of the facility. The facility would be subject to oversight and certain approvals by the Funds' Board, including, among others, approval of the interest rate formula and of the method for allocating loans across Funds, as well as review of the process in place to evaluate the liquidity implications for the Funds. A Fund's aggregate outstanding interfund loans will not exceed 15% of its net assets, and the Fund's loans to any one Fund will not exceed 5% of the lending Fund's net assets.[3]

4. Applicants assert that the facility does not raise the concerns underlying section 12(d)(1) of the Act given that the Funds are part of the same group of investment companies and there will be no duplicative costs or fees to the Funds.[4] Applicants also assert that the proposed transactions do not raise the concerns underlying sections 17(a)(1), 17(a)(3), 17(d) and 21(b) of the Act as the Funds would not engage in lending transactions that unfairly benefit insiders or are detrimental to the Funds. Applicants state that the facility will offer both reduced borrowing costs and enhanced returns on loaned funds to all participating Funds and each Fund would have an equal opportunity to borrow and lend on equal terms based on an interest rate formula that is objective and verifiable. With respect to the relief from section 17(a)(2) of the Act, applicants note that any collateral pledged to secure an interfund loan would be subject to the same conditions imposed by any other lender to a Fund that imposes conditions on the quality of or access to collateral for a borrowing (if the lender is another Fund) or the same or better conditions (in any other circumstance).[5]

5. Applicants also believe that the limited relief from section 18(f)(1) of the Act that is necessary to implement the facility (because the lending Funds are not banks) is appropriate in light of the conditions and safeguards described in the application and because the Funds would remain subject to the requirement of section 18(f)(1) that all borrowings of a Fund, including combined interfund loans and bank borrowings, have at least 300% asset coverage.

6. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Rule 17d–1(b) under the Act provides that in passing upon an application filed under the rule, the Commission will consider whether the participation of the registered investment company in a joint enterprise, joint arrangement or profit sharing plan on the basis proposed is consistent with the provisions, policies and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of the other participants.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2016–26305 Filed 10–31–16; 8:45 am]

BILLING CODE 8011–01–P

[2] Any Fund, however, will be able to call a loan on one business day's notice.

[3] Under certain circumstances, a borrowing Fund will be required to pledge collateral to secure the loan.

[4] Applicants state that the obligation to repay an interfund loan could be deemed to constitute a security for the purposes of sections 17(a)(1) and 12(d)(1) of the Act.

[5] Applicants state that any pledge of securities to secure an interfund loan could constitute a purchase of securities for purposes of section 17(a)(2) of the Act.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79162; File No. SR–BatsBZX–2016–61]

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend Exchange Rule 11.23, Auctions, To Enhance the Reopening Auction Process Following a Trading Halt Declared Pursuant to the Plan To Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS

October 26, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 13, 2016, Bats BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend Exchange Rule 11.23, Auctions, to enhance the reopening auction process following a trading halt declared pursuant to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or ''Plan'').[3] The Exchange also proposes to amend Rule 11.17, Clearly Erroneous Executions, to exclude executions that are a result of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

a Halt Auction from being reviewed as clearly erroneous.

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 11.23, Auctions, to enhance the reopening auction process following a trading halt declared pursuant to the Limit Up-Limit Down Plan. The Exchange also proposes to amend Rule 11.17, Clearly Erroneous Executions, to exclude executions that are a result of a Halt Auction from being reviewed as clearly erroneous.

Background

The Operating Committee for the Plan, with input from the Advisory Committee to the Plan and staff of the 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.[4] The Exchange is a Participant of the Plan and a member of the Operating Committee.

The Participants submitted to the Commission a proposal to amend the Plan to provide that a Trading Pause will continue until the Primary Listing Exchange has reopened trading using its established reopening procedures and reports a Reopening Price.[5] 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 propose 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.

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. If there is selling pressure, for NMS Stocks priced more than $3.00, 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 Impermissible Price (as defined and discussed below).[6] The Participants believe that widening collars only in the direction of the Impermissible Price 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 Members 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 11.23(d) to implement the proposed uniform trading practices with respect to reopening a security following a Trading Pause and amend Rule 11.17, Clearly Erroneous Executions, to preclude Members from requesting a review of a Trading Halt Auction as a clearly erroneous execution, as described below.

Description of Changes to the Halt Auction Process

To effect the proposed enhancements that would be implemented by all Primary Listing Exchanges, the Exchange proposes to incorporate the

[4] Unless otherwise specified, capitalized terms used herein have the same meaning as set forth in the Plan or in Exchange rules.

[5] *See* letter from Elizabeth K. King, General Counsel, NYSE, to Brent J. Fields, Secretary, Commission, dated September 16, 2016 (''Amendment No. 12'').

[6] For NMS Stocks that are priced $3.00 and under, the price collar threshold would be $0.15.

above items that were agreed to amongst the Participants under Exchange Rule 11.23(d), IPO and Halt Auctions. First, the Exchange proposes to adopt new paragraph (C) under Rule 11.23(d)(2) titled ''Incremental Quote Period Extensions for Halt Auctions Following a Trading Pause.'' [7] Under Exchange Rule 11.23(d)(1)(A), the Quote-Only Period [8] with respect to a Halt Auction commences five (5) minutes prior to such Halt Auction. Proposed Rule 11.23(d)(2)(C) would provide for the Quote-Only Period to be extended an additional five (5) minutes should a Halt Auction be unable to be performed due to Market Order [9] imbalance under 11.23(d)(2)(B)(i) [10] or the Indicative Price,[11] before being adjusted for Halt Auction Collars, is outside the Halt Auction Collars set forth in proposed subparagraphs (i) and (ii) to Exchange Rule 11.23(d)(2)(C) discussed below (either, an ''Impermissible Price'') (''Initial Extension Period'').[12]

After the Initial Extension Period, the Quote-Only Period shall be extended for additional five (5) minute periods should a Halt Auction be unable to be performed due to an Impermissible Price (''Additional Extension Period'') until a Halt Auction occurs. The Exchange shall attempt to conduct a Halt Auction during the course of each Additional Extension Period. The Halt Auction will be cancelled at 3:50 p.m. eastern time, at which time the auction for the security shall be conducted pursuant to the Volatility Closing Auction process under section (e) of Exchange Rule 11.23. Renumbered paragraph (D) of Rule 11.23(d)(2) would also be amended to make clear that the Exchange will notify market participants of the circumstances and length of an extension of the Quote-Only Period as proposed herein.

Under proposed subparagraph (i) to Rule 11.23(d)(2)(C), the Halt Auction Reference Price shall equal the price of the Upper or Lower Price Band that triggered the halt. If the Halt Auction Reference Price is the Lower (Upper) Price Band, the initial lower (upper) Halt Auction Collar shall be five (5) percent less (greater) than the Halt Auction Reference Price, rounded to the nearest minimum price variation and the upper (lower) Halt Auction Collar shall be the Upper (Lower) Price Band. For securities with a Halt Auction Reference Price of $3.00 or less, the initial lower (upper) Halt Auction Collar shall be $0.15 less (greater) than the Halt Auction Reference Price, rounded to the nearest minimum price variation and the upper (lower) Halt Auction Collar shall be the Upper (Lower) Price Band.

Proposed subparagraph (ii) to Rule 11.23(d)(2)(C) would state that at the beginning of the Initial Extension Period, the upper (lower) Halt Auction Collar shall be increased (decreased) by five (5) percent in the direction of the Impermissible Price rounded to the nearest minimum price variation. For securities with a Halt Auction Reference Price of $3.00 or less, the Halt Auction Collar shall be increased (decreased) in $0.15 increments in the direction of Impermissible Price. At the beginning of each Additional Extension Period, the Halt Auction Collar shall be widened by the same amount as the Initial Extension Period.

In addition, the Exchange proposes to amend paragraph (d)(2)(A) of Rule 11.23 regarding the publication of BZX Auction information. Under Rule 11.23(d)(2)(A), coinciding with the beginning of the Quote-Only Period for a security and updated every five seconds thereafter, the Reference Price,[13] Indicative Price, Auction Only Price,[14] and the lesser of Reference Buy Shares [15] and Reference Sell Shares [16] associated with the Halt Auction are disseminated via electronic means. The Exchange proposes to amend paragraph (d)(2)(A) of Rule 11.23 to include the Halt Auction Reference Price and Halt Auction Collars as part of the information to be publicly disseminated as part of the Halt Auction process.

Renumbered paragraph (E) of Rule 11.23(d)(2) describes how the Exchange determines the price of an IPO and Halt Auction and states that orders will be executed at the price that maximizes the number of shares executed in the auction. The Exchange proposes to amend renumbered paragraph (E) of Rule 11.23(d)(2) to separately describe how the price of an IPO and Halt Auction are calculated. As amended, for IPO Auctions for ETPs, orders will continue to be executed at the price level within the Collar Price Range that maximizes the number of shares executed in the auction. For Halt Auctions for ETPs, orders will be executed at the price level within the Halt Auction Collars that maximizes the number of shares executed in the auction.

The Exchange also proposes to add new paragraph (F) under Exchange Rule 11.23(d)(2). Proposed paragraph (F) to Rule 11.23(d)(2) would state if a Trading Pause is triggered by the Exchange or if the Exchange is unable to reopen trading at the end of the Trading Pause due to a systems or technology issue, the Exchange will immediately notify the single plan processor responsible for consolidation of information for the security pursuant to Rule 603 of Regulation NMS under the Securities Exchange Act of 1934.

Lastly, the Exchange proposes to amend Rule 11.17, Clearly Erroneous Executions, to provide that Members may not request a review of a Trading Halt Auction under Rule 11.17(b), which specifies the procedures for a Member 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 Members as a clearly erroneous execution.[17]

Implementation Date

The Exchange proposes to implement the proposed rule change following the Commission's approval of Amendment No. 12 to the Plan. The Exchange will announce the implementation date via a trading notice to be issued after the Commission's approval of this proposed rule change.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [18] in general, and furthers the objectives of Section 6(b)(5) of the Act [19] in particular, in that it is designed to promote just and equitable principles of

[7] The Exchange proposes to renumber current paragraphs (C) and (D) under Rule 11.23(d)(2) as (D) and (E), respectively.

[8] ''Quote-Only Period'' is defined as ''a designated period of time prior to a Halt Auction, a Volatility Closing Auction, or an IPO Auction during which Users may submit orders to the Exchange for participation in the auction.'' *See* Exchange Rule 11.23(a)(17).

[9] *See* Exchange Rule 11.9(a)(2).

[10] Under 11.23(d)(2)(B)(i), the Quote-Only Period may be extended where there are unmatched Market Orders on the Auction Book associated with the auction.

[11] ''Indicative Price'' is defined as ''the price at which the most shares from the Auction Book and the Continuous Book would match.'' *See* Exchange Rule 11.23(a)(10).

[12] The Quote-Only Period would not be extended and the Halt Auction may occur where there is a Limit Order imbalance, but no Market Order imbalance exists and the Indicative Price is inside the thresholds set forth in proposed subparagraphs (i) and (ii) to Exchange Rule 11.23(d)(2)(C).

[13] *See* Exchange Rule 11.23(a)(19).

[14] *See* Exchange Rule 11.23(a)(2).

[15] *See* Exchange Rule 11.23(a)(18).

[16] *See* Exchange Rule 11.23(a)(21).

[17] The Participants will be engaging in a more comprehensive review of Rule 11.17 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 11.17 as an initial step to eliminating its clearly erroneous executions rules in their current form.

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

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 that the proposed rule change, together with the proposed amendments to the Plan, are necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.

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 the applicable 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 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 Halt Auction.

Finally, the Exchange believes that precluding Members from requesting review of a 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 a Member caused a Trading Halt Auction 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.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. 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 increase 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

Written comments were neither solicited nor received.

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–BatsBZX–2016–61 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–BatsBZX–2016–61. 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–BatsBZX–2016–61 and should be submitted on or before November 22, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Brent J. Fields,

Secretary.

[FR Doc. 2016–26300 Filed 10–31–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79158; File No. SR–NASDAQ–2016–131]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Enhance the Reopening Auction Process Following a Trading Halt Declared Pursuant to the Plan To Address Extraordinary Market Volatility

October 26, 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 13, 2016, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 4120 to enhance the reopening auction process following a trading halt declared pursuant to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or ''Plan'').[3] The Exchange also proposes to amend Rule 4753 (''Nasdaq Halt Cross'') to include the proposed new terms Auction Reference Prices and Auction Collars in the definition of Order Imbalance Indicator for purposes of the reopening process after Trading Pauses initiated under Rule 4120(a)(12), and to amend Rule 11890 (''Clearly Erroneous Transactions'') to provide that a member cannot request a review of an execution arising from a Halt Auction as a clearly erroneous execution.

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

Background

The Exchange, together with the Bats BZX Exchange, Inc., Bats BYX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., Chicago Stock Exchange, Inc., the Financial Industry Regulatory Authority, Inc. (''FINRA''), Investors Exchange LLC, National Stock Exchange, Inc., NASDAQ BX, Inc., NASDAQ PHLX LLC, New York Stock Exchange LLC (''NYSE''), NYSE Arca, Inc. (''NYSE Arca''), and NYSE MKT LLC (''NYSE MKT'') (collectively with the Exchange, the ''Participants'') are parties to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Securities Exchange Act of 1934. The Participants initially filed the Plan with the Commission on April 5, 2011, which was published for notice and comment.[4] On May 24, 2012, the Participants filed an amendment to the Plan and the Plan, as amended, was approved by the Commission on May 31, 2012.[5] The Participants filed a second amendment to the Plan, which was immediately

---

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[4] *See* Securities Exchange Act Release No. 64547 (May 25, 2011), 76 FR 31647 (June 1, 2011) (File No. 4–631).

[5] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631) (''Approval Order'').

effective on January 23, 2013.[6] On February 19, 2013, the Participants filed a third amendment to the Plan, which the Commission approved on April 3, 2013.[7] The Participants filed a fourth amendment to the Plan, which was immediately effective on July 18, 2013.[8] On July 18, 2013, the Participants filed a fifth amendment to the Plan, which the Commission approved on September 26, 2013.[9] The Participants filed a sixth amendment to the Plan, which was immediately effective on December 3, 2013.[10] On February 24, 2014, the Participants filed a seventh amendment to the Plan, which the Commission approved on April 3, 2014.[11] On December 24, 2014, the Participants filed an eighth amendment to the Plan, which the Commission approved on February 19, 2015.[12] On July 31, 2015, the Participants filed a ninth amendment to the Plan to extend the pilot through April 22, 2016, and remove Chicago Board Options Exchange as a Plan Participant, which the Commission approved on October 22, 2015.[13] On February 19, 2016, the Participants filed a tenth amendment to the Plan to extend the pilot through April 21, 2017 and make one modification to the Plan, which the Commission approved on April 21, 2016.[14] On August 1, 2016, the Investors Exchange LLC filed an amendment to the Plan to be added to the roster of Participants.[15]

By letter dated September 16, 2016, the Participants filed a twelfth amendment to the Plan (''Amendment 12'') to provide that a Trading Pause[16] will continue until the Primary Listing Exchange has reopened trading using its established reopening procedures, even if such reopening is more than 10 minutes after the beginning of a Trading Pause, and to require that trading centers may not resume trading in an NMS Stock following a Trading Pause without Price Bands in such NMS Stock.[17] Specifically, the Participants propose to amend the Plan to provide that a Trading Pause will continue until the Primary Listing Exchange has reopened trading using its established reopening procedures and reports a Reopening Price. The Participants further propose in Amendment 12 to the Plan 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. In addition, to preclude potential scenarios when trading may resume without Price Bands, the Participants propose 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 in which there is no Reopening Price from the Primary Listing Exchange to use to calculate Price Bands, the Participants propose 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 in such a scenario or if the Primary Listing Exchange reopens trading on a zero bid or zero quote, or both.

In conjunction with filing Amendment 12 to the Plan, each Primary Listing Exchange committed to file rule changes with the Commission under Section 19(b) of the Exchange Act to amend its respective trading practice for automated reopenings following a Trading Pause consistent with a standardized approach agreed to by Participants that would allow for extensions of a Trading Pause if equilibrium cannot be met for a Reopening Price within specified parameters. Accordingly, the Exchange is proposing to adopt changes to its rules, as described below, to implement the reopening procedures agreed upon by the Participants.

Proposal

As a Primary Listing Exchange, Nasdaq is proposing to amend Rule 4120 to make the following changes: (i) Clarify that the Exchange has an obligation to notify the Processor immediately upon becoming aware that it is unable to reopen trading due to a systems or technology issue; (ii) delete rule text concerning phased implementation of the Plan, which has since been fully implemented; (iii) only resume trading after a Trading Pause initiated by another exchange upon receiving Price Bands from the Processor; (iv) adopt new procedures for reopening securities following a Trading Pause; and (v) amend Rule 11890, Clearly Erroneous Executions, to not allow a member to request a review of an execution arising from a Halt Auction as a clearly erroneous execution.

First, the Operating Committee has proposed in Amendment 12 to the Plan to require the Primary Listing Exchange to notify the Processor immediately upon becoming aware that it is unable to reopen trading due to a systems or technology issue. Pursuant to the proposal, trading centers may not resume trading in an NMS Stock following a Trading Pause without Price Bands in such NMS Stock. Thus, under the proposed Amendment 12, a trading center may resume trading only if there are Price Bands. Moreover, the Participants proposed in Amendment 12 to require that a Trading Pause will not end until the Primary Listing Exchange reports a Reopening Price. The Participants propose in Amendment 12 to allow trading centers to resume trading an NMS Stock in the absence of a Reopening Price only if: (i) The Primary Listing Exchange notifies the Processor that it is unable to reopen trading due to a systems or technology issue *and* (ii) the Processor has disseminated Price Bands based on a Reference Price. The Exchange is proposing to adopt this requirement to make it clear that the Exchange, acting as a Primary Listing Exchange for an NMS Stock, will notify the Processor immediately upon becoming aware that it is unable to reopen trading due to a systems or technology issue.

Second, the Exchange is proposing to delete rule text concerning phased implementation of the Plan, which has since been fully implemented. Currently, Rule 4120(a)(12)(G) describes how different Tier NMS Stocks are handled during Phase 1 of the Plan. Given that the Plan is fully implemented, the Exchange is proposing to delete the text under Rule

[6] *See* Securities Exchange Act Release No. 68953 (February 20, 2013), 78 FR 13113 (February 26, 2013) (File No. 4–631).

[7] *See* Securities Exchange Act Release No. 69287 (April 3, 2013), 78 FR 21483 (April 10, 2013) (File No. 4–631).

[8] *See* Securities Exchange Act Release No. 70273 (August 27, 2013), 78 FR 54321 (September 3, 2013) (File No. 4–631).

[9] *See* Securities Exchange Act Release No. 70530 (September, 26, 2013), 78 FR 60937 (October 2, 2013) (File No. 4–631).

[10] *See* Securities Exchange Act Release No. 71247 (January 7, 2014), 79 FR 2204 (January 13, 2014) (File No. 4–631).

[11] *See* Securities Exchange Act Release No. 71851 (April 3, 2014), 79 FR 19687 (April 9, 2014) (File No. 4–631).

[12] *See* Securities Exchange Act Release No. 74323 (February 19, 2015), 80 FR 10169 (February 25, 2015) (File No. 4–631).

[13] *See* Securities Exchange Act Release No. 76244 (October 22, 2015), 80 FR 66099 (October 28, 2015) (File No. 4–631).

[14] *See* Securities Exchange Act Release No. 77679 (April 21, 2016), 81 FR 24908 (April 27, 2016) (File No. 4–631).

[15] *See* Securities Exchange Act Release No. 78703 (August 26, 2016), 81 FR 60397 (September 1, 2016) (File No. 4–631).

[16] Unless otherwise specified, the terms used herein have the same meaning as set forth in the Plan.

[17] *See* letter from Elizabeth K. King, General Counsel, NYSE, to Brent J. Fields, Secretary, Commission, dated September 16, 2016.

4120(a)(12)(G) that concerns phases the Plan's implementation that have concluded.

Third, the Exchange is proposing to adopt the requirement of Amendment 12 of the Plan, as discussed above, to only resume trading after a Trading Pause initiated by another exchange upon receiving Price Bands from the Processor. As noted above, Amendment 12 proposes to prohibit trading centers from resuming trading in an NMS Stock following a Trading Pause without Price Bands in such NMS Stock. The Participants believe that if a Primary Listing Exchange is unable to reopen trading due to a systems or technology issue, trading should be permitted to resume in that NMS Stock.

Fourth, the Exchange is proposing to adopt new procedures for reopening securities following a Trading Pause. Each of the Participants that are Primary Listing Exchanges are adopting uniform processes for reopening NMS Stocks for which they are the Primary Listing Exchange following a Trading Pause. Currently, Rule 4120(a)(12)(H) provides the process by which the Exchange will resume trading after a Trading Pause. Specifically, the rule provides that at the end of a Trading Pause the Exchange shall reopen the security in a manner similar to the procedures set forth in Rule 4753. Rule 4753 provides the Nasdaq Halt Cross process by which a security that is subject to a trading halt is released from the halt to resume trading. Rule 4120(a)(12)(H) further provides that, following a Trading Pause that is triggered at or after 3:50 p.m. a stock shall reopen via a LULD Closing Cross pursuant to Rule 4754(b)(6),[18] which provides LULD-specific Closing Cross procedures following a Trading Pause.[19]

The Exchange is proposing a new process for resuming trading after a Trading Pause under proposed Rule 4120(c)(10) that will provide for an initial auction period and two additional auction periods with widening collars should the security fail to conclude each auction period. For any such security listed on Nasdaq, prior to terminating the pause, there will be a 5-minute ''Initial Display Only Period'' during which market participants may enter quotations and orders in that security in Nasdaq systems, and during which Nasdaq will establish the ''Auction Reference Price.'' The Auction Reference Price is determined by, for a Limit Down triggered pause, the Lower Band price of the LULD Band in place at the time the trading pause was triggered; or for a Limit Up triggered pause, the Upper Band price of the LULD Band in place at the time the trading pause was triggered. During the Initial Display Only Period, Nasdaq will also determine the upper and lower ''Auction Collar'' prices, which are calculated in the following manner:

• For a Limit Down triggered pause, the lower Auction Collar price is derived by subtracting 5% of the Auction Reference Price, rounded to the nearest minimum price increment,[20] or in the case of securities priced $3 [21] or less, $0.15, from the Auction Reference Price, and the upper Auction Collar price is the Upper Band price on the LULD Band in place at the time the trading pause was triggered.

• For a Limit Up triggered pause, the upper Auction Collar price is derived by adding 5% of the Auction Reference Price, rounded to the nearest minimum price increment, or in the case of securities priced $3 or less, $0.15, from the Auction Reference Price, and the lower Auction Collar price is the Lower Band price of the LULD Band in place at the time the trading pause was triggered.

At the conclusion of the Initial Display Only Period, the security will be released for trading unless, at the end of an Initial Display Only Period, Nasdaq detects an order imbalance in the security. In that case, Nasdaq will extend the Display Only Period for an additional 5-minute period (''Extended Display Only Period''), and the Auction Collar prices will be adjusted as follows:

• If the Display Only Period is extended because the calculated price at which the security would be released for trading is below the lower Auction Collar price or all sell market orders would not be executed in the cross, then the new lower Auction Collar price is derived by subtracting 5% of the initial Auction Reference Price, which was rounded to the nearest minimum price increment, or in the case of securities priced $3 or less, $0.15, from the previous lower Auction Collar price, and the upper Auction Collar price will not be changed.

• If the Display Only Period is extended because the calculated price at which the security would be released for trading is above the upper Auction Collar price or all buy market orders would not be executed in the cross, then the new upper Auction Collar price is derived by adding 5% of the initial Auction Reference Price, which was rounded to the nearest minimum price increment, or in the case of securities priced $3 or less, $0.15, to the previous upper Auction Collar price, and the lower Auction Collar price will not be changed.

At the conclusion of the Extended Display Only Period, the security will be released for trading unless, at the end of the Extended Display Only Period, Nasdaq detects an order imbalance in the security. In that case, Nasdaq will further extend the Display Only Period, continuing to adjust the Auction Collar prices every five minutes in the manner described in the bullet above until the security is released for trading. Nasdaq shall release the security for trading at the first point there is no order imbalance.

For purposes of the process under Rule 4120(c)(10), upon completion of the cross calculation an order imbalance shall be established as follows:

• The calculated price at which the security would be released for trading is above (below) the upper (lower) Auction Collar price calculated under paragraphs (A), (B), or (C) of Rule 4120(c)(10); or

• All market orders would not be executed in the cross.

Thus, if there is an imbalance of market orders, or if the Reopening Price would be outside of specified Auction Collar thresholds, as described above, 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 Auction Collar thresholds or if the reopening auction would be priced outside of the applicable Auction Collar thresholds, Nasdaq 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

[18] Rule 4754(b)(6) provides the closing process to be followed when a Trading Pause is triggered at or after 3:50 p.m. and before 4 p.m.

[19] Rule 4120(c)(7)(A) describes the 5-minute Display Only Period, which must occur prior to the release of a security from a halt arising under Rule 4120(a)(1), (4), (5), (6), (9), (10), or (11), or (12)(F). In light of the proposed new process, the Exchange is eliminating reference to Rule 4120(a)(12)(F) from the rule.

[20] The term ''minimum price increment'' means $0.01 in the case of a System Security priced at $1 or more per share, and $0.0001 in the case of a System Security priced at less than $1 per share. *See* Rule 4701(k). Thus, if adding 5% of the initial Auction Reference Price to the Auction Collar would result in a tenth of a penny, the Exchange would round down to the nearest penny when the calculation results in one to four tenths of a penny and the Exchange would round up to the nearest penny when the calculation results in five to nine tenths of a penny.

[21] The Exchange determines the price of a security based on the security's prior day closing price. The security retains its classification as either greater or less than $3 for the remainder of the trading day, and it is not adjusted intra-day.

side of the market on which there is buying or selling pressure by the same amount as the Initial Display Only Period.

The Exchange is also amending Rule 4120(a)(12)(H) to harmonize rule text concerning Trading Pauses in the last ten minutes of regular trading hours. As noted above, following a Trading Pause that is triggered at or after 3:50 p.m. a stock shall reopen via a LULD Closing Cross pursuant to Rule 4754(b)(6). In Amendment 12, the Participants are adding clarifying text to Section VII(C) stating that the requirement to attempt to execute a closing transaction instead of reopening trading applies to Trading Pauses *in existence* at 3:50 p.m. Accordingly, the Exchange is proposing to amend Rule 4120(a)(12)(H) to reflect the Plan amendment. The Exchange is also proposing new Rule 4120(a)(10)(D) to also reflect that a Trading Pause in existence at 3:50 p.m. will reopen via a LULD Closing Cross pursuant to Rule 4754(b)(6) instead of the proposed reopening procedures.

The Exchange is proposing to add new Rule 4753(a)(3)(F) to make it clear that, for purposes of the reopening process after a Trading Pause pursuant to Rule 4120(a)(12), the Exchange will disseminate the Auction Reference Price and Auction Collar prices during the reopening process as part of the Order Imbalance Indicator described under Rule 4753(a)(3), which is a message disseminated by electronic means containing information about Eligible Interest [22] and the price at which such interest would execute at the time of dissemination.

Last, the Participants have agreed that the proposed new procedures for reopening trading following a Trading Pause would eliminate the need to evaluate whether a transaction in such reopening auction would 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. Accordingly, the Exchange proposes to amend Rule 11890 to preclude members from requesting a review of a Halt Auction conducted pursuant to Rule 4120(c)(10) as a clearly erroneous execution.

[22] ''Eligible Interest'' is defined as any quotation or any order that has been entered into the system and designated with a time-in-force that would allow the order to be in force at the time of the Halt Cross. *See* Rule 4753(a)(5).

Implementation Date

The Exchange proposes to implement the proposed rule change following the Commission's approval of Amendment 12. The Exchange will announce the implementation date via a notice to be issued after the Commission's approval of this proposed rule change.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[23] in general, and furthers the objectives of Section 6(b)(5) of the Act,[24] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes that the proposed rule change, together with the proposed amendments to the Plan, are necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.

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.

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(5).

The Exchange also 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

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 Halt Auction.

Finally, the Exchange believes that precluding a member from requesting a review of an execution arising from a Halt Auction as 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 obviate the need to evaluate whether a transaction in such reopening auction would 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. 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 it is designed to increase transparency surrounding the Exchange's Trading Halt Auction process while also increasing the ability for offsetting interest to participate in an auction, which would assist in achieving pricing equilibrium in 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 either solicited or received.

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–NASDAQ–2016–131 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–NASDAQ–2016–131. 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–NASDAQ–2016–131 and should be submitted on or before November 22, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Brent J. Fields,

Secretary.

[FR Doc. 2016–26298 Filed 10–31–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79167; File Nos. SR–FICC–2016–006; SR–NSCC–2016–004]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; National Securities Clearing Corporation; Order Granting Approval of Proposed Rule Changes To Describe the Backtesting Charge and the Holiday Charge That May Be Imposed on Members

October 26, 2016.

On September 2, 2016, Fixed Income Clearing Corporation (''FICC'') and National Securities Clearing Corporation (''NSCC,'' collectively ''Clearing Agencies'') filed with the Securities and Exchange Commission (''Commission'') proposed rule changes SR–FICC–2016–006 and SR–NSCC–2016–004, respectively, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] The proposed rule changes were published for comment in the **Federal Register** on September 15, 2016.[3] The Commission did not receive any comment letters on the proposed rule changes. For the reasons discussed

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 78807 (September 9, 2016), 81 FR 63538 (September 15, 2016) (SR–FICC–2016–006); 78808 (September 9, 2016), 81 FR 63511 (September 15, 2016) (SR–NSCC–2016–004) (''Notices'').

below, the Commission is granting approval of the proposed rule changes.

I. Description of the Proposed Rule Changes

The proposed rule changes provide transparency in the FICC Government Securities Division (''GSD'') Rulebook (''GSD Rules''), the FICC Mortgage-Backed Securities Division (''MBSD'') Clearing Rules (''MBSD Rules''), and the NSCC Rules and Procedures (''NSCC Rules,'' collectively ''Clearing Agency Rules'') [4] with respect to certain margin charges that the Clearing Agencies may temporarily impose on a Clearing Agency member (''Member'') as part of such Member's Required Deposit. The charges proposed are the FICC Backtesting Charge and the NSCC Backtesting Charge (collectively, ''Backtesting Charge''), and the FICC Holiday Charge and the NSCC Bank Holiday Charge (collectively, ''Holiday Charge'').

A Clearing Agency may impose the Backtesting Charge on a Member when the Clearing Agency has observed deficiencies in the backtesting of such Member's Required Deposit over the prior 12-month period, such that the Clearing Agency determines the value-at-risk (''VaR'') margin charge being calculated for that Member may not fully address the projected liquidation losses estimated from that Member's settlement activity.

The Holiday Charge addresses the risk exposure that occurs on certain Holidays [5] when the Clearing Agency is unable to collect Required Deposit from its Members because the Board of Governors of the Federal Reserve System and banks are closed. The Clearing Agencies may impose the Holiday Charge on all Members to cover the additional day of exposure that is not contemplated in the prior day's VaR charge.[6]

A. Calculation of the Backtesting Charge

The objective of the Backtesting Charge is to increase Required Deposits for Members that are likely to experience backtesting deficiencies by an amount sufficient to maintain such Member's backtesting coverage above the 99 percent confidence threshold. Because the settlement activity and size of the backtesting deficiencies varies among impacted Members, the Clearing Agencies must assess a Backtesting Charge that is specific to each impacted Member. To do so, the Clearing Agencies examine each impacted Member's historical backtesting deficiencies observed over the prior 12-month period to identify the three largest backtesting deficiencies that have occurred during that time. The presumptive Backtesting Charge amount equals that Member's third largest historical backtesting deficiency, subject to adjustment as further described below. The Clearing Agencies stated in the Notices that they believe that applying an additional margin charge equal to the third largest historical backtesting deficiency to a Member's Required Deposit would bring the Member's historically-observed backtesting coverage above the 99 percent target.[7] If assessed, the resulting Backtesting Charge is added to the Required Deposit for such Member determined pursuant to each Clearing Agency's risk-based margining methodology, and is imposed on a daily basis for a one-month period.

This charge is only applicable to those Members whose overall 12-month trailing backtesting coverage falls below the 99 percent coverage target.

Although the third largest historical backtesting deficiency for a Member is used as the Backtesting Charge in most cases, each Clearing Agency retains discretion to adjust the charge amount based on other circumstances that may be relevant for assessing whether an impacted Member is likely to experience future backtesting deficiencies and the estimated size of such deficiencies. Examples of relevant circumstances that would be considered in calculating the final, applicable Backtesting Charge amount include material differences in the three largest backtesting deficiencies observed over the prior 12-month period, variability in the net settlement activity after the collection of the Member's Required Deposit, seasonality in observed backtesting deficiencies and observed market price volatility in excess of the Member's historical VaR charge. Based on the Clearing Agencies' assessment of the impact of these circumstances on the likelihood of, and estimated size of, future backtesting deficiencies for a Member, the Clearing Agencies may, in their discretion, adjust the Backtesting Charge for such Member in an amount that the Clearing Agencies determine to be more appropriate for maintaining such Member's backtesting results above the 99 percent coverage threshold (including a reasonable buffer).

B. Communication With Members and Imposition of the Backtesting Charge

If the Clearing Agencies determine that a Backtesting Charge should apply to a Member that was not assessed a Backtesting Charge during the immediately preceding month or that the Backtesting Charge applied to a Member during the previous month should be increased, the Clearing Agencies will notify the Member on or around the 25th calendar day of the month prior to the assessment of the Backtesting Charge, or prior to the increase to the Backtesting Charge.

Each Clearing Agency imposes the Backtesting Charge as an additional charge applied to each impacted Member's Required Deposit on a daily basis for a one month period, and reviews each applied Backtesting Charge each month. If an impacted Member's trailing 12-month backtesting coverage exceeds 99 percent (without taking into account historically-imposed Backtesting Charges), the Backtesting Charge is removed.

C. Holidays and the Required Deposit

As described above, the Clearing Agencies determine their Members' Required Deposit amounts in each Clearing Agency using a risk-based margin methodology that is intended to capture market price risk, assuming that a portfolio would take three days to liquidate or hedge in normal market conditions.

The Holiday Charge may be applied on the business day prior to any Holiday. This charge approximates the exposure that a Member's trading activity on the applicable Holiday could pose to the Clearing Agency. Because the Clearing Agencies cannot collect margin on the Holiday, the Holiday Charge is due on the business day prior to the applicable Holiday.

[4] The GSD Rules, MBSD Rules, and NSCC Rules are available at *http://www.dtcc.com/legal/rules-and-procedures.* Capitalized terms used herein and not otherwise defined shall have the meaning assigned to such terms in the Clearing Agency Rules, as applicable.

[5] For NSCC, ''Holiday'' means any day on which equities markets are open for trading, but the Board of Governors of the Federal Reserve System observes a holiday and banks are closed. Exhibit 5 for SR–NSCC–2016–004, *available at https://www.sec.gov/rules/sro/nscc/2016/34-78808-ex5.pdf.* For FICC, ''Holiday'' means any day on which FICC is closed, but the day is not observed as a holiday by the Securities Industry and Financial Markets Association and the bond markets are open. Exhibit 5 for SR–FICC–2016–006, *available at https://www.sec.gov/rules/sro/ficc/2016/34-78807-ex5.pdf.*

[6] The description of the proposed rule changes herein is based on the statements prepared by the Clearing Agencies in the Notices. Notices, *supra* note 3, 81 FR at 63538–40 and 63512–13.

[7] Each occurrence of a backtesting deficiency reduces a Member's overall backtesting coverage by 0.4 percent (1 exception/250 observation days). Accordingly, an increase equal to the third largest backtesting deficiency would bring backtesting coverage up to 99.2 percent. Notices, *supra* note 3, 81 FR at 63539 and 63512.

D. Calculation and Notification of the Holiday Charge

Each Clearing Agency would determine the appropriate methodology for calculating the Holiday Charge in advance of each applicable Holiday. Potential methodologies for calculating the Holiday Charge include, for example, time scaling of the VaR charge [8] or application of stress scenarios that cover potential market price risk exposure that may not be appropriately covered by scaling the VaR charge. The Clearing Agencies would establish a methodology for calculating each Holiday Charge that would take into consideration the market conditions prevailing at that time in order to permit the Clearing Agencies to calculate a Holiday Charge that appropriately estimates the risk that may be presented to the Clearing Agency on the applicable Holiday, when Members' Required Deposit cannot be collected. The Holiday Charge would represent a percentage increase of the volatility charge on the business day prior to the Holiday, and such percentage increase applies uniformly to all Members. This means that if the Holiday Charge is levied, the same methodology (*i.e.,* formula) is applied to all Members (that is, the Holiday Charge is not a set dollar amount applied to all Members).

Members would be notified of the applicable methodology by an Important Notice issued no later than 10 business days prior to the application the Holiday Charge, and the charge is collected on the business day prior to the applicable Holiday. The Holiday Charge is removed from the Required Deposit on the business day following the Holiday.

II. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act [9] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization. The Commission believes the proposal is consistent with Section 17A(b)(3)(F) of the Act and Rules 17Ad–22(b)(1) and (b)(2),[10] as described in detail below.

A. Consistency With Section 17A

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds that are within the custody or control of the clearing agency.[11] By incorporating the Backtesting Charge and Holiday Charge into the Rules, the proposed changes help protect the Clearing Agencies from potential losses in the event that a Member defaults. Specifically, the Backtesting Charge enables the Clearing Agencies to collect additional funds when their current margin collections may be insufficient, as indicated by backtesting deficiencies. Meanwhile, the Holiday Charge enables the Clearing Agencies to collect margin in advance of Holidays when the Clearing Agencies would be unable to collect margin. Therefore, by enabling the Clearing Agencies to better assess and collect funds, as the Clearing Agencies deem necessary, the charges would promote the safeguarding of securities and funds that are within the custody or control of the clearing agency, consistent with the requirements of the Exchange Act, in particular Section 17A(b)(3)(F).

B. Consistency With Rule 17Ad–22(b)(1)

Rule 17Ad–22(b)(1) under the Act requires a clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to measure its credit exposures to its participants at least once a day and limit its exposures to potential losses from defaults by its participants under normal market conditions, so that the operations of the clearing agency would not be disrupted and non-defaulting participants would not be exposed to losses that they cannot anticipate or control.[12] The Backtesting Charge and Holiday Charge are enhancements to the way the Clearing Agencies measure their credit exposure to Members and, ultimately, account for potential increases in exposure by collecting additional margin, as deemed necessary by the Clearing Agencies, to help limit potential losses from a Member default in normal market conditions. Therefore, the proposed rule changes are consistent with Rule 17Ad–22(b)(1) under the Act.[13]

C. Consistency With Rule 17Ad–22(b)(2)

Rule 17Ad–22(b)(2) under the Act requires a clearing agency to maintain and enforce written policies and procedures reasonably designed to use margin requirements to limit its credit exposures to participants under normal market conditions.[14] The Backtesting Charge and Holiday Charge are components of the margin requirement that the Clearing Agencies collect from Members, in the form of Required Deposits, to help limit the Clearing Agencies' credit exposure to Members in normal market conditions. Therefore, the proposed rule changes are consistent with Rule 17Ad–22(b)(2) under the Act.[15]

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposals are consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act [16] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that proposed rule changes SR–FICC–2016–006 and SR–NSCC–2016–004 be, and hereby are, APPROVED.[17]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Brent J. Fields,

Secretary.

[FR Doc. 2016–26303 Filed 10–31–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79157; File No. SR–MIAX–2016–38]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Fees and Credits for Transactions Involving Complex Orders

October 26, 2016.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4

---

[8] Market price risk and volatility increase with time as there is a greater potential for loss. This additional risk exposure is often approximated by time scaling of volatility by multiplying square root of the additional period of risk (*e.g.,* if the VaR charge is calibrated to a 3-day risk horizon, an additional day of exposure could be approximated by $\sqrt{4/3}$ VaR charge).

[9] 15 U.S.C. 78s(b)(2)(C).

[10] 15 U.S.C. 78q–1(b)(3)(F); 17 CFR 240.17Ad–22(b)(1); 17 CFR 240.17Ad–22(b)(2).

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] 17 CFR 240.17Ad–22(b)(1).

[13] *Id.*

[14] 17 CFR 240.17Ad–22(b)(2).

[15] *Id.*

[16] 15 U.S.C. 78q–1.

[17] In approving the proposed rule change, the Commission considered the proposals' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

thereunder,[2] notice is hereby given that on October 21, 2016, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the ''Fee Schedule'').

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to adopt fees and credits for transactions involving complex orders. The Securities and Exchange Commission (''SEC'' or ''Commission'') recently approved Exchange rules [3] that authorize and govern the trading of complex orders [4] on MIAX utilizing the MIAX System.[5] Accordingly, the Exchange is proposing to adopt certain fees and credits that will apply to Exchange Members [6] for transactions involving complex orders. All complex order fees will be charged on a per contract per side basis.

Market Maker Transaction Fees

Section (1)(a)(i) of the Fee Schedule sets forth the Exchange's Market Maker Sliding Scale for Market Maker Transaction Fees (the ''Sliding Scale''). The Sliding Scale assesses a per contract transaction fee on a Market Maker [7] for the execution of simple orders and quotes (collectively, ''simple orders''). The amount of the transaction fee is based on the Market Maker's percentage of total national market maker volume in an options class that trades on the Exchange during a particular calendar month. The Sliding Scale applies to all Market Makers for transactions in all products (except for mini-options, for which there are separate product fees), with fees established for option classes in the Penny Pilot Program [8] (''penny option classes'') and separate fees for non-penny option classes.

The Exchange is proposing to use the same Sliding Scale structure to establish per contract transaction fees for executions in complex orders. More specifically, the Exchange is proposing to use the same tiers and percentage thresholds that it uses for the execution of simple orders for the execution of complex orders and quotes (collectively, ''complex orders''), and will aggregate the volume executed by Market Makers in both simple orders and complex orders for purposes of determining the applicable tier and corresponding per contract transaction fee amount.[9]

Since the Exchange will aggregate the number of contracts executed in both simple orders and complex orders in its calculation of the Market Maker's relevant tier, Market Maker transaction fees in both simple orders and complex orders will be incrementally reduced once the Market Maker reaches a higher tier. The Exchange believes that aggregating simple and complex volume will provide a direct benefit to Market Makers, because it provides Market Makers with enhanced potential to lower their incremental transaction fees on the Exchange. Furthermore, it should encourage Market Makers to provide complex order liquidity on the Exchange because their executed volume in complex orders will enhance their ability to achieve discounted transaction fees in simple orders.

Since the Exchange provides discounted transaction fees for Members and their qualified Affiliates that achieve certain volume thresholds through the submission of Priority Customer [10] orders under the Exchange's Priority Customer Rebate Program (''PCRP''),[11] the Sliding Scale contains two tables: One setting forth the transaction fees applicable to Members and their Affiliates [12] that are in PCRP volume Tier 3 or higher; and the other setting forth the transaction fees applicable to Members and their Affiliates that are not in PCRP volume

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 79072 (October 7, 2016), 81 FR 71131 (October 14, 2016) (SR–MIAX–2016–26).

[4] A ''complex order'' is any order involving the concurrent purchase and/or sale of two or more different options in the same underlying security (the ''legs'' or ''components'' of the complex order), for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purposes of executing a particular investment strategy. A complex order can also be a ''stock-option'' order, which is an order to buy or sell a stated number of units of an underlying security coupled with the purchase or sale of options contract(s) on the opposite side of the market, subject to certain contingencies set forth in the proposed rules governing complex orders. *See* Securities Exchange Act Release No. 78620 (August 18, 2016), 81 FR 58770 (August 25, 2016) (SR–MIAX–2016–26).

[5] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[6] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[7] The term ''Market Makers'' refers to Lead Market Makers (''LMMs''), Primary Lead Market Makers (''PLMMs''), and Registered Market Makers (''RMMs'') collectively. *See* Exchange Rule 100. A Directed Order Lead Market Maker (''DLMM'') and Directed Primary Lead Market Maker (''DPLMM'') is a party to a transaction being allocated to the LMM or PLMM and is the result of an order that has been directed to the LMM or PLMM. *See* Fee Schedule note 2.

[8] See Securities Exchange Act Release No. 78080 (June 15, 2016), 81 FR 40377 (June 21, 2016) (SR–MIAX–2016–16).

[9] The calculation of the volume thresholds does not include QCC Orders, PRIME AOC Responses, and PRIME Participating Quotes or Orders. For a discussion of these exclusions, *see* Securities Exchange Act Release No. 78299 (July 12, 2016), 81 FR 46734 (July 18, 2016) (SR–MIAX–2016–20).

[10] The term ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). A ''Priority Customer Order'' means an order for the account of a Priority Customer. *See* Exchange Rule 100.

[11] Under the PCRP, MIAX credits each Member the per contract amount resulting from each Priority Customer order transmitted by that Member which is executed electronically on the Exchange in all multiply-listed option classes (excluding QCC Orders, mini-options, Priority Customer-to-Priority Customer Orders, PRIME AOC Responses, PRIME Contra-side Orders, PRIME Orders for which both the Agency and Contra-side Order are Priority Customers, and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in MIAX Rule 1400), provided the Member meets certain percentage thresholds in a month as described in the Priority Customer Rebate Program table. *See* Fee Schedule, Section (1)(a)(iii).

[12] For purposes of the MIAX Options Fee Schedule, the term ''Affiliate'' means an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A (''Affiliate''). *See* Fee Schedule note 1.

Tier 3 or higher. The Exchange is proposing to maintain that same, two table construct, and establish a per contract transaction fee for complex orders per tier level. Although the proposed per transaction fees for complex orders will be included in both tables (*i.e.,* one for Members and their Affiliates that are in PCRP volume Tier 3 or higher and the other for Members and their Affiliates that are not in PCRP volume Tier 3 or higher), the per contract fees for complex orders will be the same in each table. Furthermore, the Exchange is not proposing a different maker and taker fee in each tier for complex orders. Instead, the Exchange will assess one per contract fee for complex orders in each tier for penny option classes, and one per contract fee for complex orders in non-penny option classes, with a surcharge for removing liquidity, as described below. The Exchange believes that, with respect to transaction fees for complex orders, it is appropriate to distinguish between (and thus have different transaction fee amounts for) penny option classes and non-penny option classes, as is the case with the current Fee Schedule for transaction fees for simple orders. Accordingly, the Exchange is proposing separate per contract transaction fees for penny option classes and non-penny option classes for complex orders. Specifically, the Exchange would charge a Market Maker a per contract fee in penny option classes of: $0.25 in Tier 1, $0.19 in Tier 2, $0.12 in Tier 3, $0.07 in Tier 4, $0.05 in Tier 5. The Exchange would charge a Market Maker a per contract fee in non-penny option classes of: $0.29 in Tier 1, $0.23 in Tier 2, $0.16 in Tier 3, $0.11 in Tier 4, $0.09 in Tier 5.

The proposed Market Maker transaction fees are generally in line with the Market Maker transaction fees charged by other exchanges for executing complex orders.[13] The Exchange believes that the proposed transaction fees for complex orders are reasonable, and have been set at an initial level that is favorable to Market Makers and are designed to encourage Market Makers to provide complex order liquidity on the Exchange.

For simple orders, the Sliding Scale assesses a per contract transaction fee, which is based upon whether the Market Maker is a ''maker'' or a ''taker.'' [14] As an incentive for Market Makers to provide liquidity on the Exchange, the Exchange's ''maker'' fees are lower than the ''taker'' fees. The Exchange is not proposing to distinguish between a ''maker'' and a ''taker'' for complex order executions as it does in the traditional construct for simple orders. Rather, the Exchange proposes to adopt a surcharge of $0.08 per executed contract for executions in complex orders assessed to a Market Maker and all other market participants except Priority Customers when it removes liquidity by trading against a Priority Customer order that is resting on the Strategy Book.[15] Market Maker complex orders resting on the Strategy Book before executing against a Priority Customer order would not be assessed the $0.08 per contract surcharge, as reflected in the below tables. The Exchange believes that this $0.08 surcharge is a reasonable alternative to the maker/taker pricing structure in place for simple orders, and is substantially similar in structure and amount to a CBOE surcharge of the same type.[16]

All fees assessed under the Sliding Scale will be assessed on a per contract/per side basis. The fees will apply to complex orders when those complex orders are matched against other complex orders on the Strategy Book, and will also apply, to the complex side of the trade, when they leg into and match against simple orders in the simple order book. Additionally, for the avoidance of doubt, when legging into the simple order book, the contracts that were entered directly in to the simple order book will be subject to all standard transaction fees, marketing fees, rebates, and credits, as set forth in the Exchange's Fee Schedule and as applicable to simple orders.

The revised Market Maker Sliding Scale tables proposed by the Exchange will be as follows (with new text in italics):

MEMBERS AND THEIR AFFILIATES [17] IN PRIORITY CUSTOMER REBATE PROGRAM VOLUME TIER 3 OR HIGHER

	Tier	Percentage thresholds	*Simple*				*Complex*		
			Per contract fee for penny classes		Per contract fee for non-penny classes		*Per contract fee for penny classes*	*Per contract fee for non-penny classes*	*Per contract surcharge for removing liquidity against a resting priority customer complex order on the strategy book for penny and non-penny classes*
			Maker *	Taker	Maker *	Taker			
All MIAX Market Makers	1	0.00%–0.075%	$0.21	$0.23	$0.25	$0.30	*$0.25*	*$0.29*	*$0.08*
	2	Above 0.075%–0.60%	$0.15	$0.22	$0.19	$0.27	*$0.19*	*$0.23*	*$0.08*
	3	Above 0.60%–1.00%	$0.08	$0.15	$0.12	$0.20	*$0.12*	*$0.16*	*$0.08*
	4	Above 1.00%–1.50%	$0.04	$0.06	$0.08	$0.12	*$0.07*	*$0.11*	*$0.08*
	5	Above 1.50%	$0.02	$0.04	$0.06	$0.10	*$0.05*	*$0.09*	*$0.08*

[13] *See, e.g.,* CBOE Fees Schedule Options Transaction Fees; NASDAQ PHLX LLC (''Phlx'') Pricing Schedule, Section II; International Securities Exchange LLC (''ISE'') Schedule of Fees, Section II.

[14] *See* Securities Exchange Act Release No. 78519 (August 9, 2016), 81 FR 54162 (August 15, 2016) (SR–MIAX–2016–21).

[15] The ''Strategy Book'' is the Exchange's electronic book of complex orders and complex quotes. *See* Exchange Rule 518(a)(17).

[16] *See* CBOE Fees Schedule, Complex Taker Fee, and note 35. The Exchange notes that, although its base fee is slightly higher (with a similar complex fee approach), the Exchange believes that this is fair and equitable because the Exchange offers technology with unique risk mitigation features not available elsewhere, such as the Implied Away Best Bid or Offer (''ixABBO'') Price Protection. *See* Exchange Rule 518.05(d).

[17] For purposes of the MIAX Options Fee Schedule, the term ''Affiliate'' means an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A (''Affiliate'').

MEMBERS AND THEIR AFFILIATES NOT IN PRIORITY CUSTOMER REBATE PROGRAM VOLUME TIER 3 OR HIGHER

	Tier	Percentage thresholds	*Simple*				*Complex*		
			Per contract fee for penny classes		Per contract fee for non-penny classes		*Per contract fee for penny classes*	*Per contract fee for non-penny classes*	*Per contract surcharge for removing liquidity against a resting priority customer complex order on the strategy book for penny and non-penny classes*
			Maker *	Taker	Maker *	Taker			
All MIAX Market Makers	1	0.00%–0.075%	$0.23	$0.25	$0.27	$0.32	*$0.25*	*$0.29*	*$0.08*
	2	Above 0.075%–0.60%	$0.17	$0.24	$0.21	$0.29	*$0.19*	*$0.23*	*$0.08*
	3	Above 0.60%–1.00%	$0.10	$0.17	$0.14	$0.22	*$0.12*	*$0.16*	*$0.08*
	4	Above 1.00%–1.50%	$0.06	$0.08	$0.10	$0.14	*$0.07*	*$0.11*	*$0.08*
	5	Above 1.50%	$0.04	$0.06	$0.08	$0.12	*$0.05*	*$0.09*	*$0.08*

Other Market Participant Transaction Fees

Section (1)(a)(ii) of the Fee Schedule sets forth, in a single table format, transaction fees for Other Market Participants, including Priority Customers, Public Customers [18] that are not Priority Customers, non-MIAX Market Makers, non-Member Broker-Dealers, and Firms [19] (the ''Fee Table''). The Fee Table currently assesses on participants that are non-MIAX Market Makers a per contract transaction fee for simple order executions. The Fee Table applies to the listed participants for transactions in all products (except mini-options, for which there are separate product fees), with fees established for penny option classes and separate fees for non-penny option classes.

The Exchange is proposing to use the same Fee Table structure to establish per contract transaction fees for executions in complex orders. The Exchange is also proposing to assess the same per-contract transaction fee amounts that are set forth in the Fee Table for execution of simple orders for the execution of complex orders. Thus, as proposed, a participant would be charged the same fee per contract for executing a complex order as it would for executing a simple order for the same option class for the same participant type. Accordingly, the Exchange would charge a Member: $0.00 per contract per complex order executed in both penny option classes and non-penny option classes for a Priority Customer; $0.47 per contract per complex order executed in a penny option class for a Public Customer that is not a Priority Customer, for a non-MIAX Market Maker, and for a non-Member Broker-Dealer (and $0.75 per contract per complex order executed in a non-penny option class for each of those participant types); $0.45 per contract per complex order executed in a penny option class for a Firm (and $0.75 per contract per complex order executed in a non-penny option class for a Firm). The Exchange believes that the proposed fees for complex orders are reasonable and appropriate because they apply to all similarly situated participants equally. The Exchange's proposal to assess the same fees for simple and complex orders to other market participants (listed in Section (1)(a)(ii) of the Fee Schedule) for complex orders is reasonable and not unfairly discriminatory because the fees apply equally to all similarly situated market participants. Just as with the current fees assessed for simple orders in Section (1)(a)(ii), the PCRP tier discounts will not apply to these participants because Market Makers, who qualify for the discounts, have quoting and other obligations that these other market participants do not have, and the Exchange believes that the PCRP tier discounts are thus equitable and not unfairly discriminatory.[20]

The Exchange also proposes to assess the same $0.08 per contract surcharge that it assesses on Market Makers for removing liquidity against a resting Priority Customer on the Strategy Book on other market participants, specifically: (i) Public Customers that are not Priority Customers; (ii) non-MIAX Market Makers; (iii) non-Member Broker-Dealers; and (iv) Firms. The purpose of this proposed surcharge is to encourage Members to add liquidity to the Strategy Book, and to recoup costs associated with the execution of complex orders on the Strategy Book. Moreover, the Exchange believes that the proposed fee structure may also narrow the MIAX Bid and Offer (''MBBO'') on the Strategy Book because assessing the surcharge only on participants removing liquidity effectively subsidizes, and thus encourages, the posting of liquidity. The Exchange believes that this fee structure will also provide MIAX Market Makers with greater incentive to either match or improve upon the best price displayed on the Strategy Book, all to the benefit of investors and the public in the form of improved execution prices.

The revised Fee Table proposed by the Exchange will be as follows:

[18] The term ''Public Customer'' means a person that is not a broker or dealer in securities. *See* Exchange Rule 100.

[19] A ''Firm'' fee is assessed on a MIAX Electronic Exchange Member ''EEM'' that enters an order that is executed for an account identified by the EEM for clearing in the Options Clearing Corporation (''OCC'') ''Firm'' range. *See* Fee Schedule, Section (1)(a)(ii).

[20] The Commission notes that the Exchange currently offers a discount to the standard option transaction fees for simple orders for Members that qualify for the PCRP volume Tier 3 or higher in Section (1)(a)(ii). The Exchange is not proposing to offer that discount to the standard option transaction fees for complex orders. *See* footnotes 4, 5, and 8–13 in Section (1)(a)(ii) of the Fee Schedule.

OTHER MARKET PARTICIPANT TRANSACTION FEES

Types of Other Market Participants	Standard Options Transaction Fee *for Simple and Complex Orders* (per executed contract)		*Per Contract Surcharge for Removing Liquidity Against a Resting Priority Customer Complex Order on the Strategy Book for Penny and Non-Penny Classes*	Mini Options Transaction Fee (per executed contract)		These fees will apply to all option classes raded on MIAX
	Penny Classes	Non-Penny Classes		Penny Classes	Non-Penny Classes	
Priority Customer	$0.00	$0.00	*$0.00*	$0.000	$0.000	There is no fee assessed to an Electronic Exchange Member (an "EEM," as defined in MIAX Rule 100) that enters an order that is executed for the account of a Priority Customer.
Public Customer that is Not a Priority Customer.	$0.47	$0.75	*$0.08*	$0.05	$0.07	This fee is assessed to an EEM that enters an order that is executed for the account of a Public Customer [21] that does not meet the criteria for designation as a Priority Customer. This fee will also be charged to an EEM that enters an order for the account of a Public Customer that has elected to be treated as a Voluntary Professional.[22]
Non-MIAX Market Maker	$0.47	$0.75	*$0.08*	$0.045	$0.07	This fee is assessed to an EEM that enters an order that is executed for the account of a non-MIAX market maker. A non-MIAX market maker is a market maker registered as such on another options exchange.
Non-Member Broker-Dealer	$0.47	$0.75	*$0.08*	$0.045	$0.07	This fee is assessed to an EEM that enters an order that (i) is executed for the account of a non-Member Broker-Dealer, and (ii) is identified by the EEM for clearing in the Options Clearing Corporation ("OCC") "customer" range. A non-Member Broker-Dealer is a broker-dealer that is not a member of the OCC, and that is not registered as a Member at MIAX or another options exchange.
Firm	$0.45	$0.75	*$0.08*	$0.04	$0.07	This fee is assessed to an EEM that enters an order that is executed for an account identified by the EEM for clearing in the OCC "Firm" range.

The Exchange currently offers a discount to the standard option transaction fees for simple orders for Members that qualify for the PCRP volume Tier 3 or higher. The Exchange is not proposing to offer that discount to the standard option transaction fees for complex orders. Thus, the Exchange is proposing to amend Footnotes 4, 5, and 8–13 in Section (1)(a)(ii) of the Fee Schedule to explicitly state that these discounts only apply for standard options in simple order executions. Additionally, pursuant to Footnote 8 of the Fee Schedule, the Exchange currently assesses Members a $0.48 per contract transaction fee (and a $0.50 per contract transaction fee for non-MIAX market makers) for transactions that occur on or after September 1, 2016 and extending through October 31, 2016 in options overlying EEM, GLD, IWM, QQQ, and SPY. The Exchange is not proposing to apply that transaction fee to complex orders. Thus, the Exchange is proposing to further amend Footnote 8 in Section (1)(a)(ii) of the Fee Schedule to explicitly state that such fees only apply for standard options in simple order executions.

Priority Customer Rebate Program

The Exchange also proposes to amend the PCRP contained in Section 1)a)iii) of the Fee Schedule by adopting per contract credits for complex orders. Currently, with respect to simple orders, the Exchange credits each Member the per contract amount set forth in the table below resulting from each Priority Customer order transmitted by that Member which is executed electronically on the Exchange in all multiply-listed option classes (excluding QCC Orders, mini-options, Priority Customer-to-Priority Customer Orders, PRIME AOC Responses, PRIME Contra-side Orders, PRIME Orders for which both the Agency and Contra-side Order are Priority Customers, and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in MIAX Rule 1400), provided the Member meets certain volume thresholds in a month as described below. The volume thresholds are calculated based on the customer average daily volume over the course of the month. Volume is recorded for and credits are delivered to the Member that submits the order to the Exchange. The Exchange proposes to extend this per contract credit to executions in complex orders.

The Exchange proposes to apply the same volume tier thresholds in the PCRP for complex orders that it

[21] The term "Public Customer" means a person that is not a broker or dealer in securities. *See* Exchange Rule 100.

[22] The term "Voluntary Professional" means any Public Customer that elects, in writing, to be treated in the same manner as a broker or dealer in securities for purposes of Rule 514, as well as the Exchange's schedule of fees. *See* Exchange Rule 100.

currently applies to simple orders. In the same manner that the Exchange proposes to aggregate simple order volume and complex order volume of Market Makers towards the volume tiers in the Sliding Scale, the Exchange proposes to aggregate contract volume for both simple and complex orders in the calculation of the PCRP volume tier threshold applicable to each transaction, and to effect the same exclusions for transactions involving both simple and complex orders, as applicable, with respect to the PCRP volume tier calculation.[23]

The Exchange proposes to distinguish the amount of the proposed per contract credits in the PCRP for complex orders from the credits currently available to simple orders, except for Tier 1 transactions, for which there would be a $0.00 per contract credit for both simple and complex orders. The proposed per contract credits for complex orders would be: $0.21 for PCRP Tier 2 transactions; $0.24 for PCRP Tier 3 transactions, and $0.25 for PCRP Tier 4 transactions, respectively. The proposed per contract credits for complex orders are greater than the current per contract credits for simple orders. As a new entrant in the complex order marketplace, the Exchange believes that it is appropriate to establish aggressive per contract credits in order to attract order flow in this new segment of the Exchange.

For simple orders, the Exchange currently assesses different PCRP credit amounts for executions in the MIAX Select Symbols[24] versus non-MIAX Select Symbols. The PCRP table in the Fee Schedule will reflect these different credits in simple orders for MIAX Select Symbols versus non-MIAX Select Symbols. The Exchange, however, does not believe it is necessary at this time to distinguish the amount of the proposed PCRP credits for executions in the MIAX Select Symbols versus non-MIAX Select Symbols for complex orders, and thus the per contract credit for complex orders will be the same for transactions involving complex orders in both MIAX Select Symbols and non-MIAX Select Symbols.

The Exchange is not proposing to establish at this time a price improvement mechanism for complex orders, such as the Exchange has for simple orders, known as MIAX PRIME.[25] Thus, the Exchange proposes to amend the narrative portion of Section 1)a)iii) to state that, for each Priority Customer order submitted into a PRIME auction as a PRIME agency simple order, MIAX shall credit each Member at the separate per contract rate for PRIME agency simple orders; however, no rebates will be paid if the PRIME agency simple order executes against a contra-side order which is also a Priority Customer. The purpose of this proposed amendment is to explicitly state that these provisions apply only to simple orders, and not to complex orders.

The Exchange currently credits each MIAX ''Qualifying Member''[26] $0.03 per contract (except exclusions)[27] resulting from each Priority Customer order that falls within the PCRP volume Tier 1, as set forth below. The Exchange believes that it is appropriate to extend this credit to complex orders. Thus, the Exchange proposes to amend the narrative portion of Section 1)a)iii) to state that such credits will apply to both simple and complex order executions.

The revised PCRP table proposed by the Exchange will be as follows:

Origin	Tier	Percentage thresholds of national customer volume in multiply-listed options classes listed on MIAX (monthly)	Per contract credit for simple orders in non-MIAX select symbols	Per contract credit for simple orders in MIAX select symbols	Per contract credit for prime agency order	Per contract credit for complex orders
Priority Customer	1	0.00%–0.50%	$0.00	$0.00	$0.10	*$0.00*
	2	Above 0.50%–1.20%	0.10	0.10	0.10	*0.21*
	3	Above 1.20%–1.75%	0.15	0.20	0.10	*0.24*
	4	Above 1.75%	0.21	0.24	0.10	*0.25*

Professional Rebate Program

Under the Professional Rebate Program (''PRP''), the Exchange credits each Member the per contract amount listed in the table below resulting from any contracts executed from an order submitted by a Member for the account(s) of a (i) Public Customer that is not a Priority Customer; (ii) non-MIAX Market Maker; (iii) non-Member Broker-Dealer; or (iv) Firm (for purposes of the Professional Rebate Program, ''Professionals''). The Exchange proposes to amend Section 1)a)iv) of the Fee Schedule to include per contract credits for complex orders in the Exchange's PRP.

The PRP affords a per contract credit based upon the increase in the total volume submitted by a Member and executed for the account(s) of a Professional on MIAX (not including Excluded Contracts)[28] during a

[23] MIAX excludes contracts executed as part of QCC Orders, mini-options, Priority Customer-to-Priority Customer Orders, PRIME Agency Orders, PRIME AOC Responses, PRIME Contra-side Orders, PRIME Orders for which both the Agency and Contra-side Order are Priority Customers, and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in MIAX Rule 1400 from this calculation. *See* Fee Schedule Section 1)a)iii.

[24] The term ''MIAX Select Symbols'' means options overlying AA, AAL, AAPL, AIG, AMAT, AMD, AMZN, BA, BABA, BBRY, BIDU, BP, C, CAT, CBS, CELG, CLF, CVX, DAL, EBAY, EEM, FB, FCX, GE, GILD, GLD, GM, GOOGL, GPRO, HAL, HTZ, INTC, IWM, JCP, JNJ, JPM, KMI, KO, MO, MRK, NFLX, NOK, NQ, ORCL, PBR, PFE, PG, QCOM, QQQ, RIG, S, SPY, SUNE, T, TSLA, USO, VALE, VXX, WBA, WFC, WMB, WY, X, XHB, XLE, XLF, XLP, XOM, XOP and YHOO. *See* Fee Schedule note 14.

[25] The MIAX Price Improvement Mechanism (''PRIME'') is a process by which a Member may electronically submit for execution (''Auction'') an order it represents as agent (''Agency Order'') against principal interest. *See* Exchange Rule 515A.

[26] A ''Qualifying Member'' is a Member or its Affiliate that qualifies for the Professional Rebate Program and achieves a volume increase in excess of 0.065% for Professional orders transmitted by that Member which are executed electronically on the Exchange in all multiply-listed option classes for the account(s) of a Professional and which qualify for the Professional Rebate Program during a particular month relative to the applicable Baseline Percentage (as defined under the Professional Rebate Program).

[27] MIAX excludes contracts executed as part of QCC Orders, mini-options, Priority Customer-to-Priority Customer Orders, PRIME Agency Orders, PRIME AOC Responses, PRIME Contra-side Orders, PRIME Orders for which both the Agency and Contra-side Order are Priority Customers, and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in MIAX Rule 1400 from this credit. *See* Fee Schedule Section 1)a)iii.

[28] Excluded Contracts are any contracts executed as mini-options, Non-Priority Customer-to-Non-Priority Customer Orders, QCC Orders, PRIME Orders, PRIME AOC Responses, PRIME Contra-side Orders, and executions related to contracts that are

particular month as a percentage of the total volume reported by the Options Clearing Corporation (''OCC'') in MIAX classes during the same month (the ''Current Percentage''), less the total volume submitted by that Member and executed for the account(s) of a Professional on MIAX (not including Excluded Contracts), during the fourth quarter of 2015 as a percentage of the total volume reported by OCC in MIAX classes during the fourth quarter of 2015 (the ''Baseline Percentage''). The Exchange proposes to use the same volume tier thresholds for complex orders that it currently uses for simple orders, and proposes the following per contract credits to Public Customers that are not a Priority Customer, or are a non-MIAX market maker, non-Member broker-dealer, or Firm: (i) $0.03 Per contract for contracts executed in Tier 1; (ii) $0.05 per contract for contracts executed in Tier 2; and (iii) $0.07 per contract for contracts executed in Tier 3. The current credits for contracts that are part of simple orders will remain unchanged, and the amended table in Section 1(a)iv) will include separate columns, one indicating the credits applicable to contracts from simple orders, and the other indicating the credits applicable to contracts from complex orders. Additionally, proposed amended Section 1)a)iv) will include a clarifying statement that volume for transactions in both simple and complex orders will be aggregated to determine the appropriate volume tier threshold applicable to each transaction.

The revised PRP table proposed by the Exchange will be as follows:

PROFESSIONAL REBATE PROGRAM

Type of market participants eligible for rebate	Tier	Percentage thresholds of volume increase in multiply-listed options (except excluded contracts) for the current month compared to fourth quarter 2015	Per contract credit (except excluded contracts) for simple orders	Per contract credit (except excluded contracts) for complex orders
Public Customer that is Not a Priority Customer.	1	Above 0.00%–0.005%	$0.10	*$0.03*
Non-MIAX Market Maker	2	Above 0.005%–0.020%	0.15	*0.05*
Non-Member Broker-Dealer Firm	3	Above 0.020%	0.20	*0.07*

Marketing Fee

Section 1)b) of the Fee Schedule describes Marketing Fees assessed on all Market Makers for contracts, including mini options, they execute in their assigned classes when the contra-party to the execution is a Priority Customer. The current Marketing Fees are: (i) $0.70 Per contract for transactions in standard option classes ($0.070 per contract for transactions in mini options) that are not penny option classes; and (ii) $0.25 per contract for transactions in standard option classes ($0.025 per contract for transactions in mini options) that are penny option classes. The Exchange proposes to amend Section 1)b) to state that the Marketing Fee applies to contracts in simple and complex order executions, and that the Marketing Fee in complex order executions will be assessed per contract whether the transaction executes in the Strategy Book, a Complex Auction, or by Legging into the simple order book (*i.e.,* regardless of how the complex contracts are executed).[29]

The Exchange is not proposing to extend the Posted Liquidity Marketing Fee to contracts executed from complex orders. Currently, for transactions that occur on or after September 1, 2016 and extending through October 31, 2016, MIAX assesses an additional $0.12 per contract Posted Liquidity Marketing Fee to all Market Makers for any standard options overlying EEM, GLD, IWM, QQQ and SPY that Market Makers execute in their assigned class when the contra-party to the execution is a Priority Customer and the Priority Customer order was posted on the MIAX order book at the time of the execution. The Exchange proposes to amend Section 1)b) to state that the Posted Liquidity Marketing Fee applies only to contracts from simple order executions. The revised Marketing Fee table proposed by the Exchange will be as follows:

Amount of marketing fee assessed	Option classes
$0.70 (per contract)	*Simple and complex order t*[T]ransactions in Standard Option Classes that are not in the Penny Pilot Program.
$0.25[30] (per contract)	*Simple and complex order t*[T]ransactions in Standard Option Classes that are in the Penny Pilot Program (a List of those Standard Option Classes in the Penny Pilot Program is available on the MIAX Website).
$0.070 (per contract)	*Simple and complex order t*[T]ransactions in Mini Options where the corresponding Standard Option is not in the Penny Pilot Program.
$0.025 (per contract)	*Simple and complex order t*[T]ransactions in Mini Options where the corresponding Standard Option is in the Penny Pilot Program (a List of those Standard Option Classes in the Penny Pilot Program is available on the MIAX Website).

All other aspects of the Marketing Fee program of the Exchange will remain unchanged. The proposed rule changes are scheduled to become operative October 24, 2016.

routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in MIAX Rule 1400.

[29] For a discussion of these types of executions, *see* Securities Exchange Act Release No. 78620 (August 18, 2016), 81 FR 58770 (August 25, 2016) (SR–MIAX–2016–26).

[30] Extending through October 31, 2016, the Exchange will assess an additional $0.12 per contract Posted Liquidity Marketing Fee to all Market Makers for any *simple orders in* standard options overlying EEM, GLD, IWM, QQQ, and SPY that Market Makers execute in their assigned class when the contra-party to the execution is a Priority Customer and the Priority Customer order was posted on the MIAX Book at the time of the execution.

2. Statutory Basis

MIAX believes that its proposed rule change is consistent with Section 6(b) of the Act [31] in general, and in particular, furthers the objectives of Section 6(b)(4) of the Act,[32] in that it is an equitable allocation of reasonable fees and other charges among Exchange members and issuers and other persons using its facilities, and 6(b)(5) of the Act,[33] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The proposed fee structure is equitable and not unfairly discriminatory because all similarly situated market participants are subject to the same fee and rebate structure for complex order transactions, and access to the Exchange is offered on terms that are not unfairly discriminatory. The inclusion of the number of contracts executed in both simple and complex orders in the calculation of the Market Maker's monthly percentage threshold in Section 1)a)i) is reasonable, equitable and not unfairly discriminatory because it provides a direct and equal fee benefit to Market Makers that trade complex orders. All complex order volume executed will count towards the monthly percentage thresholds required to receive the enumerated discounts in both simple and complex transactions, thus benefiting all Market Makers equally. Furthermore, it should encourage Market Makers to provide liquidity in complex orders on the Exchange because their executed volume in complex orders will enhance their ability to achieve discounted per contract transaction fees in transactions involving both simple and complex orders, thus functioning to remove impediments to and perfect the mechanisms of a free and open market and a national market system.

The Exchange's proposal to assess per contract transaction fees to MIAX Market Makers for complex orders in penny option classes and non-penny option classes is reasonable and not unfairly discriminatory because it enhances the ability of Market Makers to achieve volume levels that qualify them for fees in the higher tiers, and equally rewards all Market Makers that achieve the tiers that include even further discounted per contract transaction fees. The amount of the fees in the tiers for complex orders are very similar to the amount of the fees in the tiers for simple orders, therefore the Exchange believes that fee amounts are reasonable and appropriate.

The Exchange's proposal to assess the same fees for simple and complex orders to other market participants (listed in Section 1)a)ii of the Fee Schedule) for complex orders is reasonable and not unfairly discriminatory because the fees apply equally to all similarly situated market participants. Just as with the current fees assessed for simple orders in Section 1)a)ii, the PCRP tier discounts will not apply to these participants because Market Makers, who qualify for the discounts, have quoting and other obligations that the listed other market participants do not have and the Exchange believes that the PCRP tier discounts are thus equitable and not unfairly discriminatory.[34]

The Exchange believes that it is reasonable and not unfairly discriminatory to offer discounted fees to Market Makers in simple orders if they fall within PCRP volume Tier 3 or higher, while not discounting the per contract fees for complex orders regardless of their PCRP Tier level. While the Exchange has the ability to justify and determine the level of incentives with respect to simple orders, the Exchange believes it would be premature to offer additional incentives and rewards to Market Makers above what the Exchange is offering until Market Makers actually use the new and value-added complex order functionality. The Exchange will better be able to determine if additional incentives or rewards are warranted, and if so at what level, once Market Makers begin using the new functionality and have established a performance baseline for complex orders.

The Exchange's proposal to offer certain credits for complex order transactions under the PCRP and the PRP and to include contracts executed from both simple and complex transactions in the calculation of the various percentage volume thresholds is intended to encourage participants to submit more orders to the Exchange, thus enhancing liquidity and removing impediments to and perfecting the mechanisms of a free and open market and a national market system.

The Exchange notes that the proposed per contract credits for the PCRP are higher for complex orders than they are for simple orders, and the per contract credits for the PRP are lower for complex orders than they are for simple orders. The Exchange believes that this is equitable and reasonable because the nature of the two rebate programs (PCRP and PRP) is fundamentally different in structure and purpose.

On the one hand, the PCRP rewards executed Priority Customer volume from ''contract-one.'' [35] This structure is designed to enable the Exchange to compete with the multitude of Priority Customer payment programs, such as maker-taker rebates and payment for order flow programs that are established in the industry. By offering an aggressive incentive for Priority Customer volume beginning on day one, the Exchange believes it can best compete for order flow in complex orders as soon as they become available on the Exchange.

On the other hand, the PRP credit is aimed at Professional volume executed on the Exchange on an incremental basis. The PRP credit is based on a volume increase above and beyond an established baseline. Because the trading of complex orders on the Exchange represents new functionality and new volume to the Exchange, all complex order volume executed on the Exchange is by its nature incremental. As such, the Exchange believes it is not necessary to provide rewards at the same level to Professional complex orders that it provides for Professional simple orders.

The Exchange's proposal to establish and assess a surcharge of $0.08 per contract for Market Makers and other participants for removing liquidity by trading against a Priority Customer order on the Strategy Book is consistent with Section 6(b)(4) of the Act [36] because it applies equally to all participants that remove Priority Customer liquidity from the Strategy Book, and does not apply to participants whose orders or quotes resting on the Strategy Book are executed against Priority Customer complex orders on the Strategy Book. This incentive for providing resting liquidity applies to all participants. Assessing the surcharge to market participants who take liquidity from Priority Customers is reasonable and not unfairly discriminatory because it will provide MIAX Market Makers with equal surcharges for removing

[31] 15 U.S.C. 78f(b).

[32] 15 U.S.C. 78f(b)(4).

[33] 15 U.S.C. 78f(b)(1) and (b)(5).

[34] *See supra* note 20.

[35] The Priority Customer rebate payment will be calculated from the first executed contract at the applicable threshold per contract credit with rebate payments made at the highest achieved volume tier for each contract traded in that month. *See* Fee Schedule, Section 1)a)iii.

[36] 15 U.S.C. 78f(b)(4).

liquidity, and no surcharge for resting liquidity. As stated above, this is substantially similar to a surcharge assessed on another exchange.[37] The Exchange notes that, although its base fee is slightly higher (with a similar complex fee approach), the Exchange believes that this is fair and equitable because the Exchange offers technology with unique risk mitigation features not available elsewhere, such as the Implied Away Best Bid or Offer (''ixABBO'') Price Protection. *See* Exchange Rule 518.05(d).

The Exchange's proposal to assess the $.08 surcharge is also consistent with Section 6(b)(5) of the Act [38] because it perfects the mechanisms of a free and open market and a national market system and protect investors and the public interest by encouraging participants to provide liquidity on the Strategy Book, which the Exchange believes is an important competitive tool that directly or indirectly can provide better prices for investors. The proposed fee structure may narrow the MIAX Bid and Offer (''MBBO'') because not charging the $0.08 surcharge to participants with resting liquidity on the Strategy Book effectively subsidizes, and thus encourages, the posting of liquidity on MIAX. Giving greater incentive for Market Makers to either match or improve upon the best price displayed on MIAX benefits investors and the public by improving execution prices.

Non-Priority Customers, non-MIAX Market Makers, broker-dealers and Firms that use sophisticated trading systems will be able to remove liquidity quickly from the Strategy Book, and thus the Exchange believes that assessing the surcharge to participants who remove liquidity, and not assessing the surcharge to participants with complex orders resting on the Strategy Book is reasonable and not unfairly discriminatory. Moreover, the proposed surcharge is substantially similar to the surcharge on CBOE,[39] and has been accepted as not unfairly discriminatory under the Act.[40] The Exchange believes for these reasons that the surcharge is equitable, reasonable and not unfairly discriminatory, and thus consistent with the Act.

The proposed assessment of the Marketing Fee for all complex order transactions that are executed by a Market Maker in their assigned classes when the contra-party to the trade is a Priority Customer is equitable and not unfairly discriminatory because the fee will apply equally to all Market Makers in their assigned classes. Further, the assessment of a Marketing Fee for complex transactions is a common practice of other exchanges.[41] Attracting more order flow to the Exchange will bring greater volume and liquidity which in turn benefits all market participants by providing more trading opportunities and tighter spreads.

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. The Exchange believes that the proposed fee structure for complex order transactions is intended to promote narrower spreads and greater liquidity at the best prices. The fee-based incentives for market participants to provide liquidity by submitting complex orders to the Exchange, and thereafter to improve the MBBO to ensure participation, should enable the Exchange to attract order flow and compete with other exchanges which also provide such incentives to their market participants for similar transactions.[42]

The Exchange believes that increased complex order flow will bring greater volume and liquidity which in turn benefits all market participants by providing more trading opportunities and tighter spreads. Therefore, any potential effects that the adoption of the complex transaction fees may have on intra-market competition are justifiable due to the reasons stated above.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow. The Exchange believes that the proposed rule changes reflect this competitive environment because they modify the Exchange's fees in a manner that encourages market participants to provide liquidity and to send order flow to the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[43] and Rule 19b–4(f)(2) [44] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MIAX–2016–38 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–MIAX–2016–38. 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

[37] *See supra* note 16.

[38] 15 U.S.C. 78f(b)(1) and (b)(5).

[39] *See supra* notes 16, 37.

[40] *See* CBOE Fees Schedule Complex Taker Fee, (describing a per contract, per side surcharge at note 35); *see also* International Securities Exchange (''ISE'') Schedule of Fees, Section II. ISE's fee structure does not include a specific ''taker surcharge'' in the same manner as CBOE (and which is also proposed by the Exchange) but instead includes a higher taker fee for complex transactions that remove liquidity from the complex order book.

[41] *See* CBOE Fees Schedule, p. 4; *see also* Phlx Pricing Schedule, Section II.

[42] *See, e.g.,* Phlx Pricing Schedule, Section B (Customer Rebate Program).

[43] 15 U.S.C. 78s(b)(3)(A)(ii).

[44] 17 CFR 240.19b–4(f)(2).

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–MIAX–2016–38, and should be submitted on or before November 22, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[45]

Brent J. Fields,

Secretary.

[FR Doc. 2016–26297 Filed 10–31–16; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. Chapter 35 requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before January 3, 2017.

ADDRESSES: Send all comments to Mary Frias, Loan Specialist, Office of Financial Assistance, Small Business Administration, 409 3rd Street, 8th Floor, Washington, DC 20416.

[45] 17 CFR 200.30–3(a)(12).

FOR FURTHER INFORMATION CONTACT: Mary Frias, Loan Specialist, Office of Financial Assistance, *mary.frias@sba.gov,* 202–401–8234, or Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov;*

SUPPLEMENTARY INFORMATION:

SBA regulations at 13 CFR, Section 120.830 requires CDCs to submit an annual report which contains financial statements, operational and management information. This information is used by SBA's district offices, Office of Credit Risk Management, and Office of Financial Assistance to obtain information from the CDCs that is used to evaluate whether CDCs are operating according to the statutes, regulations and policies governing the CDC loan program (504 program).

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

Title: Certified Development Company (CDC) Annual Report Guide.

Description of Respondents: Small Business Lending Companies.

Form Number: SBA Form 1253.

Total Estimated Annual Responses: 260.

Total Estimated Annual Hour Burden: 7,280.

Curtis B. Rich,

Management Analyst.

[FR Doc. 2016–26296 Filed 10–31–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 14934 and # 14935]

Georgia Disaster # GA–00082

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of GEORGIA (FEMA–4284–DR), dated 10/20/2016.

Incident: Hurricane Matthew.

Incident Period: 10/04/2016 through 10/15/2016.

Effective Date: 10/20/2016.

Physical Loan Application Deadline Date: 12/19/2016.

Economic Injury (EIDL) Loan Application Deadline Date: 07/20/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 10/20/2016, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Brantley; Bryan; Bulloch; Camden; Candler; Chatham; Effingham; Emanuel; Evans; Glynn; Jenkins; Liberty; Long; Mcintosh; Pierce; Screven; Tattnall; Toombs; Wayne

The Interest Rates are:

	Percent
For Physical Damage:	
Non–Profit Organizations With Credit Available Elsewhere ...	2.625
Non–Profit Organizations Without Credit Available Elsewhere	2.625
For Economic Injury:	
Non–Profit Organizations Without Credit Available Elsewhere	2.625

The number assigned to this disaster for physical damage is 149348 and for economic injury is 149358

(Catalog of Federal Domestic Assistance Number 59008)

Lisa Lopez-Suarez,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2016–26285 Filed 10–31–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 14839 and # 14840]

California Disaster # CA–00252

AGENCY: U.S. Small Business Administration

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Administrative declaration of a disaster for the State of California dated 09/06/2016.

Incident: Soberanes Fire.

Incident Period: 07/22/2016 and continuing through 10/12/2016.

Effective Date: 10/21/2016.

Physical Loan Application Deadline Date: 11/07/2016.

Economic Injury (EIDL) Loan Application Deadline Date: 06/06/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Administrative disaster declaration for the State of California, dated 09/06/2016 is hereby amended to establish the incident period for this disaster as beginning 07/22/2016 and continuing through 10/12/2016.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Dated: October 21, 2016.

Maria Contreras-Sweet,

Administrator.

[FR Doc. 2016–26287 Filed 10–31–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60 Day notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before January 3, 2017.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Kirk McElwain, Director, Office of Communications, Small Business Administration, 409 3rd Street SW., 7th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Kirk McElwain, Director, Office of Communications, 202–205–6175 *kirk.mcelwain@sba.gov* Curtis B. Rich, Management Analyst, 202–205–7030 *curtis.rich@sba.gov*

SUPPLEMENTARY INFORMATION: SBA.Direct is an optional feature of SBA.gov that helps bring customized, relevant SBA.gov information directly to the user which will help site visitors, including small business owners, the ability to quickly and efficiently locate content on *SBA.gov* SBA Community is also an optional feature of *SBA.gov* which allows users to contribute to SBA.gov by posting success stories, comments, or questions in an online forum interface.

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

Title: ''SBA Direct and SBA Online Community''.

Description of Respondents: SBA Web site users.

Form Number: N/A.

Annual Responses: 413,000.

Annual Burden: 4,325.

Curtis Rich,

Management Analyst.

[FR Doc. 2016–26293 Filed 10–31–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14931]

Washington Disaster # WA–00067 Declaration of Economic Injury

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Economic Injury Disaster Loan (EIDL) declaration for the State of Washington, dated 10/24/2016.

Incident: Main Street Fire.

Incident Period: 07/22/2016.

Effective Date: 10/24/2016.

EIDL Loan Application Deadline Date: 07/24/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's EIDL declaration, applications for economic injury disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: King.

Contiguous Counties:

Washington: Chelan, Kitsap, Kittitas, Pierce, Snohomish, Yakima.

The Interest Rates are:

	Percent
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	2.625

The number assigned to this disaster for economic injury is 149310.

The State which received an EIDL Declaration # is Washington.

(Catalog of Federal Domestic Assistance Number 59008)

Dated: October 24, 2016.

Maria Contreras-Sweet,

Administrator.

[FR Doc. 2016–26288 Filed 10–31–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. Chapter 35 requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before January 3, 2017.

ADDRESSES: Send all comments to Mary Frias, Loan Specialist, Office of Financial Assistance, Small Business Administration, 409 3rd Street, 8th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Mary Frias, Loan Specialist, 202–401–8234, *mary.frias@sba.gov,* or Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: Section 7(a) of the Small Business Act authorizes the Small Business Administration to guaranty loans in each of the 7(a) Programs. The regulations covering these and other loan programs at 13 CFR part 120 require certain information from loan applicants and lenders that is used to determine program eligibility and compliance.

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

Title: Borrower Information Form, Lenders Application for Guaranty, and 7(a) Loan Post Approval Action Checklist.

Description of Respondent: 7(A) Program Participants.

Total Estimated Annual Responses: 192,334.

Total Estimated Annual Hour Burden: 68,315.

Curtis B. Rich,

Management Analyst.

[FR Doc. 2016–26295 Filed 10–31–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14936 and #14937]

Florida Disaster # FL–00120

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of FLORIDA (FEMA–4283–DR), dated 10/24/2016.

Incident: Hurricane Matthew.

Incident Period: 10/03/2016 and continuing.

Effective Date: 10/24/2016.

Physical Loan Application Deadline Date: 12/23/2016.

Economic Injury (EIDL) Loan Application Deadline Date: 07/24/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 10/24/2016, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Clay; Indian River; Martin; Nassau; Putnam; Saint Johns; Volusia

The Interest Rates are:

	Percent
For Physical Damage:	
Non–Profit Organizations With Credit Available Elsewhere ...	2.625
Non–Profit Organizations Without Credit Available Elsewhere ...	2.625
For Economic Injury:	
Non–Profit Organizations Without Credit Available Elsewhere ...	2.625

The number assigned to this disaster for physical damage is 149368 and for economic injury is 149378

(Catalog of Federal Domestic Assistance Number 59008)

Lisa Lopez-Suarez,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2016–26291 Filed 10–31–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14888 and #14889]

Florida Disaster Number FL–00119

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Florida (FEMA–4280–DR), dated 09/28/2016.

Incident: Hurricane Hermine.

Incident Period: 08/31/2016 through 09/11/2016.

Effective Date: 10/21/2016.

Physical Loan Application Deadline Date: 11/28/2016.

Economic Injury (EIDL) Loan Application Deadline Date: 06/28/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Florida, dated 09/28/2016, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Columbia, Gadsden, Hernando

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Lisa Lopez-Suarez,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2016–26292 Filed 10–31–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60 day notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before January 3, 2017.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collections, to Louis Cupp, New Markets Policy Analyst, Office of Investment and Innovation, Small Business

Administration, 409 3rd Street, 6th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Louis Cupp, New Markets Policy Analyst, 202–619–0511 *louis.cupp@sba.gov* Curtis B. Rich, Management Analyst, 202–205–7030 *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: Reporting and recordkeeping requirements, Investment companies, Finance, Business/Industry, Small Business. Conduct standards.

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Title: Financing Eligibility Statement—Social Disadvantage/Economic: Disadvantage.

Frequency: On Occasion.

SBA Form Numbers: 1941A, 1941B, 1941C.

Description of Respondents: Small Business Investment Companies and Small Businesses.

Responses: 10.

Annual Burden: 15.

Curtis Rich,

Management Analyst.

[FR Doc. 2016–26294 Filed 10–31–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Disaster Declaration #14932 and #14933

Wisconsin Disaster # WI–00056

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Wisconsin (FEMA–4288–DR), dated 10/20/2016.

Incident: Severe Storms, Flooding, and Mudslides.

Incident Period: 09/21/2016 through 09/22/2016.

Effective Date: 10/20/2016.

Physical Loan Application Deadline Date: 12/19/2016.

Economic Injury (EIDL) Loan Application Deadline Date: 07/20/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 10/20/2016, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Adams, Chippewa, Clark, Crawford, Jackson, Juneau, La Crosse, Monroe, Richland, Vernon.

The Interest Rates are:

	Percent
For Physical Damage:	
Non–Profit Organizations With Credit Available Elsewhere ...	2.625
Non–Profit Organizations Without Credit Available Elsewhere	2.625
For Economic Injury:	
Non–Profit Organizations Without Credit Available Elsewhere	2.625

The number assigned to this disaster for physical damage is 14932B and for economic injury is 14933B.

(Catalog of Federal Domestic Assistance Number 59008)

Lisa Lopez-Suarez,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2016–26286 Filed 10–31–16; 8:45 am]

BILLING CODE 8025–01–P

TENNESSEE VALLEY AUTHORITY

Environmental Impact Statement for Shawnee Fossil Plant Coal Combustion Residual Management

AGENCY: Tennessee Valley Authority.

ACTION: Notice of intent.

SUMMARY: The Tennessee Valley Authority (TVA) intends to prepare an environmental impact statement (EIS) to address the potential environmental effects associated with ceasing operations at the special waste landfill and Ash Pond 2 and constructing, operating, and maintaining a new dry coal combustion residual (CCR) landfill at the Shawnee Fossil Plant (SHF) located near Paducah, Kentucky in McCracken County. The purpose of the proposed project is to foster TVA's compliance with present and future regulatory requirements related to CCR production and management, including the requirements of EPA's CCR Rule and Effluent Limitations Guidelines Rule.

In the environmental review, TVA will evaluate the potential environmental impacts of closure of the special waste landfill and Ash Pond 2 as well as the construction, operation, and maintenance of an onsite dry CCR landfill or disposal of CCR in an existing offsite permitted landfill. TVA will develop and evaluate various alternatives, including the No Action Alternative, in the EIS. Public comments are invited concerning both the scope of the review and environmental issues that should be addressed.

DATES: To ensure consideration, comments on the scope and environmental issues must be postmarked, emailed or submitted online no later than December 1, 2016.

ADDRESSES: Written comments should be sent to Ashley Pilakowski, NEPA Compliance Specialist, 400 West Summit Hill Dr., WT 11D, Knoxville, TN 37902–1499. Comments may also be submitted online at: *www.tva.gov/nepa.*

FOR FURTHER INFORMATION CONTACT: Ashley Pilakowski, 865–632–2256.

SUPPLEMENTARY INFORMATION: This notice of intent is provided in accordance with the Council on Environmental Quality's regulations (40 CFR parts 1500–1508) and TVA's procedures implementing the National Environmental Policy Act (NEPA).

TVA Power System and CCR Management

TVA is a corporate agency of the United States that provides electricity for business customers and local power distributors serving more than 9 million people in parts of seven southeastern states. TVA receives no taxpayer funding, deriving virtually all of its revenues from sales of electricity. In addition to operating and investing its revenues in its electric system, TVA provides flood control, navigation and land management for the Tennessee River system and assists local power companies and state and local governments with economic development and job creation.

Historically, TVA has managed its CCRs in wet impoundments or dry landfills. Currently, SHF consumes an average of 3,880,165 tons of coal per year, generates approximately 8 billion kilowatt-hours of electricity a year (enough to supply 540,000 homes), and produces approximately 256,000 tons of CCR a year which are managed in an existing special waste landfill and a pond (Ash Pond 2).

In July 2009, the TVA Board of Directors passed a resolution for staff to review TVA practices for storing CCRs at its generating facilities, including SHF, which resulted in a recommendation to convert the wet ash management system at SHF to a dry storage system. On April 17, 2015, the U.S. Environmental Protection Agency (EPA) published the final Disposal of CCRs from Electric Utilities rule.

In June of 2016, TVA issued a Final Programmatic Environmental Impact Statement (PEIS) that analyzed methods for closing impoundments that hold CCR materials at TVA fossil plants and identified specific screening and evaluation factors to help frame its evaluation of closures at additional facilities. A Record of Decision was released in July of 2016 that would allow future environmental reviews of CCR impoundment closures to tier from the PEIS.

This EIS is intended to tier from the 2016 PEIS to evaluate the closure alternatives for the existing CCR Ash Pond 2 impoundment and additionally analyze the impacts of the closure of the existing special waste landfill, and construction, operation, and maintenance of a new on-site special waste landfill to accommodate future dry CCR disposal actions. This project supports TVA's goal to eliminate all wet CCR storage at SHF.

Alternatives

In addition to a No Action Alternative, this EIS will address alternatives that have reasonable prospects of providing a solution to the management and disposal of dry CCRs generated at SHF. TVA has determined that either the construction of a new CCR storage area or hauling CCR to an existing permitted landfill are the most reasonable alternatives to address the need for additional dry CCR disposal. TVA will consider closure alternatives for Ash Pond 2 in accordance with and consistent with TVA's PEIS and EPA's CCR Rule. TVA will also consider closure alternatives for the existing special waste landfill in accordance with EPA's CCR Rule.

No decision has been made about CCR management at SHF beyond the current operations and available onsite capacity. TVA is preparing this EIS to inform decision makers, other agencies and the public about the potential for environmental impacts associated with the decision on how to manage CCR generated at SHF.

Proposed Issues To Be Considered

This EIS will contain descriptions of the existing environmental and socioeconomic resources within the area that could be affected by the closure of the special waste landfill and Ash Pond 2 and by the construction, operation and maintenance of a new dry CCR landfill or disposal of CCR at an offsite landfill. Evaluation of potential environmental impacts to these resources will include, but not be limited to, the potential impacts on water quality, aquatic and terrestrial ecology, threatened and endangered species, wetlands, land use, historic and archaeological resources, solid and hazardous waste, safety, socioeconomic resources and environmental justice. The need and purpose of the project will be described. The range of issues to be addressed in the environmental review will be determined, in part, from scoping comments. The preliminary identification of reasonable alternatives and environmental issues in this notice is not meant to be exhaustive or final.

Public and Agency Participation

TVA is interested in an open process and wants to hear from the community, interested agencies and special interest groups about the scope of issues they would like to see addressed in this EIS.

The public is invited to submit comments on the scope of this EIS no later than the date identified in the ''Dates'' section of this notice. Federal, state and local agencies such as the U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, Kentucky Department of Environmental Protection, and the Kentucky State Historic Preservation Officer also are invited to provide comments. After consideration of scoping comments, TVA will post a summary of them and identify the issues and alternatives to be addressed in the EIS and the study's schedule.

The Draft EIS will be made available for public comment. In making its final decision, TVA will consider the analyses in this EIS and substantive comments that it receives. A final decision on proceeding with pond closure, existing landfill closure, and construction, operation, and maintenance of a new landfill will depend on a number of factors. These include requirements of the CCR Rule, the results of the EIS, engineering and risk evaluations, and financial considerations.

TVA anticipates holding a community meeting near the plant after releasing the Draft EIS. Meeting details will be posted on TVA's Web site. TVA expects to release the Draft EIS in summer of 2017.

M. Susan Smelley,

Director, Environmental Permitting and Compliance.

[FR Doc. 2016–26272 Filed 10–31–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Aviation Insurance

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. The requested information is included in air carriers applications for insurance when insurance is not available from private sources.

DATES: Written comments should be submitted by January 3, 2017.

ADDRESSES: Send comments to the FAA at the following address: Ronda Thompson, Federal Aviation Administration, ASP–110, 800 Independence Ave. SW., Washington, DC 20591.

PUBLIC COMMENTS INVITED: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0514.

Title: Aviation Insurance.

Form Numbers: FAA Form 2120–0514.

Type of Review: Renewal of an information collection.

Background: The information submitted by applicants for insurance under Chapter 443 of Title 49 U.S.C. is used by the FAA to identify the eligibility of parties to be insured, the amount of coverage required, and insurance premiums. Without collection of this information, the FAA would not be able to issue required insurance.

Respondents: Approximately 61 applicants.

Frequency: On occasion.

Estimated Average Burden per Response: 4 hours.

Estimated Total Annual Burden: 616 hours.

Issued in Washington, DC on October 26, 2016.

Ronda Thompson,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2016–26357 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Certification of Aircraft and Airmen for the Operation of Light-Sport Aircraft

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. Information is maintained by owners and operators of light-sport aircraft and is collected to be used by FAA safety inspectors in determining whether required maintenance actions have been accomplished on light-sport aircraft. The information is also used when investigating accidents.

DATES: Written comments should be submitted by January 3, 2017.

ADDRESSES: Send comments to the FAA at the following address: Ronda Thompson, Federal Aviation Administration, ASP–110, 800 Independence Ave. SW., Washington, DC 20591.

PUBLIC COMMENTS INVITED: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0730.

Title: Certification of Aircraft and Airmen for the Operation of Light-Sport Aircraft.

Form Numbers: There are no FAA forms associated.

Type of Review: Renewal of an information collection.

Background: 14 CFR 91.417, requires the owners and operators of light-sport aircraft to maintain a record of the current status of applicable safety directives and transfer that information at the time of sale of the aircraft. The information is used by FAA safety inspectors in determining whether required maintenance actions have been accomplished on aircraft. The information is also used when investigating accidents.

Respondents: Approximately 1000 operators/owners.

Frequency: On occasion.

Estimated Average Burden per Response: 2 hours.

Estimated Total Annual Burden: 2,133 hours.

Issued in Washington, DC on October 26, 2016.

Ronda Thompson,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2016–26354 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Anti-Drug Program for Personnel Engaged in Specific Aviation Activities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. Information is collected to determine program compliance or non-compliance of regulated aviation employers, oversight planning, to determine who must provide annual Management Information System testing information, and to communicate with entities subject to the program regulations.

DATES: Written comments should be submitted by December 1, 2016.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0535.

Title: Anti-Drug Program for Personnel Engaged in Specified Aviation Activities.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: The Federal Register Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 23, 2016 (81 FR 58549). There were no comments. The FAA mandates specified aviation entities to conduct drug and alcohol testing under its regulations, Drug and Alcohol Testing Program (14 CFR part 120), 49 U.S.C. 31306 (Alcohol and controlled substances testing), and the Omnibus Transportation Employee Testing Act of 1991 (the Act). The FAA uses information collected for determining program compliance or non-compliance of regulated aviation employers, oversight planning, determining who must provide annual MIS testing information, and communicating with entities subject to the program regulations.

Respondents: Approximately 7,000 affected entities annually.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 5 minutes.

Estimated Total Annual Burden: 22,902 hours.

Issued in Washington, DC, on October 26, 2016.

Ronda L. Thompson,

FAA Information Collection Clearance Officer, Performance, Policy & Records Management Branch, ASP–110.

[FR Doc. 2016–26355 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2016–0026]

Application From the State of Florida to the Surface Transportation Project Delivery Program and Proposed Memorandum of Understanding (MOU) Assigning Environmental Responsibilities to the State

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice of proposed MOU and request for comments.

SUMMARY: This notice announces that FHWA has received and reviewed an application from the Florida Department of Transportation (FDOT) requesting participation in the Surface Transportation Project Delivery Program (Program). This Program allows for FHWA to assign, and States to assume, responsibilities under the National Environmental Policy Act of 1969 (NEPA), and all or part of FHWA's responsibilities for environmental review, consultation, or other actions required under any Federal environmental law with respect to one or more Federal-aid highway projects within the State. The FHWA has determined that the application is complete, and developed a draft MOU with FDOT outlining how the State would implement the program with FHWA oversight. The FHWA invites the public to comment on FDOT's request, including its application, and the proposed MOU, which includes the proposed assignments and assumptions of environmental review, consultation, and other activities.

DATES: Please submit comments by December 1, 2016.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

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

• *Facsimile (Fax):* 1–202–493–2251.

• *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building Ground Floor Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE., Washington, DC 20590 between 9:00 a.m. and 5:00 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

Benito Cunill, Team Leader Environmental Program, Federal Highway Administration Florida Division, 3500 Financial Plaza, Suite 400, Tallahassee, FL 32312, 8:00 a.m.–4:00 p.m. e.t., (850) 553–2224, *Benito.Cunill@dot.gov*.

Ken Morefield, Director, Office of Environmental Management, Florida Department of Transportation, 605 Suwannee Street, MS 37, Tallahassee, FL 32399–0450, 8:00 a.m.–4:00 p.m. e.t, (850) 414–4316, *ken.morefield@dot.state.fl.us*.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the **Federal Register**'s home page at *http://www.archives.gov*. An electronic version of the application materials and proposed MOU may be downloaded by accessing the DOT DMS docket, as described above, at *http://www.regulations.gov/*.

Background

Section 327 of title 23, United States Code (23 U.S.C. 327), allows the Secretary of the Department of Transportation (Secretary), to assign, and a State to assume, responsibility for all or part of FHWA's responsibilities for environmental review, consultation, or other actions required under any Federal environmental law with respect to one or more Federal-aid highway projects within the State pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). The FHWA is authorized to act on behalf of the Secretary with respect to these matters.

Under the proposed MOU, FHWA would assign to the State, through FDOT, the responsibility for making decisions on the following types of highway projects:

1. All Class I, or Environmental Impact Statement (EIS) projects, both on the State Highway System (SHS) and Local Agency Program (LAP) projects off the SHS that are funded by FHWA or require FHWA approvals.

2. All Class II, or Categorically Excluded (CE), projects, both on the SHS and LAP projects off the SHS, that are funded by FHWA or require FHWA approvals.

3. All Class III, or Environmental Assessment (EA) projects, both on the SHS and LAP projects off the SHS, that are funded by FHWA or require FHWA approvals.

4. The FDOT will not assume the NEPA responsibilities of other Federal agencies. However, FDOT may use or adopt other Federal agencies' NEPA analyses or documents consistent with 40 CFR parts 1500–1508, current law, and DOT and FHWA regulations, policies, and guidance.

Excluded from assignment are highway projects authorized under 23 U.S.C. 202, 203, and 204 unless the project will be designed and/or constructed by FDOT, projects that cross State boundaries, and projects that cross or are adjacent to international boundaries. This assignment also does not include the environmental review associated with the development and approval of the Draft EIS, FEIS, and ROD for the following projects.

a. I–4 Beyond the Ultimate (BTU) which consists of the three following project segments: Segment 2 FM # 242484–7 SR 400 (I–4) west of SR 528 (Beachline) to west of SR 435 Kirkman Rd; Segment 3 FM # 242592–4 SR 400 (I–4) 1 mile east of SR 434 to east of SR 15/600/US 17/92 Seminole/Volusia C/L; Segment 4 FM # 408464–2 SR 400 (I–4) east of SR 15/600/US 17/92 to ½ mile east of SR 472; and I–4 Ultimate

Segment FM # 242703–1 SR 400 (I–4) west of SR 435 (Kirkman Rd) to east of SR 434.

b. Tampa Interstate Study (TIS) which consists of the three following project sections: Section 4 FM # 412531–1 (Note Sections 4 and 5 have same Design FM #) I–275/SR 60 and Northwest/Veterans; Section 5 FM # 412531–1 (Note Sections 4 and 5 have same Design FM #) I–275 Lois to Hillsborough River; and Section 6 FM # 433821–1 I–275/I–4 Downtown Interchange.

The assignment also would give the State the responsibility to conduct the following environmental review, consultation, and other related activities for project delivery:

Air Quality

- Clean Air Act, 42 U.S.C. 7401–7671q, with the exception of project level conformity determinations (42 U.S.C. 7506)

Noise

- Noise Control Act of 1972, 42 U.S.C. 4901–4918
- FHWA noise regulations at 23 CFR part 772
- Airport Noise and Capacity Act of 1990, 49 U.S.C. 47521–47534

Wildlife

- Endangered Species Act of 1973, 16 U.S.C. 1531–1544
- Marine Mammal Protection Act, 16 U.S.C. 1361–1423h
- Anadromous Fish Conservation Act, 16 U.S.C. 757a-757f
- Fish and Wildlife Coordination Act, 16 U.S.C. 661–667d
- Migratory Bird Treaty Act, 16 U.S.C. 703–712
- Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801–1891d, with Essential Fish Habitat requirements at 16 U.S.C. 1855(b)(2)

Hazardous Materials Management

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675
- Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. 9671–9675
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992k

Historic and Cultural Resources

- National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306101 *et seq.*
- 23 U.S.C. 138 and Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303, and implementing regulations at 23 CFR part 774
- Preservation of Historical and Archaeological Data, 54 U.S.C. 312501–312508
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470(aa)–(mm)
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001–3013; 18 U.S.C. 1170

Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. 1996
- Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201–4209

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251–1387 (Sections 319, 401, and 404)
- Coastal Barrier Resources Act, 16 U.S.C. 3501–3510
- Coastal Zone Management Act, 16 U.S.C. 1451–1466
- Safe Drinking Water Act (SDWA), 42 U.S.C. 300f–300j–26
- Rivers and Harbors Act of 1899, 33 U.S.C. 401–406
- Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287
- Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921
- Wetlands Mitigation, 23 U.S.C. 119(g) and 133(b)(14)
- Flood Disaster Protection Act, 42 U.S.C. 4001–4130
- FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777

Parklands and Other Special Land Uses

- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138, 49 U.S.C. 303, and implementing regulations at 23 CFR part 774
- Land and Water Conservation Fund (LWCF) Act, 54 U.S.C. 200302–200310

FHWA-Specific

- Environmental Impact and Related Procedures, 23 CFR part 771
- Planning and Environmental Linkages, 23 U.S.C. 168, with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135
- Efficient Project Reviews for Environmental Decision Making 23 U.S.C. 139
- Programmatic Mitigation Plans, 23 U.S.C. 169 with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135

Executive Orders (E.O.) Relating to Highway Projects

- E.O. 11988, Floodplain Management, *(except design matters and determinations that significant encroachment is the only practicable alternative under 23 CFR parts 625 and 650)*
- E.O. 11990, Protection of Wetlands
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112, Invasive Species

The MOU would allow FDOT to act in the place of FHWA in carrying out the environmental review-related functions described above, except with respect to government-to-government consultations with federally recognized Indian tribes. The FHWA will retain responsibility for conducting formal government-to-government consultation with federally recognized Indian tribes, which is required under some of the listed laws and executive orders. The FDOT will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with the FHWA upon request. The FDOT also may assist FHWA with formal consultations, with consent of a tribe, but FHWA remains responsible for the consultation. The FDOT also will not assume FHWA's responsibilities for conformity determinations required under Section 176 of the Clean Air Act (42 U.S.C. 7506), or any responsibility under 23 U.S.C. 134 or 135, or under 49 U.S.C. 5303 or 5304.

A copy of the proposed MOU may be viewed on the DOT DMS Docket, as described above, or may be obtained by contacting FHWA or the State at the addresses provided above. A copy also may be viewed on FDOT's Web site at: *http://www.dot.state.fl.us/emo/NEPAAssignment.shtm.*

The FHWA Florida Division, in consultation with FHWA Headquarters, will consider the comments submitted when making its decision on the proposed MOU revision. Any final MOU approved by FHWA may include changes based on comments and consultations relating to the proposed MOU and will be made publicly available.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 327; 42 U.S.C. 4331, 4332; 23 CFR 771.101–139; 23 CFR 773.109; and 40 CFR 1507.3.

Issued on: October 24, 2016.

Gregory G. Nadeau,

Administrator, Federal Highway Administration.

[FR Doc. 2016–26340 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of Meeting of the Transit Advisory Committee for Safety (TRACS)

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of meeting.

SUMMARY: This notice announces a public meeting of the Transit Advisory Committee for Safety (TRACS). TRACS is a Federal Advisory Committee established to provide information, advice, and recommendations to the Secretary of the U.S. Department of Transportation and the Federal Transit Administrator on matters relating to the safety of public transportation systems.

DATES: The TRACS meeting will be held on November 29, 2016, from 9 a.m. to 5 p.m., and November 30, 2016, from 9 a.m. to 1 p.m. Contact Adrianne Malasky (see contact information below) by November 15, 2016, if you wish to be added to the visitors list to gain access to the meeting.

ADDRESSES: The meeting will be held at the National Association of Home Builders, 1201 15th Street NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Adrianne Malasky, Office of Transit Safety and Oversight, Federal Transit Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001 (telephone: 202–366–5496; or email: *TRACS@dot.gov).*

SUPPLEMENTARY INFORMATION: This notice is provided in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 2). TRACS is composed of 29 members representing the broad base of expertise necessary to discharge its responsibilities. The tentative agenda for the November 29–30 meeting of TRACS is set forth below:

Agenda

(1) Introductory Remarks
(2) Facility Use/Safety Briefing
(3) Updates from the FTA Office of Transit Safety and Oversight and the Office of Research, Demonstration and Innovation
(4) Work Group Presentations and Deliberations on Recommendations to FTA
(5) Public Comments
(6) Summary of Deliverables/ Concluding Remarks

Members of the public wishing to attend and/or make an oral statement and participants seeking special accommodations at the meeting must contact Adrianne Malasky by November 15, 2016.

Members of the public may submit written comments or suggestions concerning the activities of TRACS at any time before or after the meeting at *TRACS@dot.gov*, or to the U.S. Department of Transportation, Federal Transit Administration, Office of Transit Safety and Oversight, Room E54–425, 1200 New Jersey Avenue SE., Washington, DC 20590. Attention: Adrianne Malasky.

Information from the meeting will be posted on FTA's public Web site at *https://www.transit.dot.gov/,* on the TRACS Meeting Minutes page. Written comments submitted to TRACS will also be posted at the above web address.

Carolyn Flowers,

Acting Administrator.

[FR Doc. 2016–26269 Filed 10–31–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA–2016–0038]

Notice of Proposed Buy America Waiver for Radio Consoles

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of proposed Buy America waiver and request for comment.

SUMMARY: The Federal Transit Administration (FTA) received a request from the Greater Dayton Regional Transit Authority (GDRTA) for a Buy America non-availability waiver for the procurement of radio consoles, which are a part of a voice and cellular data communications system (the ''radio consoles''). GDRTA's current voice and data communications equipment is obsolete and malfunctioning. The new communication system will result in improved operational efficiency. GDRTA seeks a waiver for the procurement of radio consoles because there are no manufacturers that produce radio consoles that are compatible with GDRTA's communications system and comply with the Buy America requirements. 49 U.S.C. 5323(j)(2)(B) and 49 CFR 661.7(c). GDRTA is joining Montgomery County's radio system, and the radio consoles compatible with the new system must be original equipment manufacturer (OEM) Motorola devices. Motorola cannot provide Buy America-compliant radio consoles. In accordance with 49 U.S.C. 5323(j)(3)(A), FTA is providing notice of the non-availability waiver request and seeks public comment before deciding whether to grant the request. If granted, the waiver would apply to the radio consoles identified in the waiver request.

DATES: Comments must be received by November 15, 2016. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Please submit your comments by one of the following means, identifying your submissions by docket number FTA–2016–0038:

1. *Web site: http://www.regulations.gov.* Follow the instructions for submitting comments on the U.S. Government electronic docket site.
2. *Fax:* (202) 493–2251.
3. *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
4. *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must make reference to the ''Federal Transit Administration'' and include docket number FTA–2016–0038. Due to the security procedures in effect since October 2011, mail received through the U.S. Postal Service may be subject to delays. Parties making submissions responsive to this notice should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. Note that all submissions received, including any personal information therein, will be posted without change or alteration to *http://www.regulations.gov.* For more information, you may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000 (65 FR 19477), or you may visit *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Cecelia Comito, FTA Assistant Chief Counsel, at (202) 366–2217 or *Cecelia.comito@dot.gov.*

SUPPLEMENTARY INFORMATION: The purpose of this notice is to provide notice and seek public comment on whether the FTA should grant a Buy America non-availability waiver for the Greater Dayton Regional Transportation Authority (GDRTA) to procure radio consoles, which would be a part of GDRTA's new communication system (the ''radio consoles''). On May 24, 2016, GPMTD requested a Buy America waiver for the radio consoles because they are not produced in the United States in sufficiently and reasonably available quantities or of a satisfactory quality. 49 U.S.C. 5323(j)(2)(B); 49 CFR 661.7(c).

GDRTA is a public transit agency that serves Montgomery and Western Green counties in Ohio. GDRTA provides more than 9 million passenger trips per year on 31 routes throughout the region. In January 2014, GDRTA conducted a technology scope development project to determine how technology enhancements could improve its operational efficiency; this included a voice and data communication alternatives analysis. GDRTA comprehensively examined various technologies available for its voice and data communication needs. GDRTA compared and evaluated the differences between radio and cellular-based communication, including a cost analysis, reliability assessment, and long-range maintenance and operational differences. On August 5, 2014, the GDRTA Board approved the adoption of a mixed communication system for the agency, which would employ both voice and cellular data systems. GDRTA would join Montgomery County's 800MHz analog trunked system, instead of continuing to own a 450 MHz radio system.

Montgomery County's analog system uses proprietary Motorola SmartNetTrunking, and all equipment must be original equipment manufacturer (OEM) Motorola devices. All equipment must also be programmed to use the County's 800MHz analog system and have the ability to work on the MARCS 800 MHz digital system without any additional hardware. In November 2014, GDRTA purchased Motorola mobile and portable radios for its supervisors and its diesel, trolly, paratransit, maintenance, and support vehicles. The procurement and installation of the radio consoles is the final step to move GDRTA's communication system to Montgomery County's system.

Motorola manufactures equipment both domestically and overseas. While the voice processing module portion of the radio consoles are currently manufactured in Illinois, the other components are manufactured in Mexico. Thus, GDRTA is seeking a Buy America non-availability waiver under 49 CFR 661.7(c)(1) for the radio consoles.

With certain exceptions, FTA's Buy America requirements prevent FTA from obligating an amount that may be appropriated to carry out its program for a project unless ''the steel, iron, and manufactured goods used in the project are produced in the United States.'' 49 U.S.C. 5323(j)(1). A manufactured product is considered produced in the United States if: (1) All of the manufacturing processes for the product take place in the United States; and (2) all of the components of the product are of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents. 49 CFR 661.5(d). If, however, FTA determines that ''the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality,'' then FTA may issue a waiver (non-availability waiver). 49 U.S.C. 5323(j)(2)(B); 49 CFR 661.7(c).

Finally, under 49 U.S.C. 5323(j)(6), FTA cannot deny an application for a waiver based on non-availability unless FTA can certify that (i) the steel, iron, or manufactured good (the ''item'') is produced in the United States in a sufficient and reasonably available amount; and (ii) the item produced in the United States is of a satisfactory quality. Additionally, FTA must provide a list of known manufacturers in the United States from which the item can be obtained. FTA is not aware of any manufacturers who produce the required radio consoles in the United States.

The purpose of this notice is to publish GDRTA's request and seek public comment from all interested parties in accordance with 49 U.S.C. 5323(j)(3)(A). Comments will help FTA understand completely the facts surrounding the request, including the effects of a potential waiver and the merits of the request. After consideration of the comments, FTA will publish a second notice in the **Federal Register** with a response to comments and noting any changes made to the proposed waiver as a result of the comments received.

Ellen Partridge,

Chief Counsel.

[FR Doc. 2016–26317 Filed 10–31–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA–2016–0037]

Notice of Proposed Buy America Waiver for Ultrastraight Rail

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of proposed Buy America waiver and request for comment.

SUMMARY: The Federal Transit Administration (FTA) received a request from the Central Puget Sound Transit Authority (Sound Transit) for a Buy America non-availability waiver for the procurement of ultrastraight rail. Sound Transit seeks to procure ultrastraight rail for a portion of its Northgate Link light rail extension to avoid exceedance of contractually-mandated vibration thresholds. Sound Transit seeks a waiver because there is no domestic manufacturer available to produce rail that has passed the applicable vibration testing standards. In accordance with 49 U.S.C. 5323(j)(3)(A), FTA is providing notice of the waiver request and seeks public comment before deciding whether to grant the request. If granted, the waiver would apply to a one-time FTA-funded procurement by Sound Transit.

DATES: Comments must be received by November 8, 2016. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Please submit your comments by one of the following means, identifying your submissions by docket number FTA–2016–0037.

1. *Web site: http://www.regulations.gov.* Follow the instructions for submitting comments on the U.S. Government electronic docket site.
2. *Fax:* (202) 493–2251.
3. *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
4. *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must make reference to the ''Federal Transit Administration'' and include docket number FTA–2016–0037. Due to the security procedures in effect since October 2011, mail received through the U.S. Postal Service may be subject to delays. Parties making submissions responsive to this notice should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. Note that all submissions received, including any personal information therein, will be posted without change or alteration to *http://www.regulations.gov.* For more information, you may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000 (65 FR 19477), or you may visit *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Cecelia Comito, Assistant Chief Counsel, at (202) 366–2217 or *cecelia.comito@dot.gov.*

SUPPLEMENTARY INFORMATION: The purpose of this notice is to provide notice and seek comment on whether the FTA should grant a non-availability waiver for Sound Transit's purchase of approximately 15,100 feet of ultrastraight rail. On February 23, 2016, Sound Transit requested a Buy America waiver for the ultrastraight rail because the as-installed condition of ultrastraight rail, procured from a domestic manufacturer, failed to meet applicable vibration threshold requirements. Sound Transit estimates that the ultrastraight rail will cost approximately $300,000.

Sound Transit's Northgate Link extension is a $1.9 billion rail project that consists of 4.3 miles and 3 new stations, and runs through residential and employment areas, including the University of Washington. Approximately 15,100 feet of that extension will run under the University of Washington's Health Sciences and Physics-Astronomy buildings, which house precision-measurement laboratories and experiments conducted by Nobel Prize winning faculty. The project's potential impact on the University's buildings was considered as part of the environmental review process required by the National Environmental Policy Act (NEPA). In 2006, FTA issued a final Record of Decision (ROD) for the project, and required implementation of mitigation measures, including a measure that would minimize vibration under the University buildings. Sound Transit then executed a 2007 agreement with the University of Washington in which Sound Transit agreed to not exceed specified vibration thresholds, which could be met through use of ultrastraight rail, with parameters for that rail based on American Railway Engineers Maintenance-of-Way Association (''AREMA'') standards.

Sound Transit contacted domestic rail manufacturers regarding their ability to produce ultrastraight rail within the agreed upon AREMA specifications for the rail. Two leading manufacturers, Steel Dynamics, Inc. (SDI) and EVRAZ North America (EVRAZ), stated unequivocally that they are unable to fabricate rail that meets the specification. Sound Transit subsequently explored using domestically-sourced, milled rail. However, testing of the as-installed milled rail found that the rail failed to meet the applicable vibration thresholds. Due to its unsuccessful efforts to procure domestically-sourced ultrastraight rail within the vibration thresholds, Sound Transit seeks a non-availability waiver of the Buy America requirements for domestically-sourced steel.

With certain exceptions, FTA's Buy America requirements prevent FTA from obligating an amount that may be appropriated to carry out its program for a project unless ''the steel, iron, and manufactured goods used in the project are produced in the United States.'' 49 U.S.C. 5323(j)(1). The steel and iron requirements apply to all construction materials made primarily of steel or iron and used in infrastructure projects such as transit or maintenance facilities, rail lines, and bridges. These items include, but are not limited to, structural steel or iron, steel or iron beams and columns, running rail and contact rail. For steel or iron to be considered produced in the United States, all steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. 49 CFR 661.5.

If, however, FTA determines that ''the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality,'' then FTA may issue a waiver (non-availability waiver). 49 U.S.C. 5323(j)(2)(B); 49 CFR 661.7(c). Any non-availability waiver granted would be effective for a one-time procurement of the rail and would expire upon completion of that procurement.

Finally, under 49 U.S.C. 5323(j)(6), FTA cannot deny an application for a waiver based on non-availability unless FTA can certify that (i) the steel, iron, or manufactured good (the ''item'') is produced in the United States in a sufficient and reasonably available amount; and (ii) the item produced in the United States is of a satisfactory quality. Additionally, FTA must provide a list of known manufacturers in the United States from which the item can be obtained. FTA is not aware of any manufacturers who produce ultrastraight rail that would meet the required parameters in the United States.

Sound Transit conducted an extensive search for a domestic manufacturer of ultrastraight rail, including testing domestically-sourced, milled rail. Unfortunately, testing of the as-installed milled rail found that the rail failed to meet the applicable vibration thresholds. Due to its unsuccessful efforts to procure domestically-sourced ultrastraight rail within the vibration thresholds, FTA proposes to grant Sound Transit a non-availability waiver of the Buy America requirements for 15,100 feet of ultrastraight rail, as required in the 2007 agreement between Sound Transit and the University. This non-availability waiver would be effective for a one-time procurement of the rail and would expire upon completion of that procurement.

The purpose of this notice is to publish Sound Transit's request and seek public comment from all interested parties in accordance with 49 U.S.C. 5323(j)(3)(A). Comments will help FTA understand completely the facts surrounding the request, including the effects of a potential waiver and the merits of the request. After consideration of the comments, FTA will publish a second notice in the **Federal Register** with a response to comments and noting any changes made to the proposed waiver as a result of the comments received.

Ellen Partridge,

Chief Counsel.

[FR Doc. 2016–26316 Filed 10–31–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

[Docket No. DOT–MARAD 2016–0110]

Agency Requests for Renewal of a Previously Approved Information Collection(s): Approval of Underwriters of Marine Hull Insurance

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: The Maritime Administration (MARAD) invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The information is needed in order for Maritime Administration officials to evaluate the underwriters and determine their suitability for providing marine hull insurance on Maritime Administration vessels. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995, Public Law 104–13.

DATES: Written comments should be submitted by January 3, 2017.

ADDRESSES: You may submit comments [identified by Docket No. DOT–

MARAD–2016–0110] through one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251
- *Mail or Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mike Yarrington, 202–366–1915, Director, Office of Marine Insurance, Maritime Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2133–0517.

Title: Approval of Underwriters of Marine Hull Insurance.

Form Numbers: None.

Type of Review: Renewal of an information collection.

Background: This collection of information involves the approval of marine hull underwriters to insure Maritime Administration program vessels. Foreign and domestic applicants will be required to submit financial data upon which Maritime Administration approval would be based.

Respondents: Marine insurance brokers and underwriters of marine insurance.

Number of Respondents: 62.

Frequency: Annually.

Number of Responses: 62.

Total Annual Burden: 46.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for the Department's performance; (b) the accuracy of the estimated burden; (c) ways for the Department to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1:93.

By Order of the Maritime Administrator.

Dated: October 24, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–26353 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016 0113]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel ARC TIME; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before December 1, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0113. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ARC TIME is:

Intended Commercial use of Vessel: "Charter Fishing."

Geographic Region: "Texas, Louisiana, Mississippi, Alabama, Florida, South Carolina, North Carolina, Virginia, Delaware, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, Maine, Puerto Rico including Vieques."

The complete application is given in DOT docket MARAD–2016–0113 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: October 24, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–26359 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016 0111]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel MANNA; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before December 1, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0111. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel MANNA is:

Intended Commercial Use of Vessel: ''Day and Term Charters''.

Geographic Region: ''Florida, Alabama, Mississippi, Louisiana, Texas, Puerto Rico''.

The complete application is given in DOT docket MARAD–2016–0111 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: October 24, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–26352 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016 0112]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel Gotta Love It; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before December 1, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0112. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel GOTTA LOVE IT is:

Intended Commercial Use of Vessel: ''Charter dive boat''.

Geographic Region: ''Florida and Dry Tortugas''

The complete application is given in DOT docket MARAD–2016–0112 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: October 24, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–26351 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016 0114]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel SPELLBOUND; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized

to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before December 1, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0114. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel SPELLBOUND is:

Intended Commercial use of Vessel: Passengers for hire, for recreational charters.

Geographic Region: ''Washington State''.

The complete application is given in DOT docket MARAD–2016–0114 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: October 24, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–26356 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2016–0113]

Denial of Motor Vehicle Defect Petition, DP12–004

AGENCY: National Highway Traffic Safety Administration (NHTSA).

ACTION: Denial of Petition for a Defect Investigation.

SUMMARY: This notice describes the reasons for denying a petition (DP12–004) submitted to NHTSA under 49 U.S.C. 30162, requesting that the agency conduct ''a defect investigation into MY 2005–2010 Nissan Pathfinder, Frontier, and Xterra vehicles [the subject vehicles] for automatic transmission failures related to failed transmission coolers.''

FOR FURTHER INFORMATION CONTACT: Bob Young, Office of Defects Investigation (ODI), NHTSA; 1200 New Jersey Ave. SE., Washington, DC 20590. Telephone: 202–366–4806.

SUPPLEMENTARY INFORMATION: In support of his petition, received on February 29, 2012, Mr. Mathew Oliver, Director of Operations for the North Carolina Consumers Council, Inc. (NCCC); alleged the following:

(1) ''During the past six months, five owners of 2005 Xterra vehicles, and one owner of a 2006 Frontier vehicle, reported that they experienced sudden jerking of their vehicle(s) at highway speeds. They report, in all instances, that dealers diagnosed the problem as a failed transmission fluid cooler located in the radiator that allowed coolant to mix with, and contaminate, the automatic transmission fluid resulting in damaged internal transmission components and a damaged internal transmission computer. The complaints report no warning signs leading up to or just prior to the failures'';

(2) ''NCCC has learned from Web site searches, and through the NHTSA Web site, of many other similar complaints in the subject vehicles. Web site data and NHTSA reports usually [report] the same symptoms and lack of warning. Numerous complaints on the NHTSA Web site note repeat oil [sic] cooler and transmission failures'';

(3) Nissan extended its warranty coverage of subject vehicles' radiator/transmission fluid coolers from 3yrs/36,000 miles to 8yrs/80,000 miles and that this coverage applied only to the radiator/cooler but not to transmissions that may have been damaged as a consequence of cooler failures;

(4) Nissan extended its warranty coverage of subject vehicles' radiator/transmission fluid coolers from 3yrs/36,000 miles to 8yrs/80,000 miles and that this coverage applied only to the radiator/cooler but not to transmissions that may have been damaged as a consequence of cooler failures. Additionally, Nissan failed to conduct inspections that may have revealed a cooler failure was imminent thus helping consumers avoid a catastrophic transmission failure; and

(5) A class action lawsuit was filed in 2010 on behalf of clients relating to this alleged defect.

Mr. Oliver concluded his petition by stating, ''through our limited investigation into the matter, all of the vehicles experiencing these [transmission] failures are within the 8 year period specified by the extended warranty but are often beyond the 80,000 mile limit. It also appears that the number of reported defects is increasing, which is concerning to say the least. Due to the nature of the reported defect, the severity of the reported failures, the repetitive nature of the failures and the limited or missing failure warning signs, we believe that an investigation is warranted.''

NHTSA has reviewed the material provided by the petitioner and other pertinent data. The results of this review and our analysis of the petition's merit is set forth in the DP12–004 Petition Analysis Report, published in its entirety as an appendix to this notice.

For the reasons presented in the petition analysis report, there is no reasonable possibility that an order concerning the notification and remedy of a safety-related defect would be issued as a result of granting Mr. Oliver's petition. Therefore, in view of the need to allocate and prioritize NHTSA's limited resources to best accomplish the agency's safety mission, the petition is denied.

Authority: 49 U.S.C. 30162(d); delegations of authority at CFR 1.50 and 501.8.

Jeffrey M. Giuseppe,

Acting Associate Administrator for Enforcement.

APPENDIX—Petition ANALYSIS—DP12–004

1.0 INTRODUCTION

On February 29, 2012 the National Highway Traffic Safety Administration (NHTSA) received a letter from Mr. Mathew Oliver, Director of Operations for the North Carolina Consumers Council, Inc. (NCCC); petitioning the agency to conduct ''a defect investigation into MY 2005–2010 Nissan Pathfinder, Frontier, and Xterra vehicles [the subject vehicles] for automatic transmission failures related to failed transmission coolers.''

Mr. Oliver's letter included the following information:

(1) ''During the past six months, five owners of 2005 Xterra vehicles, and one owner of a 2006 Frontier vehicle, reported that they experienced sudden jerking of their vehicle(s) at highway speeds. They report, in all instances, that dealers diagnosed the problem as a failed transmission fluid cooler located in the radiator that allowed coolant to mix with, and contaminate, the automatic transmission fluid resulting in damaged internal transmission components and a damaged internal transmission computer. The complaints report no warning signs leading up to or just prior to the failures'';

(2) ''NCCC has learned from Web site searches, and through the NHTSA Web site, of many other similar complaints in the subject vehicles. Web site data and NHTSA reports usually [report] the same symptoms and lack of warning. Numerous complaints on the NHTSA Web site note repeat oil [sic] cooler and transmission failures'';

(3) Nissan extended its warranty coverage of subject vehicles' radiator/transmission fluid coolers from 3yrs/36,000 miles to 8yrs/80,000 miles and that this coverage applied only to the radiator/cooler but not to transmissions that may have been damaged as a consequence of cooler failures;

(4) Nissan extended its warranty coverage of subject vehicles' radiator/transmission fluid coolers from 3yrs/36,000 miles to 8yrs/80,000 miles and that this coverage applied only to the radiator/cooler but not to transmissions that may have been damaged as a consequence of cooler failures. Additionally, Nissan failed to conduct inspections that may have revealed a cooler failure was imminent thus allowing consumers avoid a catastrophic transmission failure; and

(5) A class action lawsuit was filed in 2010 on behalf of clients relating to this alleged defect.

Mr. Oliver concluded his petition by stating, ''Through our limited investigation into the matter, all of the vehicles experiencing these [transmission] failures are within the 8 year period specified by the extended warranty but are often beyond the 80,000 mile limit. It also appears that the number of reported defects is increasing, which is concerning to say the least. Due to the nature of the reported defect, the severity of the reported failures, the repetitive nature of the failures and the limited or missing failure warning signs, we believe that an investigation is warranted.'' [1]

In analyzing the petitioner's allegations and preparing a response, we:

- Reviewed the petitioner's letter, received on February 29, 2012.
- Reviewed the NCCC Web site for additional information.
- Reviewed 2,505 individual complaints filed in our consumer complaint database through September 13, 2016.
- Reviewed individual vehicle Carfax information to determine ownership and service histories.
- Reviewed vehicle manufacturer information concerning relevant extended warranty programs.
- Reviewed vehicle manufacturer technical information concerning transmission operation.
- Reviewed vehicle manufacturer technical information concerning transmission control module (TCM) and engine control unit (ECU) functional relationship, including transmission related fault codes triggering an illuminated ''malfunction indicator lamp.''
- Reviewed various ODI safety defect investigations related to engine stalling and loss of motive power (LOMP).
- Gathered and reviewed information related to the class action lawsuit cited by the petitioner.
- Reviewed vehicle production quantity information from Nissan.
- Interviewed owners, in person and by telephone, about their experience with related transmission failures.
- Test drove subject vehicles where transmission fluid and engine coolant were co-mingled and transmission problems were evident and unresolved.
- Interviewed Nissan dealer service staff about the subject issue.
- Interviewed independent transmission repair shop staff about the subject issue.
- In an effort to learn more about the transmission coolant tank failures, ODI secured the services of NHTSA's Vehicle Research and Test Center (VRTC). VRTC did the following:

A. Interviewed subject vehicle owners and test drove their vehicles; and

B. Conducted a root cause analysis to determine why subject fluid cooler tanks were failing.

Based on our analysis of the information gathered during this comprehensive effort, it does not appear there is a reasonable possibility that an order concerning the notification and remedy of a safety-related defect would be issued as a result of granting Mr. Oliver's petition. Therefore, in view of the need to allocate and prioritize NHTSA's limited resources to best accomplish the agency's safety mission, the petition is denied.

2.0 SUBJECT VEHICLES

The subject vehicles are all MY 2005–10 Nissan Pathfinder, Frontier, and Xterra vehicles equipped with a RE5R05A 5-spd, electronically controlled, automatic transmission. Nissan produced 857,432 subject vehicles for sale in the United States.

3.0 SUBJECT TRANSMISSION COOLING SYSTEM

The subject vehicles are equipped with a transmission fluid cooler. The cooler, a cylindrical tank located within the radiator and submerged in engine coolant, acts as a heat exchanger. Hot transmission fluid flows from the transmission to, and through, the tank where it is ''cooled'' before returning to the transmission. The tank is not visible unless the radiator is disassembled.

[1] Mathew Oliver, to Administrator, National Highway Traffic Safety Administration, Washington, DC, 29 February 2012, page 2.

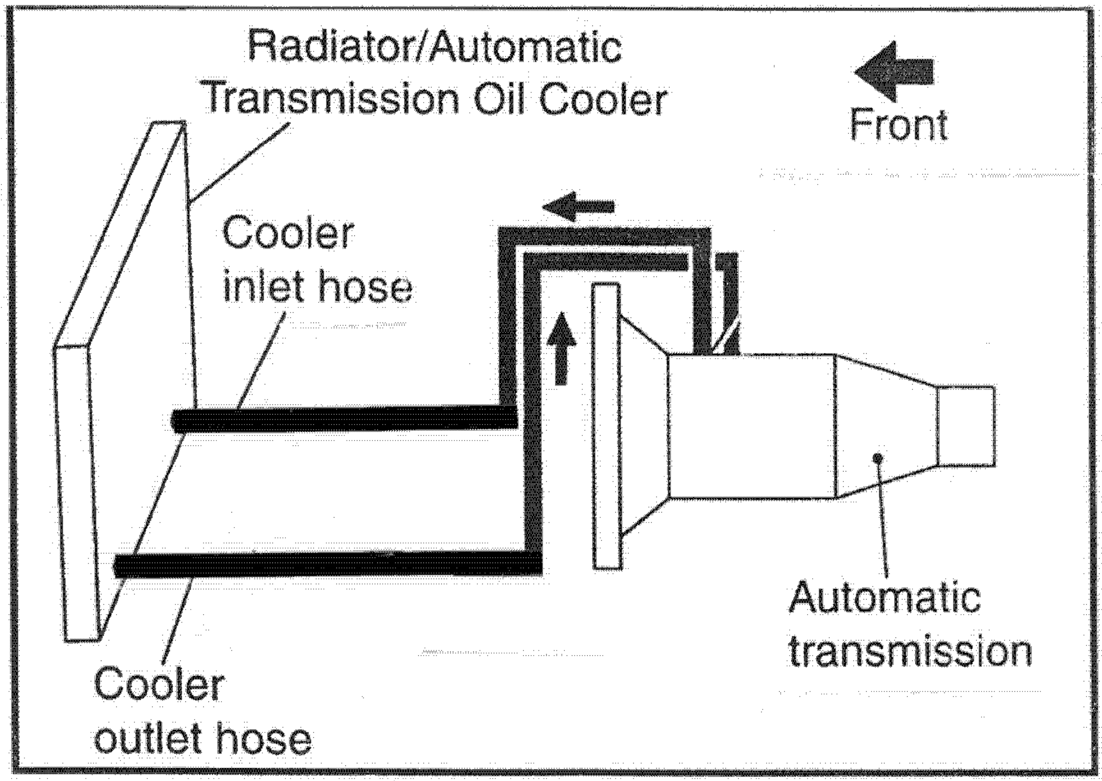


Figure 1 – Subject transmission cooling system - fluid flow schematic

4.0 THE ALLEGED DEFECT

The petitioner alleges that consumers are experiencing a subject transmission performance issue due to co-mingling of engine coolant and automatic transmission fluid (ATF) occurring when the ATF cooling tank fails.

5.0 ROOT CAUSE

NHTSA's Vehicle Research and Test Center (VRTC) in East Liberty, OH was tasked with conducting an assessment to determine why ATF and engine coolant were co-mingling. VRTC's final report, documenting this work, was filed on May 30, 2013.[2]

5.1 MY2005 Nissan Pathfinder, VOQ 10415028

The owner of a 2005 Nissan Pathfinder filed VOQ #10415028, including the following summary:

''TRANSMISSION STARTED SLIPPING STARTED JERKING WHILE DRIVING, ALSOSOUNDED LIKE TIRES WERE MAKING NOISE ESPECIALLY AROUND 40 MPH. I WAS DRIVING ON RT 62 NEAR MY HOME AND WAS VERY FORTUNATE NOT BEING T–BONED AS A PULLED OUT,MY PATHFINDER DIDN'T GO LIKE IT WAS SUPPOSED TO, FORTUNATELY THE ONCOMING VEHICLE STOPPED. I TOOK IT TO A NISSAN DEALER AND THEY SAID THAT THE 2005,2006,2007 PATHFINDER WERE KNOWN TO HAVE AN ISSUE WITH THE COOLER FAILING AND BREAKING DOWN THE TRANSMISSION AND THAT THEY KNEW ABOUT THE FAULTY COOLER FOR ALONG TIME. NISSAN SAID THEY INCREASED THE WARRANTY FROM 60,000 TO 80,000 BUT OTHER THAN THAT THEY HAVE DONE NOTHING. AND DIDN'T INFORM THE PUBLIC. MY FAMILY AND I, DIDN'T GET HURT OR HURT SOMEONE ELSE, HOWEVER THIS SCENARIO COULD BE VERY DANGEROUS AND NISSAN SHOULD INFORM THE PUBLIC AND RECALL THE TRANSMISSION AND FAULTY COOLER BEFORE DEATHS START HAPPENING.''

In a follow-up phone interview, he reported the transmission and radiator were original equipment and that he had the radiator flushed once but was still having problems. He knew about the extended warranty, but his vehicle mileage was beyond the mileage limit. The owner reported that he had not been driving the vehicle for approximately one year.

The owner accepted VRTC's offer of a cost-free tow and free vehicle inspection at his local Nissan dealer. If co-mingled fluid was found, his radiator would be removed and taken to the Center's lab.

However, on the day of the inspection (August 28, 2012), he drove it to the dealership. The vehicle appeared to be in good condition with 126,495 miles on the odometer. At the dealership, the owner discussed his situation. He had replaced the engine coolant and the ATF approximately 12months/40 miles ago. He described transmission slipping, jerking, the tires making chirping noises, and lack of acceleration when needed, such as pulling out onto a highway. He reiterated his concern about the $6,000.00 estimated repair cost.

VRTC staff removed the radiator cap and found the fluids co-mingled. The radiator was removed and replaced with a new one. Before leaving with the subject radiator, the dealership service manager reported that they find co-mingled fluid in subject vehicles about once or twice per month.

5.2 VRTC root cause finding

At VRTC, the radiator was pressurized and submerged in a tank of water. The radiator bubbled slowly and steadily from the open ATF ports indicating a crossover leak, as shown in Figure 2.

[2] FINAL REPORT: DP12–004 ''Inspections and Tests of Engine Coolant Radiators with Integrated ATF-Temperature-Stabilizing Cylinders from 2005–10 Nissan Light Trucks''; Roger A. Saul, Director, VRTC, May 30, 2013.

When the ATF cooling cylinder was removed and pressurized, a leak was noted just inboard of the AFT ports, as shown in Figure 3. Figure 4 shows this was due to a fractured interface between the cylinder and the disk that supports the ATF port. This fracture appears to be the result of normal hoop stress on the cylinder in an area that was restrained by the port disk that resulted in a stress concentration and a fatigue fracture.

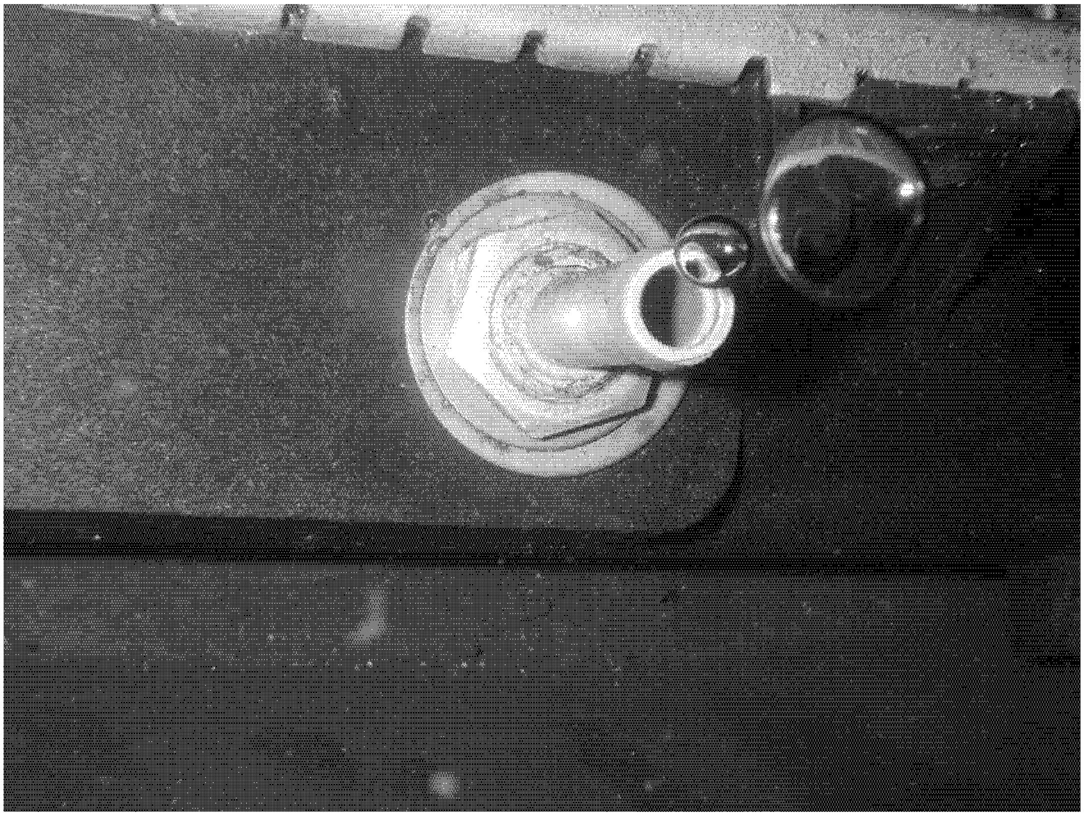


Photo 1 – Crossover leak from the ATF cooling cylinder port

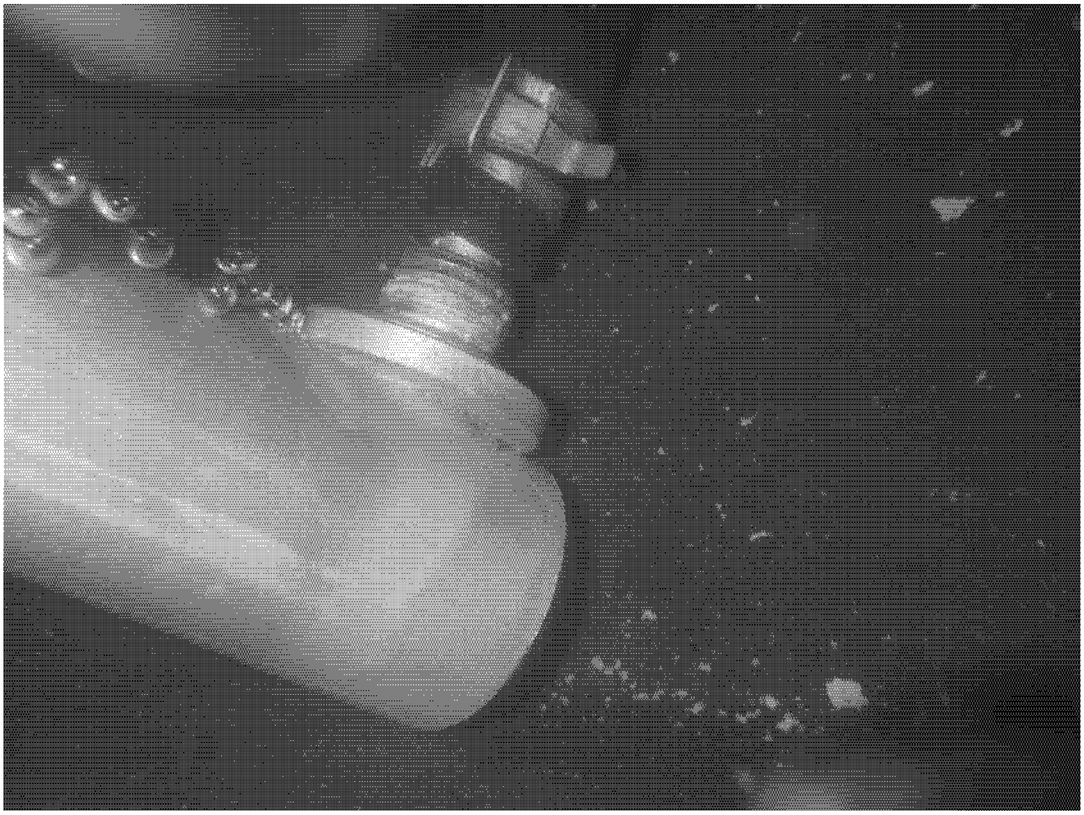


Photo 2 – Leak at left ATF port from submerged cooling cylinder

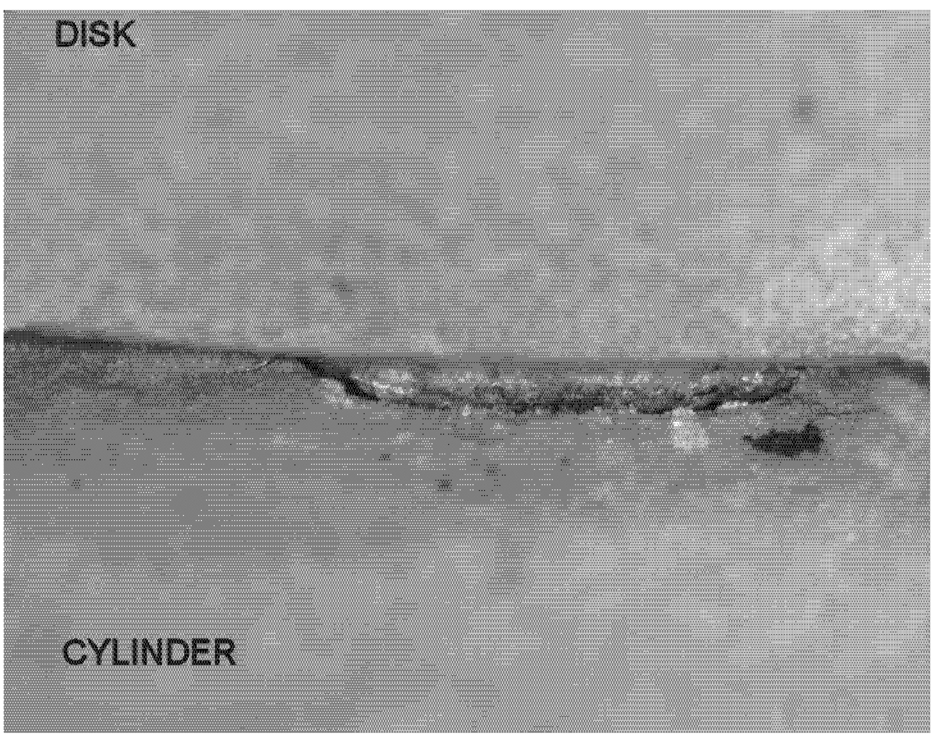


Photo 3 – The ATF cooling cylinder fracture at 25x magnification

6.0 EFFECT OF CO-MINGLED FLUID ON VEHICLE OPERATION

Co-mingled ATF and engine coolant may affect transmission performance and may cause an engine stall.

6.1 Transmission performance anomalies due to co-mingled fluid

Exposure to co-mingled ATF and engine coolant will have an adverse effect on transmission performance and longevity. Engine coolant (*e.g.,* water, anti-freeze and/or a combination of the two) will cause the automatic transmission clutch linings to delaminate from transmission clutch plates and bands. Once that begins to occur, transmission performance will degrade over time with operators first noting sluggish shifts, shift shudder, slipping in gear, and a delay when shifting from Park into Drive or Reverse. If not remedied, ultimately the transmission will no longer transmit engine power to the driven wheels and the vehicle will perform as though its transmission is in neutral (*i.e.,* no motive power).

6.2 Engine stalling due to co-mingled fluid

The subject transmission is electronically controlled by the Transmission Control Module (TCM) located internally. By design, the TCM should never come in contact with engine coolant. The TCM communicates with the Engine Control Module through the vehicle's Controller Area Network (CAN). The TCM is capable of diagnosing transmission malfunctions and the ECM stores the resulting diagnostic trouble codes (DTCs) in memory. In some instances, a TCM malfunction (due to contamination by engine coolant, for example), can result in an engine stall, poor shift performance, and an engine no-start condition. Typically a TCM malfunction will trigger the illumination of a MIL (malfunction indicator lamp), which, on the subject vehicles' instrument cluster, is displayed as ''Service Engine Soon.''

Photo 4 – Subject vehicle MIL - "Service Engine Soon"

Typically ''fault codes'' are stored within the ECM when the MIL is illuminated due to a TCM anomaly. These codes are later used by technicians to diagnose the problem. For example, a ''U1000'' code is stored when the TCM cannot communicate with the ECM.[3] The engine may stall when this type of malfunction is detected.

7.0 CONSUMER COMPLAINTS TO NHTSA

As of September 13, 2016 we received 2,505 complaints concerning subject vehicle transmission performance. Of these, 2,081 were submitted since the petition was filed on February 29, 2012.

After reviewing the complaints, they broadly fall into two categories: Customer Satisfaction and Potential Hazard.

7.1 Customer Satisfaction-Related

Of the 2,505 complaints received by ODI, 1,867 pertained to customer satisfaction issues such as cost of repair, vehicle shudder and shake, no engine start, engine overheat, no cabin heat, no reverse, and check engine light on. Fully fifty percent of these complaints (944) mention cost of repair, the single most reported concern. Vehicle shudder and shake was identified in 798 VOQs, the most reported vehicle-related customer satisfaction issue.

7.2 Potential Hazard

Six hundred and thirty-eight VOQs reported the following potential hazards: unable to maintain vehicle speed, loss of motive power, and engine stalling. As in the customer satisfaction-related VOQs discussed previously, cost of repair was the single most identified issue, with fifty-four percent (344) voicing the concern. Allegations of ''unable to maintain speed'' and ''no motive power'' were found in 573 complaints (299 and 274, respectively). Engine stalling was identified in 65 VOQs. Average vehicle mileage when these complaints were filed is approximately 106,482.

[3] The ''U1000'' code is identified in alleged crash VOQ 10789140 discussed later in this report.

8.0 ALLEGED CRASH REPORTS

Four crashes are alleged; two due to loss of motive power, one due to an engine stall, and the fourth due to vehicle shudder.

8.1 Alleged crash report #1—VOQ 10555827—Loss of motive power

This VOQ was filed with us on December 12, 2013 by the second owner of a MY2008 Nissan Xterra. No VIN was provided. It includes this summary:

''WHILE DRIVING THROUGH THE INTERSECTION, MY VEHICLE SUDDENLY LOST POWER CAUSING ME TO GET REAR ENDED. VERY MINIMAL DAMAGE TO MY VEHICLE BUT MY DAUGHTER WAS IN THE CAR WITH ME. UPON FURTHER INSPECTION AT A SHOP IT WAS CONCLUDED THAT THE CAUSE OF THE LOSS OF POWER WAS DUE TO A FAILURE IN THE TEAMS FLUID COOLER CAUSING RADIATOR FLUID TO ENTER THE TRANSMISSION. ''

In a subsequent telephone conversation, complainant stated that he had purchased the vehicle, with 112,098 miles, from a private owner on December 6, 2013. No transmission or radiator issues were disclosed. However some sluggishness in transmission up- and down- shifting was noted about a day before the crash.

The owner reported that he was driving the Xterra, with his 12 y.o. daughter as a passenger, on December 9, 2013 as they approached an intersection at about 40 mph. The vehicle suddenly lost motive power, slowed, and was rear-ended resulting in damage to the rear bumper and no personal injury. No police report was filed. Later that day, he drove the Xterra to his local Nissan dealer where co-mingled fluids were found. He was given a repair estimate of $4500 to replace the radiator and transmission. He was also told that, based on vehicle age and mileage, he was not eligible of either Nissan's extended warranty or the class action settlement terms (which are, in fact, identical). So, unable to afford this repair, the vehicle has been parked near his home since.

We attempted to gather service and owner history information but without a VIN have been unable to do this. The owner agreed to provide the VIN by email. To date he has not done so.

8.2 Alleged crash report #2—VOQ 10561840—Shudder

This VOQ was filed with ODI on January 28, 2014 by the second owner of a MY2007 Nissan Pathfinder. The alleged crash occurred on January 10, 2014, at about 90,000 miles which he summarized as follows:

''I REQUEST THAT THE DOT NHTSA INVESTIGATE MANUFACTURER DEFECTS IN 2007 NISSAN PATHFINDERS COOLING SYSTEM AND TRANSMISSION AS UNEXPECTED FAILURE RELATES TO DRIVER SAFETY. MY 2007 PATHFINDER WITH 90,000 MILES CAUSED A MAJOR COLLISION WITH A DEER AS THE TRANSMISSION BEGAN TO FAIL. DRIVING HOME, AT AROUND 40MPH, UP A HILL (ENGINE UNDER LOAD @2,200–2,500 RPM) THE WHOLE CAR BEGAN SUDDENLY TO ''SHUDDER''- SIMILAR TO THE FEELING/SOUND OF RIDING OVER HIGHWAY RUMBLE STRIPS. THIS RESULTED IN A LOSS OF CONTROL OVER THE SPEED OF THE VEHICLE AND A NOTICEABLE DISTRACTION LEAVING ME UNPREPARED AS A LARGE BUCK RAN OUT FROM THE TREE LINE ATTEMPTING TO CROSS THE ROAD- THE BUCK DID NOT MAKE IT ACROSS. AS I HAVE FOUND IN MY RESEARCH AFTERWARDS, THERE IS A WIDELY KNOWN MANUFACTURER DEFECT IN WHICH ENGINE COOLANT MIXES WITH TRANSMISSION FLUID. THE RESULTING ''GOOP'' SHREDS THE INTERNAL PARTS OF THE TRANSMISSION RENDERING IT (ALONG WITH THE RADIATOR AND COMPONENTS) COMPLETELY USELESS. THESE VEHICLES ARE UNSAFE FOR THE ROADWAYS AS THIS PROBLEM OCCURS SUDDENLY AND UNEXPECTEDLY WITHOUT WARNING. I CONSIDER MYSELF LUCKY FOR BEING ALIVE- NOW, BUT SINCE NISSAN NOR ANY OTHER ORGANIZATION IS WILLING TO RECALL OR REPLACE THIS VEHICLE/AFFECTED PARTS, I AM STUCK, *FORCED* [EMPHASIS ADDED] TO DRIVE ON THE ROAD BEING A HAZARD TO OTHERS AND MYSELF.''

Numerous attempts to contact this filer, by mail, email, and telephone have been unsuccessful.

According to the VOQ, the incident was not reported to police.

A Carfax vehicle history report reveals that the subject owner, the vehicle's second, purchased it on February 21, 2009 at 29,526 miles. The detailed service history includes 11 service visits prior to the alleged crash . . . none related to either the transmission or radiator nor are any crash-related repairs identified either before or after the alleged crash date. We recognize, however, that not all service attempts may be documented in the report.

8.3 Alleged crash report #3—VOQ 10789140—Engine Stall

This VOQ was filed on November 9, 2015 by the owner of a MY2008 Nissan Pathfinder. It contains the following summary:

'' ON NOVEMBER 6, 2015 AROUND OR ABOUT 7:00PM MY V6 2008 NISSAN PATHFINDER SERVICE ENGINE LIGHT TURNED ON WHILE IN FIRST GEAR IN MOSTION; THE SUV ENGINE AND TRANSMISSION TURNED OFF HAD NO BRAKES AND HAD A FENDER BENDER WHILE IN MOTION, HAD THE SUV TOWED HOME AND CHECKED THE CODE ON THE OBD AND IT READ CODE: U1000 CONTROLLER AREA NETWORK (CAN) COMMUNCATION LINE SIGAL MALFUNCTION.DID A VISUAL CHECK INSIDE RADIATOR FILLER PORT, ELECTRICAL FUSE (10AMP FUSE TO THE TRANSMISSION BLEW WHICH ATOMCTICLY TOLD ME A COMMUNICATION HARNESS IS OPEN OR SHORTED; OR A FAULTY ENGINE CONTROL MODULE(ECM))AND ALSO CHECKED THE RESIVOR FILLER PORT, FOUND RED TRANSMISSION FLUID AND GREEN ENGINE COOLENT FLUID INCORPORATED IN RADIATOR (CONTAMINATION), ALSO CHECKED TRANSMISSION DIP STICK TO SEE IF TRANSMISSON FLUIDS LOW BUT INSTEAD FOUND RUST AT THE END PART OF THE DIPSTICK INSIDE THE TRANSMISSON INDICATING ENGINE COOLENT CONTAMINATION (WATER) ALL INSIDE THE TRANSMISSION.WHO KNOW HOW MUCH RUST IS INSIDE THE TRANSMISSION UNTIL A FULL TEAR DOWN AND THOROUGH INSPECTION IS PERFORMED.....CAR IS STATIONARY AND WILL NOT START''

We have been unable to contact the owner to confirm the details related in his complaint.

This vehicle, with 105,985 miles, was bought at auction in July, 2015 by a used car dealer in Texas before being sold, on September 9th to the current owner (and VOQ filer). Fifty-seven days later the alleged crash occurred due to an engine stall. No police report was filed. The Carfax service history shows no transmission/radiator-related repairs and indicates that the only service work done on the vehicle since September 9, 2015 was a ''maintenance inspection'' at 111,916 miles.

8.4 Alleged crash report #4—VOQ 10854627—Loss of motive power

This VOQ was filed with us on April 10, 2016 alleging that a crash occurred on September 15, 2015 involving a

MY2006 Nissan Frontier. The Carfax Vehicle History Report shows there have been at least 5 owners of this truck with the current owner filing a VOQ containing this narrative:

''I BOUGHT MY 06 NISSAN FRONTIER WITH 95000 MILES GREAT TRUCK LOVED IT WHEN IT GOT TO 118000 MILES THE RADIATOR MESSED UP CAUSING ME TO REPLACE THE RAD AND TRANS FLUSH 500$ TWO WEEKS LATER NO REVERSE ONE DAY HEADED HOME FROM WORK GOING UP LICK HILL SECOND GEAR GOS OUT CAUSING ME TO GET REARENED THEN THERE'S 200$ FOR TOWING AND A SMASHED UP TRUCK JUST SPENT 8000 ON THE TRUCK AND CAN NOT AFFORD TO PUT 4000 MORE IN IT WHAT THE HELL THIS IS A JOKE MY TRUCK WILL ROT TO THE GROUND BEFORE I SPEND 4000 MORE I HOPE THIS IS TAKEN CARE OF NOBODY SHOULD HAVE TO DEAL WITH THIS NOW I A PIECE OF JUST THAT'S NOT WORTH 2500 NISSAN U SUCK''

In a subsequent telephone conversation with us, the owner said, after finding co-mingled ATF/engine coolant, he replaced the radiator and then had an independent repair shop perform a transmission fluid flush. The transmission still would not shift into reverse. No further repair attempts were made. Two weeks later the September 15th crash occurred. No police accident report was filed and the vehicle has been parked since.

9.0 ODI VEHICLE INSPECTIONS

ODI met with two local owners for an interview and vehicle inspection. The second prompted the discovery, and inspection, of a third vehicle.

9.1 VOQ 10695005

On June 28, 2016, we met with the original owner of the MY 2007 Nissan Pathfinder at his home in the Baltimore, MD suburbs. We focused on this owner because his vehicle was involved in a loss of motive power incident; the dealer confirmed the fluid was co-mingled; and it had not been repaired. His VOQ (10695005), filed on March 18, 2015, included the following summary:

''PURCHASED 2007 NISSAN PATHFINDER BRAND NEW. BROUGHT TO NISSAN DEALER DUE TO CHECK ENGINE LIGHT ON DASHBOARD. DIAGNOSIS PERFORMED AND DETERMINED RADIATOR/TRANSMISSION FLUID/COOLANT LEAKING INTO TRANSMISSION. ESTIMATED REPAIR $6000 TO REPLACE RADIATOR/THERMOSTAT/TRANSMISSION. AT 140000 MILES, NISSAN STATES NO LONGER UNDER POWERTRAIN WARRANTY. DECLINED SERVICE.''

While meeting with the owner, he told us that about a week after filing his VOQ, he drove the Pathfinder, with his family, to a birthday party about 20 miles away. He noted that the vehicle seemed to shudder when shifting and that engaging ''Drive'' occurred sluggishly when shifting out of ''Park''. While driving home from the party, it suddenly became difficult to keep up with traffic on the Baltimore beltway. Soon he was driving in the far right lane with his flashers on. They finally made it home but the vehicle was unable to negotiate the ramp onto his driveway so he just parked it on the ramp. The following day he was able to move the vehicle in reverse and he parked it, on the street in front of his house, where it remained until our visit.

Photo 5 – June 28, 2016 - 2005 Pathfinder

The owner advised he had made no attempt to have the vehicle repaired due to the estimated $6,000.00 repair cost. He was aware of both Nissan's extended warranty and the class action settlement but neither would cover his repair due to both age (now 11 years) and mileage (greater than 100,000).

During our visit, we removed the radiator cap and found co-mingled ATF/coolant.

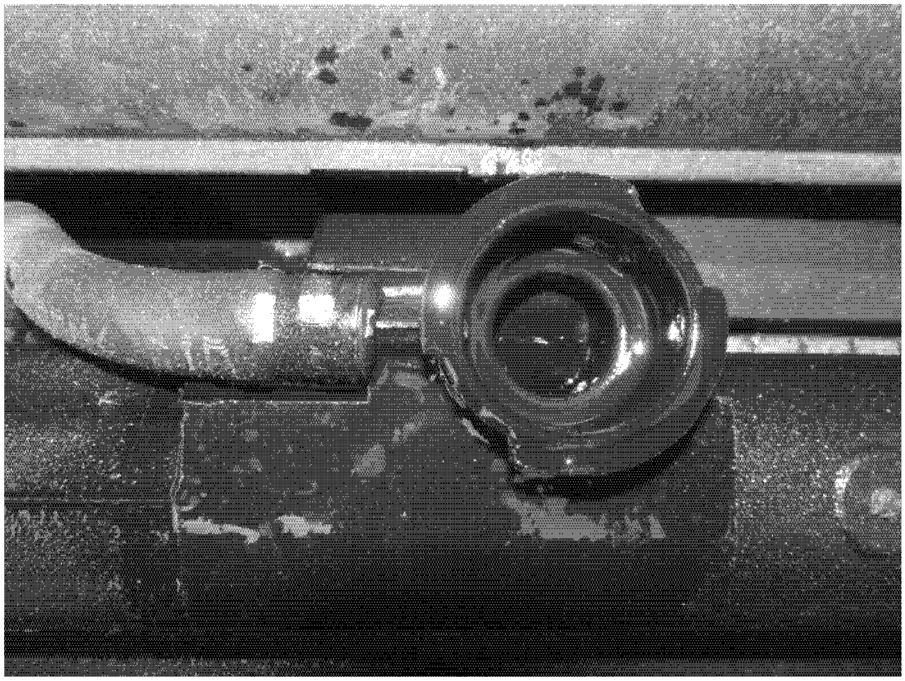


Photo 6 – June 28, 2016 - 2005 Pathfinder - co-mingled ATF/Coolant

We then drove the vehicle, accompanied by the owner, around his neighborhood. The engine started easily as the owner had charged the battery in anticipation of our meeting. Initially, no transmission shift anomalies were noted but the check engine light was illuminated as described over a year earlier in the subject VOQ. However, as the engine warmed up, we began to notice sluggish engagement whenever the transmission would up-, and down-, shift. After about 10 minutes, we parked in front of his house. No other transmission anomalies were noted.

When asked why, after being told by the dealer that he needed a new transmission, he elected to drive to the birthday party in the Pathfinder with his wife and three children, he told us he did not realize that the transmission might fail in a way that would make it impossible to maintain highway speed. He further advised that he did not want to spend $6,000.00 to repair the vehicle and was awaiting the outcome of this investigation before deciding whether to sell the vehicle or have it repaired.

9.2 VOQ 10721809

On May 27, 2015 we received a VOQ from the owner of a MY2006 Nissan Pathfinder located in the northern Baltimore suburbs. She is the vehicle's second owner, having purchased it on October 8, 2011. Vehicle mileage was 53,887 at that time. The VOQ summary reads:

''TRANSMISSION IS SHAKY AND JERKS WHEN SHIFTING, APPARENTLY NISSAN KNEW ABOUT RADIATOR COOLANT LEAKING INTO THE TRANSMISSION LINE!!!''

We decided to meet with this owner because the dealer installed an aftermarket ATF cooler in addition to replacing the radiator and transmission. On June 30, 2016 we met at her work and inspected her vehicle.

Photo 7 – June 30, 2016 - 2006 Pathfinder

She advised that the radiator and transmission were replaced by her local Nissan dealer on December 15, 2015 and provided a copy of the repair order. At the time her vehicle was less than 10 years old and had fewer than 90,000 miles (87,110), thus she was eligible for the $3,000.00 deductible extended warranty coverage. We confirmed that an external ATF cooler had been installed. After discussing the repair, we removed the radiator cap and found apparent co-mingled fluid:

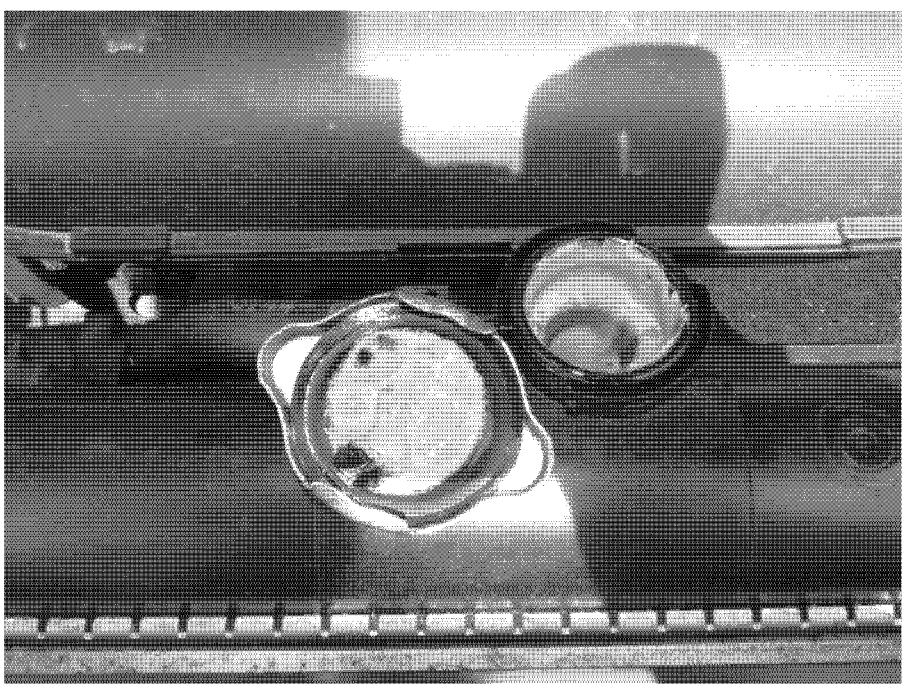


Photo 8 – June 30, 2016 - 2006 Pathfinder - co-mingled ATF/Coolant

Further inspection found that the aftermarket cooler had been installed ''in series'' so that ATF still flowed through the OE ATF cooler. Thus, a failure of the OE cooler could still result in co-mingled ATF and engine coolant.

We were to confirm that the source of the co-mingled fluid resulted from an OE cooler failure, however.

9.2.3 No VOQ

Following our visit with owner two (VOQ 10721809), we cold-called a local Nissan dealer service department to learn about its perspective concerning subject transmission failures due to ATF/engine coolant co-mingling.

The service manager advised that his department had replaced ''about 30'' subject transmissions due to ATF cooler failures. ''In fact, he said, we have one in right now.'' He then led us out to the lot where we found this 2005 Xterra:

Photo 9 – June 30, 2016 - 2005 Xterra

Upon removing the radiator cap, we found evidence of fluid co-mingling:

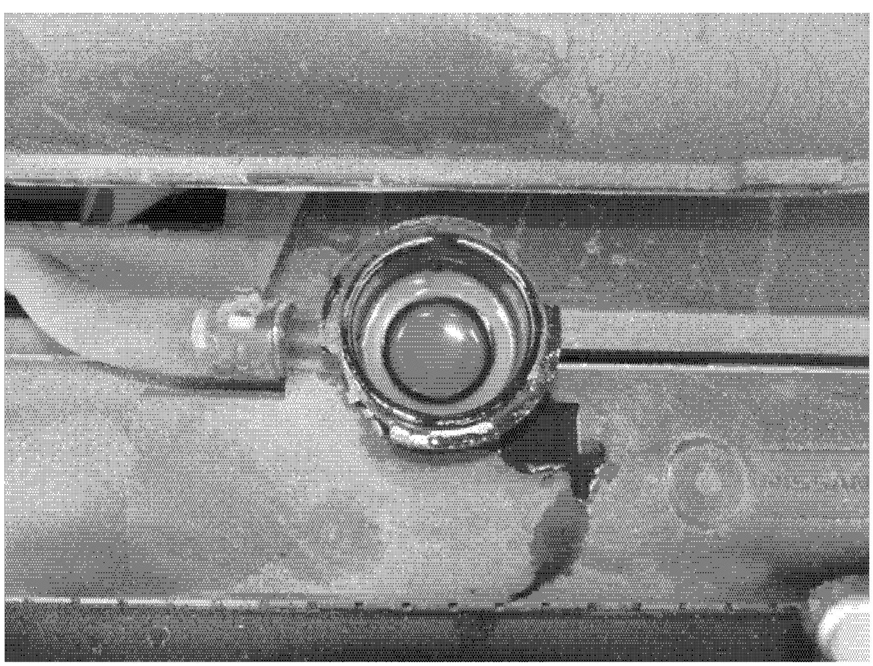


Photo 10 – June 30, 2016 - 2005 Xterra - co-mingled ATF/Coolant

When asked for this vehicle owner's contact information, the service manager was reluctant to provide it without first contacting the customer. He said would have them call us. As of September 21, 2016 we have not heard from the customer.

According to a Carfax report, run on September 21, 2016, this vehicle has had three owners. The first sold the vehicle on December 18, 2010 with 38, 353 miles. The second owner traded in the vehicle on July 15, 2016 (16 days after we inspected it) with 102, 816 miles. On September 5, 2016 the vehicle was sold at auction to an unidentified buyer as a ''dealer vehicle.'' The last service noted occurred on June 27, 2016 as ''recommended maintenance performed/Oil and filter changed.'' No transmission or radiator-related work is identified.

10.0 COST OF REPAIR

The single most commonly reported concern, expressed by 1,288 of the 2,505 owners filing related VOQs with us, is repair cost. Once an automatic transmission has been exposed to engine coolant due to a radiator failure, vehicle owners are faced with an expensive repair. With subject vehicles, a radiator replacement and fluid flush costs between $500.00 and $1,000.00. However, fluid flushes do nothing to reverse damage done to transmission clutch material. Thus, replacing a subject transmission (to effectively repair the vehicle) will cost an additional $3,200.00 to $6,500.00 for a total repair cost (radiator and transmission replacement) of $4,200.00-$7,500.00. Since these failures occur on some vehicles greater than ten years old, such an expense may be more than 50% of vehicle re-sale value. Finally, despite two warranty extensions by Nissan and a class action settlement, owners are still faced with a steep repair bill to correct a manufacturing issue.

10.1. Nissan's first extended warranty

In October, 2010, Nissan extended its warranty coverage of subject radiators to 8 years/80,000 miles from the original 3 years/36,000 miles. Nissan claims it did this to ''demonstrate our commitment to stand behind our products and our customers, by addressing an issue that had been identified with a limited number of vehicles. Specifically, in a small number of vehicles equipped with automatic transmissions, a crack in the radiator assembly might occur at higher mileages leading to internal leakage of engine coolant.'' No direct notice of this warranty extension was sent to the affected customers. Nissan later claimed such coverage extended to ''other affected components'' (such as the transmission). However, affected Nissan customers report that the company would refuse to cover replacement of automatic transmissions damaged by such ''internal leakage of engine coolant'' resulting from a ''crack in the radiator assembly.'' Here is one such report:

VOQ 10310194—''I OWN A 2005 NISSAN PATHFINDER AND I HAVE BEEN HAVING PROBLEMS WITH THE HEAT STAYING CONSISTENT (DOES NOT BLOW HOT AIR WHEN IDLE) AS WELL A VIBRATION WHEN DRIVING AT CERTAIN SPEEDS. I ALSO BEGIN TO NOTICE THAT TRANSMISSION BEGAN TO SLIP. I WOULD STOP AT A RED LIGHT AND GO TO TAKE OFF AND WOULD NOT BE ABLE TO PICK UP SPEED WHICH CAN BE DANGEROUS WHEN ENTERING THE HIGHWAY. I RESEARCHED THIS ONLINE AND FOUND MANY OTHERS HAVING THE SAME PROBLEMS. I TOOK THE TRUCK TO A NISSAN DEALERSHIP AND THEY TOLD ME EXACTLY WHAT I ALREADY KNEW, THE RADIATOR WAS NOW NO GOOD AND LEAKING ANTIFREEZE INTO THE TRANSMISSION WHICH HAS CAUSED BOTH OF THEM TO BE RUINED AND THEY WANT TO CHARGE ME 5K TO REPLACE. I ASKED IF THE DEALERSHIP HAS SEEN THIS BEFORE AND IT WAS CONFIRMED THAT SEVERAL OF THE SAME VEHICLES HAVE BEEN IN FOR THIS VERY REASON. HE ADVISED THAT NISSAN HAS NOT PAID FOR THESE SERVICES AS THE VEHICLES ARE ALWAYS OUT OF WARRANTY ON THE RADIATOR. I STILL HAVE 2000 MILES LEFT ON MY POWERTRAIN AND ADVISED THAT I WOULD BE CONTACTING NISSAN FOR ''GOODWILL'' ASSISTANCE. NISSAN FINALLY CONTACTED ME AND ADVISED THAT SINCE THE PROBLEM WAS INITIALLY CAUSED BY THE RADIATOR, THEY WOULD NOT HONOR THE POWERTRAIN WARRANTY...''

10.2 Class Action Lawsuit

On September 30, 2010, shortly before Nissan's first extension of subject radiator warranty terms, a class action lawsuit was filed against the company alleging cross-contamination (co-mingling) of coolant and transmission fluid in MY 2005 Nissan Pathfinders. Nissan asserts it was already in the process of extending the warranty before the lawsuit was filed.[4] Later, the lawsuit complaint was amended to include all vehicles covered by Nissan's first warranty extension (which are also the ''subject vehicles'' in this petition analysis).

On July 23, 2012, Nissan and the plaintiffs agreed to settlement terms and formal settlement papers were executed in August, 2012. On October 9, 2012 the court preliminarily approved the following settlement and granted the plaintiff attorneys application for an award of attorneys' fees in the amount of $1,620,000.00.

''Nissan agrees to make repairs through authorized [Nis-san] Dealers, if and as needed, on the radiator assembly and other damaged components (including the trans-mission) in Class Vehicles owned or leased by Settlement Class Members because of cross-contamination of engine coolant and transmission fluid (and inclusive of towing costs, if any) as a result of a defect in the radiator up to a maximum of 10 years or 100,000 miles, which-ever is less, subject to the following customer co-pay:

(a) All repairs on vehicles that exceed eight years or 80,000 miles, whichever is less, but fewer than nine years or 90,000 miles, whichever is less, are subject to a customer co-pay in the amount of $2500 which is the responsibility of the Settlement Class Member.

(b) All repairs on vehicles that exceed nine years or 90,000 miles, whichever is less, but fewer than 10 years or 100,000 miles, whichever is less, are subject to a customer co-pay in the amount of $3000 which is the responsibility of the Settlement Class Member.

Nissan also agreed to reimburse Class Members who have paid for repairs to their radiators and other damaged components (including the transmission) because of cross-contamination of engine coolant and transmission fluid as a result of a defect in the radiator between 8 years/80,000 miles, whichever occurs first, and 10 years/100,000 miles, whichever occurs first, subject to the mileage-related co-payments described above. Reimbursement is inclusive of towing costs, if any, incurred as a result of this problem.''

On January 7, 2013, settlement notices were sent to the subject vehicle owners.

10.3 Nissan's second extended warranty

On October 12, 2012, three days after the court approved the class action lawsuit settlement, Nissan released the

[4] DECISION MEMORANDUM, United States District Court, S.D. New York; in re NISSAN RADIATOR/TRANSMISSION COOLER LITIGATION; No. 10 DV 7493(VB); May 30, 2013, page 1.

following bulletin notifying its dealers that it was further extending warranty coverage of subject radiators.

Subject: **2005-10 Frontier, Pathfinder, and Xterra Radiator Assembly Additional Warranty Extension**

Attention: **Dealer Principals, Sales, Parts and Service Managers**

******* Warranty Extension Announcement *******

Nissan has decided in the interest of customer satisfaction, to further extend the warranty for the Radiator Assembly on all 2005-10 Frontier, Pathfinder, and Xterra vehicles equipped with automatic transmissions.

On a small percentage of vehicles, an internal crack on the oil cooler tube may occur leading to internal leakage of engine coolant. While the majority of vehicles will not experience this issue, for customer satisfaction purposes, Nissan has decided to further extend the coverage of the New Vehicle Limited Warranty on the radiator assembly, subject to certain customer co-pays that vary with age/mileage.

The New Vehicle Limited Warranty coverage on applied vehicles for the Radiator Assembly (original terms 3 years/36,000 miles) will be extended from the current extension of 8 years/80,000 miles to 10 years/100,000 miles (whichever occurs first), including damage, repairs, replacement, and towing resulting from this issue.

With the additional extension, the following warranty coverage and corresponding customer co-pays will now apply:

- Up to 8 years/80,000 miles (whichever comes first): **No customer co-pay**
- After 8 years/80,000 miles (whichever comes first) up to 9 years/90,000 miles (whichever comes first): **Customer co-pay is $2,500**
- After 9 years/90,000 miles (whichever comes first) up to 10 years/100,000 miles (whichever comes first): **Customer co-pay is $3,000**

As with the prior extension, this extension of warranty on the radiator assembly will cover damage caused to other affected components, including the vehicle transmission, as a result of an internal leakage condition in the radiator assembly. However, existing powertrain coverage applicable to the transmission (5 years/60,000 miles) otherwise remains unchanged.

Figure 2 – Nissan's extended warranty bulletin sent to dealers 10/12/12

The terms described in this bulletin are identical to those found in the lawsuit settlement, including the specific reference to coverage of transmissions damaged as a result of radiator failure and the reimbursement provision. And, as in the class settlement, there would be no assistance for owners of subject vehicles older than 10 years or with more than 100,000 miles.

11.0 NHTSA ANALYSIS

Automatic transmission failures as a result of clutch degradation (which, in this case occurs due to contamination by engine coolant) are progressive. Prior to a complete breakdown, vehicle performance will exhibit hesitation when shifting from Park to D/R, harsh shifting, intermittent slippage and/or vehicle shudder before a loss of motive force occurs. In many instances drivers report they had no idea that vehicle shift shudder would ultimately result in a loss of motive power and leave them stranded if they ignored an apparent problem with their vehicle's transmission. Those that do have the vehicle inspected for ''shift shudder,'' for example, many times refuse the service due to cost and continue driving it instead. Others, faced with the expense of replacing the transmission and radiator (frequently without the benefit of the extended warranty or class action settlement since their vehicle is either too old or has too many miles), simply sell it to an unsuspecting buyer. Indeed, the four crashes alleged to have occurred due to the subject issue involved vehicles that had been purchased, used, less than two months earlier at an average of 109,000 miles. The petitioner (NCCC) recognized this latter scenario in a May 18, 2016 consumer advisory against purchasing a subject vehicle.[5]

[5] North Carolina Consumer Council at *www.ncconsumer.org/news-articles/nccc-advises-against-the-purchase-of-nissan-pathfinder-frontier-and-xterra-vehicles.*

The United States Code for Motor Vehicle Safety (Title 49, Chapter 301) defines motor vehicle safety as ''the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.''

The Office of Defects Investigations (ODI) has opened many defect investigations into engine stalling and/or loss of motive power. The majority of investigations resulting in safety recalls involved a complete loss of motive power, frequently accompanied by loss of power-assist to steering and brake systems (the latter conditions not present here). Factors that support recalls to remedy these conditions include a lack of warning or precursor symptoms to the driver; stalling during power-demand situations such as accelerating or to maintain highway speeds/uphill grades; and an inability to immediately ''restart'' or restore mobility to a stranded vehicle. Absent very high failure rates in new vehicles, NHTSA has not successfully pursued hesitation, reduced engine power modes, or stalling outside the conditions listed above, primarily because these conditions have not been found to demonstrate an unreasonable risk to motor vehicle safety. Experience of harsh shifting and transmission degradation over time would typically fall into this category, even if it leads to an eventual loss of motive power condition.

12.0 FINDINGS

1. Of the 2,505 complaints received through September 13, 2016, 1,288 (51%) mention repair cost . . . the single most cited issue
2. The high repair cost motivates many owners to delay repair if one is done at all. The extended warranty/CA settlement terms contribute to this.
3. Cost of repair motivates some owners to sell un-repaired vehicles w/o disclosing co-mingling problem
4. Transmission failures resulting in LOMP, due to co-mingled fluid, are slowly progressive . . . vibration, shift degradation, slipping, then loss of motive power.
5. While many owners acknowledge noticing shift quality degradation, they did not understand that, if left untended, it could result in loss of motive force.
6. Three of the four alleged crashes involve pre-event warning symptoms which were ignored and all involved used vehicles that had recently been purchased presumably with a pre-existing fluid co-mingling condition.

13.0 CONCLUSION

Based on the foregoing analysis, there is no reasonable possibility that an order concerning the notification and remedy of a safety-related defect would be issued as a result of granting Mr. Oliver's petition. Therefore, in view of the need to allocate and prioritize NHTSA's limited resources to best accomplish the agency's safety mission, the petition is denied.

[FR Doc. 2016–26289 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No.: DOT–OST–2016–0203]

Advisory Committee on Automation in Transportation

AGENCY: Office of the Secretary, U.S. Department of Transportation (DOT).

ACTION: Notice—Correction to Establishment of the Advisory Committee on Automation in Transportation (ACAT) and Solicitation of Nominations for Membership.

SUMMARY: This notice corrects an October 20, 2016, **Federal Register** notice that announced the establishment of, and solicited nominations to serve on, the DOT's Advisory Committee on Automation in Transportation. It also extends the deadline for nominations to serve on the Committee.

DATES: The deadline for nominations for Committee members must be received on or before November 16, 2016.

ADDRESSES: All nomination materials should be emailed to *automation@dot.gov* or faxed to the attention of John Augustine at (202) 366–0263, or mailed to John Augustine, U.S. Department of Transportation, Office of the Secretary, Office of Policy, Room W84–306, 1200 New Jersey Avenue SE., Washington, DC 20590. Any person needing accessibility accommodations should contact John Augustine at (202) 366–0353.

FOR FURTHER INFORMATION CONTACT: John Augustine, U.S. Department of Transportation, Office of the Secretary, Office of Policy, Room W84–306, 1200 New Jersey Avenue SE., Washington, DC 20590; phone (202) 366–0353; email: *automation@dot.gov.*

SUPPLEMENTARY INFORMATION: In a **Federal Register** notice published on October 20, 2016, the Department of Transportation solicited nominations for membership to the Advisory Committee on Automation in Transportation (ACAT). The ACAT shall undertake information gathering activities, develop technical advice, and present recommendations to the Secretary to further inform this policy, including—but not limited to—aviation automated navigation systems technologies, unmanned aircraft systems, automated and connected road and transit vehicle technologies, enhanced freight movement technologies, railroad automated technologies, and advanced technology deployment in surface transportation environments. In particular, the ACAT will perform these activities as they may relate to emerging or ''not-yet-conceived'' innovations to ensure DOT is prepared when disruptive technologies emerge and can better manage long term evolution of training and education, regulation, and safety oversight. The ACAT shall consider these topics and areas of application as they alleviate or exacerbate challenges to disabled and disadvantaged populations.

In the prior notice, the Department of Transportation stated that individuals already serving on a Federal advisory committee will be ineligible for nomination. After further consideration, the Department finds it appropriate to consider applicants already serving on a Federal advisory committee. As a result, interested parties may self-nominate or submit a nomination for a candidate who already serves on another Federal advisory committee.

Process and Deadline for Submitting Nominations: Qualified individuals can self-nominate or be nominated by any individual or organization. To be considered for the ACAT, nominators should submit the following information:

(1) Name, title, and relevant contact information (including phone, fax, and email address) of the individual requesting consideration;

(2) A letter of support from a company, union, trade association, academic or non-profit organization on letterhead containing a brief description why the nominee should be considered for membership;

(3) Short biography of nominee including professional and academic credentials;

(4) An affirmative statement that the nominee meets all Committee eligibility requirements.

Please do not send company, trade association, or organization brochures or any other information. Materials submitted should total two pages or less. Should more information be needed, DOT staff will contact the nominee, obtain information from the nominee's past affiliations, or obtain information from publicly available sources, such as the Internet.

Nominations may be emailed to *automation@dot.gov* or faxed to the attention of John Augustine at (202) 366–0263, or mailed to John Augustine, U.S. Department of Transportation, Office of the Secretary Office of Policy, Room W84–306, 1200 New Jersey Avenue SE., Washington DC, 20590. Nominations must be received before November 16, 2016. Nominees selected for appointment to the Committee will be notified by return email and by a letter of appointment.

Issued in Washington, DC, on October 24, 2016.

Blair C. Anderson,

Under Secretary of Transportation for Policy.

[FR Doc. 2016–26328 Filed 10–31–16; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Sanctions Action Pursuant to Executive Order 13224

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (OFAC) is removing the names of five individuals, whose property and interests in property were blocked pursuant to Executive Order 13224 of September 23, 2001, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism,'' from the list of Specially Designated Nationals and Blocked Persons (SDN List).

DATES: OFAC's action described in this notice was effective on October 27, 2016.

FOR FURTHER INFORMATION CONTACT: Associate Director for Global Targeting, tel.: 202/622–2420, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202/622–2490, Assistant Director for Licensing, tel.: 202/622–2480, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202/622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available from OFAC's Web site (*www.treas.gov/ofac*).

Notice of OFAC Action

The following individuals were removed from the SDN List, effective as of October 27, 2016.

Individuals

1. AL–LIBY, Anas (a.k.a. AL–LIBI, Anas; a.k.a. AL–RAGHIE, Nazih; a.k.a. AL–RAGHIE, Nazih Abdul Hamed; a.k.a. AL–SABAI, Anas), Afghanistan; DOB 30 Mar 1964; alt. DOB 14 May 1964; POB Tripoli, Libya; citizen Libya (individual) [SDGT].
2. HUSAYN ALAYWAH, Al-Sayyid Ahmad Fathi; DOB 30 Jul 1964; POB Suez, Egypt; nationality Egypt (individual) [SDGT].
3. SHAWEESH, Yasser Abu (a.k.a. ABOU SHAWEESH, Yasser Mohamed; a.k.a. ABU SHAWEESH, Yasser Mohamed Ismail), Meckennheimer Str. 74a, Bonn 53179, Germany; Wuppertal Prison, Germany; DOB 20 Nov 1973; POB Benghazi, Libya; Passport 981358 (Egypt); alt. Passport 0003213 (Egypt); Travel Document Number C00071659 (Germany); alt. Travel Document Number 939254 (Egypt) (individual) [SDGT].
4. AIDER, Farid (a.k.a. ACHOUR, Ali), Via Milanese, 5, 20099 Sesto San Giovanni, Milan, Italy; DOB 12 Oct 1964; POB Algiers, Algeria; Italian Fiscal Code DRAFRD64R12Z301C (individual) [SDGT].
5. ABD AL HAFIZ, Abd Al Wahab (a.k.a. FERDJANI, Mouloud; a.k.a. ''MOURAD''; a.k.a. ''RABAH DI ROMA''), Via Lungotevere Dante, Rome, Italy; DOB 07 Sep 1967; POB Algiers, Algeria (individual) [SDGT].

Dated: October 27, 2016.

John E. Smith,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2016–26311 Filed 10–31–16; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of nine individuals whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act (Kingpin Act), 21 U.S.C. 1901–1908, 8 U.S.C. 1182.

DATES: OFAC's actions described in this notice were effective on October 27, 2016.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Office of Foreign Assets Control, U.S. Department of the Treasury, Washington, DC 20220, Tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available from OFAC's Web site (*www.treas.gov/ofac*).

Notice of OFAC Actions

On October 27, 2016, OFAC blocked the property and interests in property of the following nine individuals pursuant to section 805(b) of the Kingpin Act and placed them on the SDN List.

Individuals:

1. CASTILLO RODRIGUEZ, Julio Alberto, Mexico; DOB 11 Oct 1976; POB Apatzingan, Michoacan de Ocampo, Mexico; C.U.R.P. CARJ761011HMNSDL06 (Mexico) (individual) [SDNTK] (Linked To: CARTEL DE JALISCO NUEVA GENERACION; Linked To: LOS CUINIS; Linked To: J & P ADVERTISING, S.A. DE C.V.; Linked To: W&G ARQUITECTOS, S.A. DE C.V.). Materially assisting in, or providing financial support for or to, or providing services in support of, the international narcotics trafficking activities of, CARTEL DE JALISCO NUEVA GENERACION and/or is directed by, or acting for or on behalf of CARTEL DE JALISCO NUEVA GENERACION and/or the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and thus meets the criteria for designation pursuant to § 805(b)(2) and/or (3) of the Kingpin Act, 21 U.S.C. 1904(b)(2) and/or (3).
2. GONZALEZ VALENCIA, Arnulfo, Mexico; DOB 22 Jun 1968; POB Aguililla, Michoacan de Ocampo, Mexico; C.U.R.P. GOVA680622HMNNLR02 (Mexico) (individual) [SDNTK] (Linked To: LOS CUINIS). Materially assisting in, or providing financial support for or to, or providing services in support of, the international narcotics trafficking activities of, the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and/or is directed by, or acting for or on behalf of the LOS CUINIS DRUG

TRAFFICKING ORGANIZATION and thus meets the criteria for designation pursuant to § 805(b)(2) and/or (3) of the Kingpin Act, 21 U.S.C. 1904(b)(2) and/or (3).

3. GONZALEZ VALENCIA, Edgar Eden, Mexico; DOB 08 Oct 1984; POB Aguililla, Michoacan de Ocampo, Mexico; C.U.R.P. GOVE841008HMNNLD01 (Mexico) (individual) [SDNTK] (Linked To: LOS CUINIS). Materially assisting in, or providing financial support for or to, or providing services in support of, the international narcotics trafficking activities of, the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and/or is directed by, or acting for or on behalf of the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and thus meets the criteria for designation pursuant to § 805(b)(2) and/or (3) of the Kingpin Act, 21 U.S.C. 1904(b)(2) and/or (3).

4. GONZALEZ VALENCIA, Elvis (a.k.a. TAPIA CASTRO, Alejandro), Mexico; DOB 12 Oct 1980; alt. DOB 18 Mar 1979; POB Aguililla, Michoacan de Ocampo, Mexico; C.U.R.P. GOVE801012HMNNLL03 (Mexico); alt. C.U.R.P. TACA790318HJCPSL08 (Mexico); I.F.E. TPCSAL79031814H401 (Mexico) (individual) [SDNTK] (Linked To: CARTEL DE JALISCO NUEVA GENERACION; Linked To: LOS CUINIS). Materially assisting in, or providing financial support for or to, or providing services in support of, the international narcotics trafficking activities of, CARTEL DE JALISCO NUEVA GENERACION and/or the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and/or is directed by, or acting for or on behalf of CARTEL DE JALISCO NUEVA GENERACION and/or the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and thus meets the criteria for designation pursuant to § 805(b)(2) and/or (3) of the Kingpin Act, 21 U.S.C. 1904(b)(2) and/or (3).

5. GONZALEZ VALENCIA, Marisa Ivette, Mexico; DOB 27 Jul 1988; POB Apatzingan, Michoacan de Ocampo, Mexico; C.U.R.P. GOVM880727MMNNLR08 (Mexico) (individual) [SDNTK] (Linked To: LOS CUINIS). Materially assisting in, or providing financial support for or to, or providing services in support of, the international narcotics trafficking activities of, the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and/or is directed by, or acting for or on behalf of the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and thus meets the criteria for designation pursuant to § 805(b)(2) and/or (3) of the Kingpin Act, 21 U.S.C. 1904(b)(2) and/or (3).

6. GONZALEZ VALENCIA, Noemi (a.k.a. GONZALEV VALENCIA, Noemi), Mexico; DOB 05 Dec 1983; POB Aguililla, Michoacan de Ocampo, Mexico; C.U.R.P. GOVN831205MMNNLM07 (Mexico) (individual) [SDNTK] (Linked To: LOS CUINIS). Materially assisting in, or providing financial support for or to, or providing services in support of, the international narcotics trafficking activities of, the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and/or is directed by, or acting for or on behalf of the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and thus meets the criteria for designation pursuant to § 805(b)(2) and/or (3) of the Kingpin Act, 21 U.S.C. 1904(b)(2) and/or (3).

7. OSEGUERA CERVANTES, Antonio (a.k.a. MORA GARIBAY, Joel; a.k.a. ''Tony Montana''), Priv Linda Vista 3986, Fracc El Soler, Tijuana, B.C. 22110, Mexico; DOB 20 Aug 1958; POB Aguililla, Michoacan de Ocampo, Mexico; C.U.R.P. OECA580820HMNSRN04 (Mexico); I.F.E. OSCRAN58082016H800 (Mexico) (individual) [SDNTK] (Linked To: CARTEL DE JALISCO NUEVA GENERACION). Materially assisting in, or providing financial support for or to, or providing services in support of, the international narcotics trafficking activities of CARTEL DE JALISCO NUEVA GENERACION and/or Nemesio OSEGUERA CERVANTES, and/or directed by, or acting for or on behalf of, CARTEL DE JALISCO NUEVA GENERACION and/or Nemesio OSEGUERA CERVANTES and therefore meets the criteria for designation pursuant to sections 805(b)(2) and/or (3) of the Kingpin Act, 21 U.S.C. 1904(b)(2) and/or (3).

8. QUINTANA NAVARRO, Maria Teresa, C. Jose Vasconcelos 556, Col. Colinas De La Normal, Guadalajara, Jalisco, Mexico; Efrain Gonzalez Luna 2481, Guadalajara, Jalisco 44140, Mexico; Efrain Gonzalez Luna 302, Guadalajara, Jalisco CP 44200, Mexico; DOB 05 Mar 1971; POB Guadalajara, Jalisco, Mexico; C.U.R.P. QUNT710305MJCNVR02 (Mexico) (individual) [SDNTK] (Linked To: CARTEL DE JALISCO NUEVA GENERACION; Linked To: LOS CUINIS). Materially assisting in, or providing financial support for or to, or providing services in support of, the international narcotics trafficking activities of, CARTEL DE JALISCO NUEVA GENERACION, the LOS CUINIS DRUG TRAFFICKING ORGANIZATION, Nemesio OSEGUERA CERVANTES, and/or Abigael GONZALEZ VALENCIA and/or is directed by, or acting for or on behalf of CARTEL DE JALISCO NUEVA GENERACION, the LOS CUINIS DRUG TRAFFICKING ORGANIZATION, Nemseio OSEGUERA CERVANTES, and/or Abigael GONZALEZ VALENCIA and thus meets the criteria for designation pursuant to § 805(b)(2) and/or (3) of the Kingpin Act, 21 U.S.C. 1904(b)(2) and/or (3).

9. VERA LOPEZ, Fabian Felipe (a.k.a. LOPEZ, Favian Felipe; a.k.a. VARELLA LOPEZ, Ton; a.k.a. VERA LOPEZ, Felipe), Mexico; DOB 28 Oct 1967; POB Guadalajara, Jalisco, Mexico; C.U.R.P. VELF671028HJCRPL08 (Mexico) (individual) [SDNTK] (Linked To: LOS CUINIS). Materially assisting in, or providing financial support for or to, or providing services in support of, the international narcotics trafficking activities of, the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and/or Abigael GONZALEZ VALENCIA and/or is directed by, or acting for or on behalf of, the LOS CUINIS DRUG TRAFFICKING ORGANIZATION and/or Abigael GONZALEZ VALENCIA and thus meets the criteria for designation pursuant to § 805(b)(2) and/or (3) of the Kingpin Act, 21 U.S.C. 1904(b)(2) and/or (3).

Dated: October 27, 2016.

John E. Smith,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2016–26344 Filed 10–31–16; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

United States Mint

Exchange of Coin

AGENCY: United States Mint, Department of the Treasury.

ACTION: Notice with request for comment.

SUMMARY: For many years, the United States Mint has administered a program by which people and businesses could exchange bent and partial coins (commonly referred to as ''mutilated coins'') for reimbursement. On November 2, 2015, the Mint suspended the exchange program to assess the security of the program and develop additional safeguards to enhance the integrity of the acceptance and processing of mutilated coinage. Since that time, the Mint has made significant progress in evaluating risks and identifying potential remedial measures. This notice and request for comment is to supplement the information that the Mint has collected to date.

DATES: Submit either electronic or written comments by November 15, 2016.

ADDRESSES: Submit electronic comments to *MutilatedCoin@usmint.treas.gov.* Submit all written comments to Mutilated Coin Redemption Program; Financial Directorate; United States Mint; 801 9th Street NW., Washington, DC 20220.

FOR FURTHER INFORMATION CONTACT: Sheila Barnett, Legal Counsel, Office of the Chief Counsel, United States Mint, at (202) 354–7624 or *sbarnett@usmint.treas.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

For many years, the United States Mint has administered a program by which people and businesses could exchange bent and partial coins (commonly referred to as ''mutilated coins'') for reimbursement. Regulations governing the program appear at 31 CFR part 100, subpart C. Bent coins are defined as U.S. coins which are bent or deformed so as to preclude normal machine counting but which are readily and clearly identifiable as to genuineness and denomination. Partial coins are defined as U.S. coins which are not whole; partial coins must be readily and clearly identifiable as to genuineness and denomination. This notice is not seeking comments on changing the definitions of bent or partial coins.

On November 2, 2015, the Mint suspended its exchange of bent and partial coins to assess the security of the program and develop additional safeguards to enhance the integrity of the acceptance and processing of mutilated coinage. On May 2, 2016, the Mint extended the suspension. The program will resume at such time as the new regulations are finalized and published. Some of the safeguards the Mint is considering include requiring participant certification, coinage material authentication, chain of custody information, and annual submission limitations. The Mint is now seeking input on the effects of such measures on stakeholders, as well as other factors that should be considered to enhance the integrity of the acceptance and processing of mutilated coinage.

The redemption of uncurrent coins, as defined by 31 CFR 100.10(a), is not being considered by the Mint. Uncurrent coins may be redeemed only at Federal Reserve banks and branches in accordance with the criteria and procedures set forth in 31 CFR 100.10.

Dated: October 25, 2016.

Richard A. Peterson,

Deputy Director for Manufacturing and Quality.

[FR Doc. 2016–26270 Filed 10–31–16; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 81 Tuesday,

No. 211 November 1, 2016

Part II

Department of Education

34 CFR Parts 30, 668, 674, et al.

Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 30, 668, 674, 682, 685, and 686

RIN 1840–AD19

[Docket ID ED–2015–OPE–0103]

Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary establishes new regulations governing the William D. Ford Federal Direct Loan (Direct Loan) Program to establish a new Federal standard and a process for determining whether a borrower has a defense to repayment on a loan based on an act or omission of a school. We also amend the Direct Loan Program regulations to prohibit participating schools from using certain contractual provisions regarding dispute resolution processes, such as predispute arbitration agreements or class action waivers, and to require certain notifications and disclosures by schools regarding their use of arbitration. We amend the Direct Loan Program regulations to codify our current policy regarding the impact that discharges have on the 150 percent Direct Subsidized Loan Limit. We amend the Student Assistance General Provisions regulations to revise the financial responsibility standards and add disclosure requirements for schools. Finally, we amend the discharge provisions in the Federal Perkins Loan (Perkins Loan), Direct Loan, Federal Family Education Loan (FFEL), and Teacher Education Assistance for College and Higher Education (TEACH) Grant programs. The changes will provide transparency, clarity, and ease of administration to current and new regulations and protect students, the Federal government, and taxpayers against potential school liabilities resulting from borrower defenses.

DATES: These regulations are effective July 1, 2017. Implementation date: For the implementation dates of the included regulatory provisions, see the *Implementation Date of These Regulations* section of this document.

FOR FURTHER INFORMATION CONTACT: For further information related to borrower defenses, Barbara Hoblitzell at (202) 453–7583 or by email at: *Barbara.Hoblitzell@ed.gov.* For further information related to false certification and closed school loan discharges, Brian Smith at (202) 453–7440 or by email at: *Brian.Smith@ed.gov.* For further information regarding institutional accountability, John Kolotos or Greg Martin at (202) 453–7646 or (202) 453–7535 or by email at: *John.Kolotos@ed.gov* or *Gregory.Martin@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action: The purpose of the borrower defense regulations is to protect student loan borrowers from misleading, deceitful, and predatory practices of, and failures to fulfill contractual promises by, institutions participating in the Department's student aid programs. Most postsecondary institutions provide a high-quality education that equips students with new knowledge and skills and prepares them for their careers. However, when postsecondary institutions make false and misleading statements to students or prospective students about school or career outcomes or financing needed to pay for those programs, or fail to fulfill specific contractual promises regarding program offerings or educational services, student loan borrowers may be eligible for discharge of their Federal loans.

The final regulations give students access to consistent, clear, fair, and transparent processes to seek debt relief; protect taxpayers by requiring that financially risky institutions are prepared to take responsibility for losses to the government for discharges of and repayments for Federal student loans; provide due process for students and institutions; and warn students in advertising and promotional materials, using plain language issued by the Department, about proprietary schools at which the typical student experiences poor loan repayment outcomes—defined in these final regulations as a proprietary school at which the median borrower has not repaid in full, or made loan payments sufficient to reduce by at least one dollar the outstanding balance of, the borrower's loans received at the institution—so that students can make more informed enrollment and financing decisions.

Section 455(h) of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. 1087e(h), authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. Section 685.206(c), governing defenses to repayment, has been in place since 1995 but, until recently, has rarely been used. Those final regulations specify that a borrower may assert as a defense to repayment any "act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law."

In response to the collapse of Corinthian Colleges (Corinthian) and the flood of borrower defense claims submitted by Corinthian students stemming from the school's misconduct, the Secretary announced in June 2015 that the Department would develop new regulations to establish a more accessible and consistent borrower defense standard and clarify and streamline the borrower defense process to protect borrowers and improve the Department's ability to hold schools accountable for actions and omissions that result in loan discharges.

These final regulations specify the conditions and processes under which a borrower may assert a defense to repayment of a Direct Loan, also referred to as a "borrower defense." The current standard allows borrowers to assert a borrower defense if a cause of action would have arisen under applicable State law. In contrast, these final regulations establish a new Federal standard that will allow a borrower to assert a borrower defense on the basis of a substantial misrepresentation, a breach of contract, or a favorable, nondefault contested judgment against the school, for its act or omission relating to the making of the borrower's Direct Loan or the provision of educational services for which the loan was provided. The new standard will apply to loans made after the effective date of the proposed regulations. The final regulations establish a process for borrowers to assert a borrower defense that will be implemented both for claims that fall under the existing standard and for later claims that fall under the new, proposed standard. In addition, the final regulations establish the conditions or events upon which an institution is or may be required to provide to the Department financial protection, such as a letter of credit, to help protect students, the Federal government, and taxpayers against potential institutional liabilities.

These final regulations also prohibit a school participating in the Direct Loan Program from obtaining, through the use of contractual provisions or other agreements, a predispute agreement for arbitration to resolve claims brought by a borrower against the school that could also form the basis of a borrower defense under the Department's regulations. The final regulations also prohibit a school participating in the Direct Loan Program from obtaining an agreement, either in an arbitration agreement or in another form, that a borrower waive his or her right to initiate or participate in a class action lawsuit regarding such claims and from requiring students to engage in internal dispute processes before contacting accrediting or government agencies with authority over the school regarding such claims. In addition, the final regulations impose certain notification and disclosure requirements on a school regarding claims that are the subject of a lawsuit filed in court or that are voluntarily submitted to arbitration after a dispute has arisen.

Summary of the Major Provisions of This Regulatory Action: For the Direct Loan Program, the final regulations—

• Clarify that borrowers with loans first disbursed prior to July 1, 2017, may assert a defense to repayment under the current borrower defense State law standard;

• Establish a new Federal standard for borrower defenses, and limitation periods applicable to the claims asserted under that standard, for borrowers with loans first disbursed on or after July 1, 2017;

• Establish a process for the assertion and resolution of borrower defense claims made by individuals;

• Establish a process for group borrower defense claims with respect to both open and closed schools, including the conditions under which the Secretary may allow a claim to proceed without receiving an application;

• Provide for remedial actions the Secretary may take to collect losses arising out of successful borrower defense claims for which an institution is liable; and

• Add provisions to schools' Direct Loan Program participation agreements (PPAs) that, for claims that may form the basis for borrower defenses—

▪ Prevent schools from requiring that students first engage in a school's internal complaint process before contacting accrediting and government agencies about the complaint;

▪ Prohibit the use of predispute arbitration agreements by schools;

▪ Prohibit the use of class action lawsuit waivers;

▪ To the extent schools and borrowers engage in arbitration in a manner consistent with applicable law and regulation, require schools to disclose to and notify the Secretary of arbitration filings and awards; and

▪ Require schools to disclose to and notify the Secretary of certain judicial filings and dispositions.

The final regulations also revise the Student Assistance General Provisions regulations to—

• Amend the definition of a misrepresentation to include omissions of information and statements with a likelihood or tendency to mislead under the circumstances. The definition would be amended for misrepresentations for which the Secretary may impose a fine, or limit, suspend, or terminate an institution's participation in title IV, HEA programs. This definition is also adopted as a basis for alleging borrower defense claims for Direct Loans first disbursed after July 1, 2017;

• Clarify that a limitation may include a change in an institution's participation status in title IV, HEA programs from fully certified to provisionally certified;

• Amend the financial responsibility standards to include actions and events that would trigger a requirement that a school provide financial protection, such as a letter of credit, to insure against future borrower defense claims and other liabilities to the Department;

• Require proprietary schools at which the median borrower has not repaid in full, or paid down by at least one dollar the outstanding balance of, the borrower's loans to provide a Department-issued plain language warning in promotional materials and advertisements; and

• Require a school to disclose on its Web site and to prospective and enrolled students if it is required to provide financial protection, such as a letter of credit, to the Department.

The final regulations also—

• Expand the types of documentation that may be used for the granting of a discharge based on the death of the borrower (''death discharge'') in the Perkins, FFEL, Direct Loan, and TEACH Grant programs;

• Revise the Perkins, FFEL, and Direct Loan closed school discharge regulations to ensure borrowers are aware of and able to benefit from their ability to receive the discharge;

• Expand the conditions under which a FFEL or Direct Loan borrower may qualify for a false certification discharge;

• Codify the Department's current policy regarding the impact that a discharge of a Direct Subsidized Loan has on the 150 percent Direct Subsidized Loan limit; and

• Make technical corrections to other provisions in the FFEL and Direct Loan program regulations and to the regulations governing the Secretary's debt compromise authority.

Costs and Benefits: As noted in the NPRM, the primary potential benefits of these regulations are: (1) An updated and clarified process and a Federal standard to improve the borrower defense process and usage of the borrower defense process to increase protections for students; (2) increased financial protections for taxpayers and the Federal government; (3) additional information to help students, prospective students, and their families make informed decisions based on information about an institution's financial soundness and its borrowers' loan repayment outcomes; (4) improved conduct of schools by holding individual institutions accountable and thereby deterring misconduct by other schools; (5) improved awareness and usage, where appropriate, of closed school and false certification discharges; and (6) technical changes to improve the administration of the title IV, HEA programs. Costs associated with the regulations will fall on a number of affected entities including institutions, guaranty agencies, the Federal government, and taxpayers. These costs include changes to business practices, review of marketing materials, additional employee training, and unreimbursed claims covered by taxpayers. The largest quantified impact of the regulations is the transfer of funds from the Federal government to borrowers who succeed in a borrower defense claim, a significant share of which will be offset by the recovery of funds from institutions whose conduct gave rise to the claims.

On June 16, 2016, the Secretary published a notice of proposed rulemaking (NPRM) for these parts in the **Federal Register** (81 FR 39329). The final regulations contain changes from the NPRM, which are fully explained in the *Analysis of Comments and Changes* section of this document.

Implementation Date of These Regulations: Section 482(c) of the HEA requires that regulations affecting programs under title IV of the HEA be published in final form by November 1, prior to the start of the award year (July 1) to which they apply. However, that section also permits the Secretary to designate any regulation as one that an entity subject to the regulations may choose to implement earlier and the conditions for early implementation.

The Secretary is exercising his authority under section 482(c) to designate the following new regulations included in this document for early implementation beginning on November

1, 2016, at the discretion of each lender or guaranty agency:

(1) Section 682.211(i)(7).

(2) Section 682.410(b)(6)(viii).

Additionally, the Secretary intends to exercise his authority under section 482(c) of the HEA to permit the Secretary and guaranty agencies to implement the new and amended regulations specific to automatic closed school discharges in §§ 674.33(g)(3)(ii), 682.402(d)(8)(ii) and 685.214(c)(2)(ii) as soon as operationally possible after the publication date of these final regulations. We will publish a separate **Federal Register** notice to announce this implementation date.

The Secretary has not designated any of the remaining provisions in these final regulations for early implementation. Therefore, the remaining final regulations included in this document are effective July 1, 2017.

Public Comment: In response to our invitation in the June 16, 2016, NPRM, more than 50,000 parties submitted comments on the proposed regulations.

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address technical or other minor changes or recommendations that are out of the scope of this regulatory action or that would require statutory changes in this preamble.

Analysis of Comments and Changes

An analysis of the comments and of any changes in the regulations since publication of the NPRM follows.

General

Comments: Many commenters supported the Department's proposals to improve the borrower defense regulations by establishing a Federal standard for permissible defenses to borrower repayment, standardizing the defense to repayment claim processes for both borrowers and institutions, and strengthening the financial responsibility standards for institutions. The commenters also supported granting automatic closed school discharges in certain instances and ending the use of mandatory, predispute arbitration agreements at schools that receive Federal financial aid.

Other commenters expressed support for the proposed regulations, but felt that the Department should further strengthen them. For example, these commenters believed that the final regulations should provide full loan relief to all defrauded students, eliminate the six-year time limit to recover amounts that borrowers have already paid on loans for which they have a borrower defense based on a breach of contract or substantial misrepresentation, and allow automatic group discharges without an application in cases where there is sufficient evidence of a school's wrongdoing.

Many commenters agreed with the Department's proposed objectives, but believed that the proposed regulations would have the unintended consequences of creating a ''cottage industry'' of opportunistic attorneys and agents attempting to capitalize on students who have been, or believe they have been, victims of wrongdoing by schools and unleashing a torrent of frivolous and costly lawsuits, which would tarnish the reputation of many institutions. The commenters also believed that the proposed Federal standard is so broad that borrowers will have nothing to lose by claiming a borrower defense even if they are employed and happy with their college experience.

Many commenters did not support the proposed regulations and stated that the Department should completely revise them and issue another NPRM and 30-day comment period, or that the proposed regulations should be withdrawn completely. The commenters were concerned that the projected net budget impact provided in the NPRM would undermine the integrity of the Direct Loan Program and that neither American taxpayers, nor schools that have successfully educated students, could cover these costs if thousands of students or graduates start requesting discharges of their loans. Other commenters stated that the proposed regulations would create unneeded administrative and financial burdens for institutions that work hard to comply with the Department's regulations and establish new substantive standards of liability, new procedural issues, new burdens of proof, widespread and unwarranted ''triggering'' of the financial responsibility requirements, and the abolition of a ''Congressionally favored'' arbitration remedy, that are unnecessary or counterproductive.

Discussion: We appreciate the commenters' support. In response to the commenters requesting that the proposed regulations be strengthened, completely revised, or withdrawn, we believe these final regulations strike the right balance between our goals of providing transparency, clarity, and ease of administration to the current and new regulations while at the same time protecting students, the Federal government, and taxpayers against potential liabilities resulting from borrower defenses. In response to commenters' concerns that the proposed regulations will create a ''cottage industry'' of opportunistic attorneys attempting to capitalize on victimized students and unleash a torrent of frivolous lawsuits, the individual borrower defense process described in § 685.222(e) is intended to be a simple process that a borrower may access without the aid of counsel. Similarly, by providing that only a designated Department official may present group borrower claims in the group processes described in § 685.222(f) to (h), the Department believes that the potential for frivolous suits in the borrower defense process will be limited. To date, Department staff have generally not received borrower defense claims submitted by attorneys, opportunistic or otherwise, and we have not observed the filing of frivolous lawsuits against schools. We will monitor both situations going forward. We note that we address commenters' arguments with respect to specific provisions of the regulations in the sections of this preamble specific to those provisions.

Changes: None.

Comments: One commenter contended that the proposed regulations run contrary to Article III (separation of powers) and the Seventh Amendment (right to jury trial) of the Constitution, in that it would vest the Department with exclusive judicial powers to determine private causes of action in the absence of a jury.

The commenter contended that the proposed regulations do not ensure Constitutional due process because they do not ensure that schools would have the right to receive notice of all the evidence presented by a borrower in the new borrower defense proceedings. The commenter stated that the lack of due process also affects the process for deciding claims, under which the Department is effectively the prosecutor, the judge, the only source of appeal, and the entity tasked with executing judgment.

The commenter also contended that a breach of contract or a misrepresentation determination are determinations that normally arise in common law claims and defenses and are subject to the expertise of the courts, rather than a particular government agency. The commenter believes that these determinations are not matters of public right, but are instead matters of ''private right, that is, of the liability of one individual to another under the law as defined,'' which cannot be delegated outside the judiciary. *Stern* v. *Marshall,* 564 U.S. 462, 489 (2011) (quoting *Crowell* v. *Benson,* 285 U.S. 22, 50 (1932).

Discussion: The rights adjudicated in borrower defense proceedings are rights of the Direct Loan borrower against the government regarding the borrower's obligation to repay a loan made by the government, and rights of the government to recover from the school for losses incurred as a result of the act or omission of the school in participating in the Federal loan program. The terms of these rights are governed (for loans disbursed prior to July 1, 2017) by common law or State law, but in each instance the rights are asserted against or by a Federal agency, with respect to obligations incurred by the borrower and the school in the course of their voluntary participation in the Federal loan program. Those facts give the rights adjudicated in these proceedings, both the individual borrower adjudications and the adjudications of group claims against the school, the character of public rights, even if the resolution of those rights turns on application of common law and State law (for current loans), and thus giving them some of the characteristics of private rights as well.

Even if these common law rights of the borrower and the school were to be considered simply private rights, Congress could properly consign their adjudication to the Department, as it did in committing purely private rights of the investor and broker asserted in its reparations program to the Commodity Futures Trading Commission for adjudication. *Commodity Futures Trading Comm'n* v. *Schor,* 478 U.S. 833 (1986). In *Schor,* the competing claims asserted were not creations of Federal law, nor were the rights asserted by or against a Federal agency. Nevertheless, the Court ruled that Congress properly assigned adjudication of those private rights to the agency. Like the claimants in *Schor,* both parties—the Direct Loan borrower, by filing the claim for relief, and the Direct Loan-participant school, by entering into the Direct Loan Participation Agreement—have consented to adjudications of their respective rights by the Federal agency—the Department. Moreover, these rights are adjudicated in this context precisely because Congress directed the Department to establish by regulation which acts or omissions of a school would be recognized by the Department as defenses to repayment of the Direct Loan; by so doing, and by further requiring the Department to conduct a predeprivation hearing before credit bureau reporting, Federal offset, wage garnishment, of Federal salary offset, Congress necessarily committed adjudication of these claims to the Department. 20 U.S.C. 1080a(c)(4), 31 U.S.C. 3711(e) (credit bureau reporting); 5 U.S.C. 5514 (Federal salary offset); 20 U.S.C. 1095, 31 U.S.C. 3720D (wage garnishment); 31 U.S.C. 3716, 3720B (Federal payment offset). Similarly, by recognizing that acts or omissions of the school in participating in the title IV, HEA programs would give rise to a claim by the Department against the school that arises not by virtue of any statutory requirement, but under common law as discussed elsewhere and by requiring the Department to provide a hearing for a school that disputes that common law claim for damages, Congress necessarily committed adjudication of that common law claim to the Department. 20 U.S.C. 1094(b) (administrative hearing on appeal of audit or program review liability claim). In each of these instances, judicial review of these agency adjudications by an Article III court is available under the APA. 5 U.S.C. 706. The fact that the borrower, the school, and the Department might have pursued their claims solely in a judicial forum instead of an administrative forum does not preclude assignment of their adjudication to the Department: ''(T)he Congress, in exercising the powers confided to it may establish 'legislative' courts . . . to serve as special tribunals 'to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.' '' *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n,* 430 U.S. 442, 452 (1977) (*quoting Crowell* v. *Benson,* 285 U.S. 22, 50 (1932)).

As to the assertion that committing adjudication of these claims to the Department deprives a party of the right to trial by jury, the Court has long rejected that argument, as it stated in *Atlas Roofing,* on which the commenter relies:

> . . . the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication. . . . This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency.

Atlas Roofing Co, 430 U.S. at 454–55 (*quoting Pernell* v. *Southall Realty,* 416 U.S. 363, 383 (1974)).

We address the comment with respect to ensuring due process in the sections of this preamble specific to the framework for the borrower defense claims process.

Changes: None.

Comments: Some commenters asserted that the Department lacks authority to recover from the institution losses incurred by reason of borrower defenses to repayment. A commenter asserted that nothing in section 455(h) of the HEA (20 U.S.C. 1087e(h)) permits the Department to seek recoupment from any institution related to defenses to repayment. In contrast, the commenter asserted, section 437(c)(1) of the HEA (20 U.S.C. 1087) explicitly provides that, in the case of closed school discharges, the Secretary shall pursue any claim ''available to the borrower'' against the institution to recover the amounts discharged. The commenter contended that this clear grant of authority to pursue claims to recoup funds associated with closed school discharges and false certification discharges indicates that Congress intended no grant of authority to recover for borrower defense losses. The commenter noted that the Department conditions discharge on the borrower transferring any claim she has against the institution to the Department. The commenter asserted that this assignment does not empower the Department to enforce the borrower's claim, because the Secretary does not have the ability to acquire a claim from the borrower on which it may seek recoupment from a school. The commenter based this position on section 437(c) of the HEA, which provides that a borrower who obtains a closed school or false certification discharge is ''deemed to have assigned to the United States the right to a loan refund,'' and the absence of any comparable provision in section 455 of the HEA, which authorizes the Secretary to determine which acts or omissions of the institution may constitute defenses to repayment of a Direct Loan. Given that Congress indicated clear intent that the Secretary pursue claims related to closed school and false certification discharges, and explicitly provided for an assignment of claims, the commenter considered the failure of Congress to give any indication it wanted the Department to pursue claims of recoupment against institutions for section 455(h) loan discharges, or to acquire any claims from borrowers related to section 455(h) discharges, to show congressional intent to preclude a recoupment remedy against institutions.

Another commenter questioned whether the Department would have a valid right to enforce a collection against an institution in the absence of what the commenter called a ''third-party adjudication'' of the loan discharge.

A commenter stated that the Department could not recover from the institution losses incurred from borrower defense claims because the commenter considered those losses to be incurred voluntarily by the Department. The commenter based this view on common law, under which a person who voluntarily pays another with full knowledge of the facts will not be entitled to restitution. The commenter asserted that the Department is further barred from recovery from the institution under a theory of indemnity or equitable subrogation because, under either theory, a party that voluntarily makes a payment or discharges a debt may not seek reimbursement.

Discussion: We address under ''Group Process for Borrower Defenses—Statutory Authority'' comments regarding whether the Department has authority to assert against the school claims that borrowers may have, and discuss here only the comments that dispute whether the Department has a legal right to recover from a school the amount of loss incurred by the Department upon the recognition of a borrower defense and corresponding discharge of some or all of a Direct Loan obtained to attend the school.

Applicable law gives the Department the right to recover from the school losses incurred on Direct Loans for several reasons. First, section 437(c) of the HEA gives the Department explicit authority to recover certain losses on Direct and FFEL loans. Section 437(c) provides that, upon discharge of a FFEL Loan for a closed school discharge, false certification discharge, or unpaid refund, the Secretary is authorized to pursue any claim of the borrower against the school, its principals, or other source, and the borrower is deemed to have assigned his or her claim against the school to the Secretary. 20 U.S.C. 1087(c). Section 487(c)(3)(ii) authorizes the Secretary to deduct the amount of any civil penalty, or fine, imposed under that section from any amounts owed to the institution, but any claim for recovery is not based on authority to fine under that section. Section 432(a)(6) authorizes the Secretary to enforce any claim, however acquired, but does not describe what those claims may be. 20 U.S.C. 1082(a)(6) (applicable to Direct Loan claims by virtue of section 455(a)(1), 20 U.S.C. 1078e(a)(1)). In addition, section 498(c)(1)(C) of the HEA, 20 U.S.C. 1099c(c)(1)(C), implies that the Secretary has claims that the Secretary is expected to enforce and recover against the institution for ''liabilities and debts''—the ''liabilities of such institution to the Secretary for funds under this title, *including* loan obligations discharged pursuant to section 437.'' 20 U.S.C. 1099c(c)(3)(A) (emphasis added).[1] These provisions are meaningless if the Secretary can enforce claims against institutions only if the HEA or another statute explicitly authorizes such recoveries.

There are two distinct, and overlapping, lines of authority that empower the Secretary to recover from the school the amount of losses incurred due to borrower defense claims. The first relies on the Secretary's longstanding interpretation of the HEA as authorizing such recovery. The second relies on the government's rights under common law.

In both the Direct Loan and FFEL programs, the institution plays a central role in determining which individuals receive loans, the amount of loan an individual receives, and the Federal interest subsidy, if any, that an individual qualifies to receive on the loan, a determination based on assessment of financial need. In the Direct Loan Program, the institution determines whether and to whom the Department makes a loan; in the FFEL Program, the institution determines whether and to whom a private lender may make a loan that will be federally reinsured.

In *Chauffeur's Training School* v. *Spellings,* 478 F.3d 117 (2d Cir. 2007), the court addressed a challenge by an institution to the Department's asserted right to hold the school liable through an administrative procedure for losses incurred and to be incurred on FFEL Loans that were made by private lenders and federally reinsured and subsidized, after the school had wrongly determined that the borrowers had proven eligibility for these loans. The court noted that no provision of the HEA expressly authorized the Department to determine and recover these losses on student loans (as opposed to recovery of losses of grant funds, expressly authorized by 20 U.S.C. 1234a)). However, the court looked to whether the Department's interpretation of the HEA as authorizing the Department to assess a liability for loan program violations was reasonable. 478 F.3d at 129. The court concluded that the Department had reasonably interpreted the HEA's grant of authority to administer the FFEL program to empower the Department to ''assess liability to recover its guarantee payments'' on loans made as a result of the school's ''improper documentation.'' *Id.*

Similarly, the Department is authorized under the HEA to administer the Direct Loan Program. The HEA directs that, generally, Direct Loans are made under the same ''terms, conditions, and benefits'' as FFEL Loans. 20 U.S.C. 1087a(b)(2), 1087e(a)(1). In 1994 and 1995, the Department interpreted that Direct Loan authority as giving the Department authority to hold schools liable for borrower defenses under both the FFEL and Direct Loan programs, and stated that, for this reason, it was not pursuing more explicit regulatory authority to govern the borrower defense process.

Thus, in Dear Colleague Letter Gen 95–8 (Jan. 1995), the Department stated (emphasis in original):

> Finally, some parties warn that Direct Loan schools will face potential liability from claims raised by borrowers that FFEL schools will not face. . . . The liability of any school—whether a Direct Loan or FFEL participant—for conduct that breaches a duty owed to its students is already established under law other than the HEA—usually state law. In fact, borrowers will have no legal claims against Direct Loan schools that FFEL borrowers do not already have against FFEL schools. The potential legal liability of schools under both programs for those claims is the same, and the Department proposes to develop procedures and standards to ensure that in the future schools in both programs will face identical actual responsibility for borrower claims based on grievances against schools.
>
> The Direct Loan statute creates NO NEW LIABILITIES for schools; the statute permits the Department to recognize particular claims students have against schools as defenses to the repayment of Direct Loans held by the Department. Current Direct Loan regulations allow a borrower to assert as a defense any claim that would stand as a valid claim against the school under State law.
>
> . . . Congress intended that schools participating in either FFEL or Direct Loan programs should receive parallel treatment on important issues, and the Department has already committed during negotiated rulemaking to apply the same borrower defense provisions to BOTH the Direct Loan and FFEL programs. Therefore, schools that cause injury to student borrowers that give rise to legitimate claims should and, under these proposals, will bear the risk of loss, regardless of whether the loans are from the Direct Loan or FFEL Program.

The Department reiterated this position in a notice published in the **Federal Register** on July 21, 1995 (60 FR 37768, 37769–37770):

> Some members of the FFEL industry have asserted that there will be greater liabilities for institutions participating in the Direct Loan Program than for institutions participating in the FFEL Program as a consequence of differences in borrower

[1] The Secretary can require the institution to submit ''third-party financial guarantees'' which third-party financial guarantees shall equal not less than one-half of the annual potential liabilities of such institution to the Secretary for funds under this title, including loan obligations discharged pursuant to section 437 [20 U.S.C. 1087], and to students for refunds of institutional charges, including funds under this title.'' 20 U.S.C. 1099c(c)(3)(A).

defenses between the Direct Loan and FFEL Programs. These assertions are inaccurate.

The Department has consistently stated that the potential legal liability resulting from borrower defenses for institutions participating in the Direct Loan Program will not be significantly different from the potential liability for institutions participating in the FFEL Program. (59 FR 61671, December 1, 1994, and Dear Colleague Letter GEN 95–8 January 1995) That potential liability usually results from causes of action allowed to borrowers under various State laws, not from the HEA or any of its implementing regulations. Institutions have expressed some concern that there is a potential for greater liability for institutions in the Direct Loan Program than in the FFEL Program under 34 CFR 685.206. The Secretary believes that this concern is based on a misunderstanding of current law and the intention of the Direct Loan regulations. The Direct Loan regulations are intended to ensure that institutions participating in the FFEL and Direct Loan programs have a similar potential liability. Since 1992, the FFEL Program regulations have provided that an institution may be liable if a FFEL Program loan is legally unenforceable. (34 CFR 682.609) The Secretary intended to establish a similar standard in the Direct Loan Program by issuing 34 CFR 685.206(c). Consistent with that intent, the Secretary does not plan to initiate any proceedings against schools in the Direct Loan Program unless an institution participating in the FFEL Program would also face potential liability. . . .

Thus, the Secretary will initiate proceedings to establish school liability for borrower defenses in the same manner and based on the same reasons for a school that participates in the Direct Loan Program or the FFEL Program. . . .

Thus, applying the *Chauffeur's Training* analysis, this history and formal interpretation shows that the Department has, from the inception of the Direct Loan Program, considered its administrative authority under the HEA for the Direct Loan Program to authorize the Department to hold schools liable for losses incurred through borrower defenses, and to adopt administrative procedures to determine and liquidate those claims.

Alternatively, common law provides the Department a legal right to recover from the school the losses it incurs due to recognition of borrower defenses on Direct Loans. Courts have long recognized that the government has the same rights under common law as any other party. *U.S.* v. *Kearns,* 595 F.2d 729 (D.C. Cir. 1978). Even when Congress expressly provides a remedy by statute, the government has the remedies that ''normally arise out of the relationships authorized by the statutory scheme.'' *U.S.* v. *Bellard,* 674 F.2d 330 (5th Cir. 1982) (finding the Department had a common law right to recover as would any other guarantor regardless of an HEA provision describing the Department as assignee/subrogor to rights of the private lender whom it insured).[2] In fact, as noted by the *Bellard* court, statutes must be read to preserve common law rights unless the intent to limit those rights is ''clearly and plainly expressed by the legislature.'' *Id.* The *Bellard* court found no such limiting language in the HEA, nor does any exist that is relevant to the Direct Loan issue presented here.

The school enters into a PPA with the Department in order to participate in the Direct Loan Program. 20 U.S.C. 1087(a). The PPA is a contract. *San Juan City College Inc.* v. *U.S.,* 74 Fed. Cl. 448 (2006); *Chauffeurs Training School* v. *Riley,* 967 F.Supp. 719, 727 (N.D. N.Y. 1997). In executing the contract, the school ''assume[s] a fiduciary relationship with the title IV, HEA Programs.'' *Chauffeurs Training School* v. *Paige,* C.A. No. 01–CV–02–08 (N.D. N.Y. Sept. 30, 2003), at 7; 34 CFR 682.82(a). An institution must ''act with the competency and integrity necessary to qualify as a fiduciary'' on behalf of taxpayers, ''in accordance with the highest standard of care and diligence in administering the program *and* in accounting to the Secretary for the funds received under [title IV HEA] programs.'' *Id.;* see 34 CFR 668.82.

Specifically, under the Direct Loan Program, the HEA describes the institution pursuant to its agreement with the Department as ''originating'' Direct Loans, 20 U.S.C. 1087c(a), 1087d(b), and accepting ''responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement.'' 20 U.S.C. 1087d(a)(3), 34 CFR 685.300(b)(8). The regulations describe the role of the institution as ''originating'' Direct Loans. 34 CFR 685.300(c), 685.301.

As a loan ''originator'' for the Department, the school is the authorized agent of the Department: The school acts pursuant to Department direction, the school manifests its intent to act as agent by entering into the PPA, and most importantly, the school has power to alter the legal relationships between the principal (the Department) and third parties (the students). But for the school's act in originating the loan, there would be no lender-borrower relationship.

The interests of the Department as lender and principal in this Direct Loan Program relationship with the institution are simple: To enable students and parents to obtain Federal loans to pay for postsecondary education. 20 U.S.C. 1087a. Congress selected the vehicle—a loan, not a grant—under which the borrower repays the loan, made with public funds, which in turn enables the making of new loans to future borrowers. Acts or omissions by an agent of the Department that frustrate repayment by the borrower of the amount the Department lends are contrary to the Department's benefit and interest. Acts or omissions by the institution, as the Department's loan-making agent, that harm the Department's interests in achieving the objectives of the loan program violate the duty of loyalty owed by the institution as the Department's loan originator, or agent. The Department made clear at the inception of the Direct Loan relationship with the institution that the institution would be liable for losses caused by its acts and omissions, in 1994 and 1995, when the Department publicly and unequivocally adopted the ''borrower defense to repayment'' regulation, 34 CFR 685.206, and, in the **Federal Register** and other statements described earlier, stated the consequences for the institution that caused such losses.

The government has the same protections against breach of fiduciary duty that extend under common law to any principal against its agent. *U.S.* v. *Kearns,* at 348; see also *U.S.* v. *York,* 890 F.Supp. 1117 (D.D.C. 1995) (breach of fiduciary duty to government by contractor, loan servicing dealings constituting conflict of interest). The remedies available for breach of fiduciary duty are damages resulting from the breach of that duty. ''One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.'' *Restatement Second, Torts § 874.*

Applying this common law analysis to the relationship between the Department and the Direct Loan participating institution as it bears on the Department's right to recover, we note, first, that the Department has the rights available under common law to any other party, without regard to whether any statute explicitly confers such rights. Second, the institution enters into a contract with the Department pursuant to which the institution acts as the Department's agent in the making of Direct Loans. The school is the loan ''originator'' for the Department. Third, under common law, an agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency. Fourth, under common law, an agent's

[2] See: *U.S.* v. *Texas,* 507 U.S. 529, 534 (1993) (courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.' '').

breach of its fiduciary duty makes the agent liable to the principal for the loss that the breach of duty causes the principal. And last, a school that commits an act or omission that gives a Direct Loan borrower a defense to repayment that causes the Department loss thereby violates its common law fiduciary duty to act loyally for the interests of the Department, and is liable to the Department for losses caused by that breach of duty.

The commenter who argued that the Secretary incurs the loss by honoring the borrower defense ''voluntarily,'' and is barred by that fact from recovery against the institution, misconceives the nature of the claim. As early as *Bellard,* the courts have consistently recognized that in its capacity as a loan guarantor under the FFEL Program, the Department pays the lender under its contractual obligation as loan guarantor, and not as a volunteer. The Department guarantees FFELP loans at the request of the borrower who applied for the guaranteed loan, as well as the lender. By virtue of payment of the guarantee, the Department acquired an implied-in-law right against the borrower for reimbursement of the losses it incurred in honoring the guarantee—a claim distinct from its claim as assignee from the lender of the defaulted loan. Similarly, where the Department incurs a loss under a statutory obligation to discharge by reason of closure of the school or false certification, the Department does not incur that loss voluntarily, but rather under legal obligation imposed by the statute, as well as the terms of the federally prescribed promissory note. Regardless of whether the HEA explicitly authorized the Secretary to recover for that loss, or deemed the borrower's claim against the school to be assigned to the Secretary, common law gives the Secretary the right to recover from the school for the loss incurred as a result of the act or omission of the school. Section 455(h) of the HEA, by directing that the Secretary determine by regulation which acts or omissions of the school constitute defenses to repayment, requires the Department to discharge the borrower's obligation to repay when the borrower establishes such a defense. 20 U.S.C. 1087e(h). To the extent that the borrower proves that the act or omission of the school gave the borrower a defense, the amount not recoverable from the borrower was a loss incurred because of the Department's legal obligation to honor that defense. That loss, like the loss on payment of a loan guarantee on a FFEL Loan, is not one incurred voluntarily, but rather is incurred, like the loss on the loan guarantee, by legal obligation. By honoring the proven defense of the Direct Loan borrower, like honoring the claim of the lender on the government guarantee, the Secretary acquires by subrogation the claim of the Direct Loan borrower or FFEL lender, as well as a claim for reimbursement from the party that caused the loss—the borrower, on the defaulted FFEL Loan, or the school, on the Direct Loan defense.

Changes: None.

Comments: Several commenters stated that the HEA does not authorize, or even contemplate, the sweeping regulatory framework set forth in the Department's borrower defense proposals. The commenters questioned the three HEA provisions cited by the Department as the source of its statutory authority: Section 455(h), which allows the Secretary to identify ''acts or omissions . . . a borrower may assert as a defense to repayment of a loan;'' Section 487, which outlines certain consequences for an institution's ''substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates;'' and Section 454(a)(6), which permits the Department to ''include such . . . provisions as the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of'' the Direct Loan Program in each institution's PPA. The commenters believed that section 455(h) of the HEA only empowers the Department to define those ''acts or omissions'' that an individual borrower may assert as a defense in a loan collection proceeding and noted that none of the provisions allows the Department to create a novel cause of action for a borrower to levy against her school, which the Department would both prosecute and adjudicate in its own ''court.'' Accordingly, the commenters believed that the Department should substantially revise the rule to be consistent with the regulatory authority granted to the Department by Congress. Other commenters stated that the Department should withdraw the proposed regulations and instead work jointly with Congress to address the issues in the proposed regulations as part of the reauthorization of the HEA. The commenters believed that borrower defense policy proposals are so substantive and commit such an enormous amount of taxpayer dollars that careful consideration by Congress is required so that all of the available options are weighed in the overall context of comprehensive program changes.

Discussion: We disagree with the commenters who contended that the HEA does not authorize the regulatory framework proposed in the Department's borrower defense proposals. As explained above, common law and the HEA as interpreted by the Department in adopting the Direct Loan regulations, give the Department the right to recover losses incurred due to borrower defense claims. The commenters rightly identify sections 455(h), 487, and 454(a)(6) of the HEA as some of the sources of the Department's statutory authority for these regulations as they relate to identification of causes of action that are recognized as defenses to repayment, as well as procedures for receipt and adjudication of these claims. In addition, the HEA authorizes the Secretary to include in Direct Loan PPAs with institutions any provisions that are necessary to protect the interests of the United States and to promote the purposes of the Direct Loan Program. In becoming a party to a Direct Loan PPA, the institution accepts responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement. And, as a result, students and parents are able to obtain Federal loans to pay for postsecondary education. Far from exceeding its statutory authority in developing procedures for adjudicating these claims, section 455(h) presumes that the Department must recognize in its existing administrative collection and enforcement proceedings the very defenses that section directs the Department to establish, or create new procedures to better address these claims, as we do here.

In addition, section 410 of the General Education Provisions Act (GEPA) provides the Secretary with authority to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operations of, and governing the applicable programs administered by, the Department. 20 U.S.C. 1221e–3. Further, under section 414 of the Department of Education Organization Act, the Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department. 20 U.S.C. 3474. These general provisions, together with the provisions in the HEA and common law explained earlier, noted above, authorize the Department to promulgate regulations that govern defense to repayment standards, process, and institutional liability.

With regard to the commenters who believe that the Department's proposals are so substantive and commit such an enormous amount of taxpayer dollars that the Department should work with Congress, or defer to Congress, in terms of the development of such comprehensive program changes, we do not agree that the Department should not take, or should defer, regulatory action on this basis until Congress acts. Since the collapse of Corinthian, the Department has received a flood of borrower defense claims stemming from the school's misconduct. In order to streamline and strengthen this process, we believe it is critical that the Department proceed now in accordance with its statutory authority, as delegated by Congress, to finalize regulations that protect student loan borrowers while also protecting the Federal and taxpayer interests.

Changes: None.

Comments: Several commenters stated that the proposed regulations were arbitrary and capricious and therefore violate the APA. Commenters raised this concern both generally and with respect to specific elements of the proposed regulations. For example, several commenters argued that the Department withheld substantive detail regarding its expansion of the loan repayment defenses into offensive causes of action and on the process by which borrower defense claims and Department proceedings to collect claim liabilities from institutions will be adjudicated, thereby depriving institutions and affected parties the opportunity to offer meaningful comment on critical parts of the rule.

Discussion: We address commenters' arguments with respect to specific provisions of the regulations in the sections of this preamble specific to those provisions. However, as a general matter, in taking this regulatory action, we have considered relevant data and factors, considered and responded to comments and articulated a reasoned basis for our actions. *Marsh* v. *Oregon Natural Res. Council,* 490 U.S. 360, 378 (1989); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983); *see also Pub. Citizen, Inc.* v. *Fed. Aviation Admin.,* 988 F.2d 186, 197 (D.C. Cir. 1993); *PPL Wallingford Energy LLC* v. *FERC,* 419 F.3d 1194, 1198 (D.C. Cir. 2005).

Changes: None.

Comments: Several commenters stated that the negotiated rulemaking process, by which the proposed rules were developed, was flawed.

One commenter stated that input from representatives of publicly held proprietary institutions was not included in the public comment process prior to the establishment of a negotiated rulemaking committee. This commenter also stated that only representatives from private, proprietary institutions were represented on the negotiated rulemaking committee and that those representatives had no expertise in the active management of an institution. The commenter also stated that the NPRM 45-day public comment process was too short.

Several commenters contended that the Department failed to provide adequate notice to the public of the scope of issues to be discussed at the negotiated rulemaking. The commenters stated that the issues of financial responsibility and arbitration clauses were not included in the **Federal Register** notices announcing the establishment of a negotiated rulemaking committee or the solicitation of negotiators and that, had the higher education community known these issues were within the scope of the rulemaking, negotiators more familiar with these issues would have been nominated. The commenters believed that the Department failed to carry out its statutory mandate under 20 U.S.C. 1098 to engage the public and receive input on the issues to be negotiated. One commenter also expressed dismay at the Department's accelerated timetable and intent to publish final regulations one week before the general election. The commenter felt that the ''rush to regulate'' resulted in a public comment period that did not give the public enough time to fully consider the proposals and a timeline that did not afford the Department enough time to develop an effective, cost-effective rule.

Discussion: The negotiated rulemaking process ensures that a broad range of interests is considered in the development of regulations. Specifically, negotiated rulemaking seeks to enhance the rulemaking process through the involvement of all parties who will be significantly affected by the topics for which the regulations will be developed. Accordingly, section 492(b)(1) of the HEA, 20 U.S.C. 1098a(b)(1), requires the Department to choose negotiators from groups representing many different constituencies. The Department selects individuals with demonstrated expertise or experience in the relevant subjects under negotiation, reflecting the diversity of higher education interests and stakeholder groups, large and small, national, State, and local. In addition, the Department selects negotiators with the goal of providing adequate representation for the affected parties while keeping the size of the committee manageable. The statute does not require the Department to select specific entities or individuals to be on the committee. As there was both a primary and an alternate committee member representing proprietary institutions, we believe that this group was adequately represented on the committee.

We note that the Department received several nominations to seat representatives from proprietary schools on the committee after publication of our October 20, 2015, **Federal Register** notice. The Department considered each applicant to determine their qualifications to serve on the committee.

This process did not result in proprietary sector nominees with the requisite qualifications, so we published a second **Federal Register** notice on December 21, 2015, seeking further nominations for the negotiated rulemaking committee, including representation from the proprietary sector. Dennis Cariello, Shareholder, Hogan Marren Babbo & Rose, Ltd., and Chris DeLuca, Founder, DeLuca Law, were selected following this second notice. Given the topics under discussion, we believe Mr. Cariello and Mr. DeLuca adequately represented the proprietary sector.

We disagree with the commenters who contended that the Department failed to provide adequate public notice and failed to engage and receive input from the public on the scope of issues to be discussed at the negotiated rulemaking, in particular the issues of financial responsibility and arbitration clauses. On August 20, 2015, the Department published a notice in the **Federal Register** announcing our intention to establish a negotiated rulemaking committee. We also announced our intention to accept written comments from and hold two public hearings (September 10, 2015 and September 16, 2015, in Washington, DC and San Francisco, respectively) at which interested parties could comment on the topics suggested by the Department and suggest additional topics that should be considered for action by the committee. Lastly, we announced our intent to develop proposed regulations for determining which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under the Direct Loan Program and the consequences of such borrower defenses for borrowers, institutions, and the Secretary. We specifically stated that we would address the issues of defense to repayment procedures; the criteria that constitute a defense to repayment; the standards and procedures that the Department would use to determine institutional liability for amounts based on borrower defenses; and, the effect of borrower defenses on institutional capability assessments. No representatives of the proprietary sector testified at the hearings. One proprietary association representing 1,100 cosmetology schools submitted written testimony stating that the association was interested in working with the Department to determine the institutional liability and capability assessments associated with borrower defense claims. In addition, we presented issue papers prior to the first day of the first of the three negotiating sessions in which we outlined the particular questions to be addressed.[3] These included Issue Paper No. 5, which explicitly addresses financial responsibility and letters of credit.[4] Negotiators who had any question about the scope of issues we intended to cover were thus given very explicit notice before the first day of negotiations, and were free to obtain then, or at any other time during the nine days of hearings over three months, any expert advisors they wished to engage to inform their deliberations.

We received written testimony from other parties that supported both holding institutions financially accountable for the costs associated with borrower defenses and limiting a school's use of certain dispute resolution procedures.

We disagree with the commenter who contended that the Department's timetable for developing borrower defense regulations was rushed and that the comment period did not give the public enough time to fully consider the proposals. We believe that the 45-day public comment period provided sufficient time for interested parties to submit comments, particularly given that prior to issuing the proposed regulations, the Department conducted two public hearings and three negotiated rulemaking sessions, where stakeholders and members of the public had an opportunity to weigh in on the development of much of the language reflected in the proposed regulations. In addition, the Department also posted the NPRM on its Web site several days before publication in the **Federal Register**, providing stakeholders additional time to view the proposed regulations and consider their viewpoints on the NPRM.

Changes: None.

Comments: Although the regulations will affect all schools, many commenters expressed frustration at their perception that the regulations target proprietary schools in particular. The commenters noted several provisions of the regulations—for example, financial protection triggers related to publicly traded institutions, distributions of equity, the 90/10 regulations, and the Gainful Employment regulations, and disclosure provisions regarding loan repayment rates—as unfairly targeting only proprietary schools with no justification or rationale. The commenters noted that that there are many private sector career schools and colleges that play a vital role in the country's higher education system by providing distinctive, career-focused programs and that the Department should develop rules that are applied uniformly across all educational institutions that offer title IV, HEA funding. Another commenter appreciated the distinction made in the NPRM between nonprofit/public institutions and proprietary schools as the basis for restricting the loan repayment rate disclosure to proprietary schools. The commenter suggested that the fundamental differences in the governance structures and missions of the public and non-profit sectors versus the for-profit sector provide a substantive basis for differentiating this regulation among the sectors.

Several commenters urged the Department to reconsider the changes to the financial responsibility standards to include actions and events that would trigger a requirement that a school provide financial protection, such as a letter of credit, to insure against future borrower defense claims and other liabilities, given their sweeping scope and potentially damaging financial impact on historically black colleges and universities (HBCUs). The commenters contended that these provisions could lead to the closure of HBCUs that are not financially robust but provide quality educational opportunities to students and noted that HBCUs have not been the focus of Federal and State investigations nor have they defrauded students or had false claims lawsuits filed against them. These commenters expressed concern about a number of the specific financial protection triggers, including, but not limited to, the triggers relating to lawsuits, actions by accrediting agencies, and cohort default rate.

Discussion: We agree that there are many proprietary career schools and colleges that play a vital role in the country's higher education system. We do not agree, however, that either the financial protection triggers or the loan repayment rate disclosure unfairly target proprietary institutions. We apply the financial protection triggers related to publicly traded institutions, the distribution of equity, and the 90/10 regulations only to proprietary institutions because, as another commenter noted, of the fundamental differences in the governance structures and missions of the public and non-profit sectors and the unique nature of the business model under which these institutions operate. These triggers identify events or conditions that signal impending financial problems at proprietary institutions that warrant action by the Department. We apply the loan repayment rate disclosure only to the for-profit sector primarily because the frequency of poor repayment outcomes is greatest in this sector. We appreciate the support of the commenter who agreed with this approach.

We note that we address commenters' arguments with respect to specific provisions of the regulations in the sections of this preamble specific to those provisions.

We also note that HBCUs play a vital role in the Nation's higher education system. We recognize the concerns commenters raised regarding the financial protection provisions of the proposed regulations, which they argue would have a damaging financial impact on HBCUs. We note that the triggers are designed to identify signs, and to augment the Department's tools for detection, of impending financial difficulties. If an institution is subject to material actions or events that are likely to have an adverse impact on the financial condition or operations of an institution, we believe that the Federal government and taxpayers should be protected from any resulting losses incurred by requiring a letter or credit, regardless of the institution's sector. As commenters mentioned, our recent experience suggests that HBCUs have not been the subject of government agency suits or other litigation by students or others, or of administrative enforcement actions. Institutions that do not experience these kinds of claims,

---

[3] *http://www2.ed.gov/policy/highered/reg/hearulemaking/2016/index.html.*

[4] The paper states—

Questions to be considered by the negotiating committee include:

1. Should the Department take additional steps to protect students and taxpayers from (a) potential borrower defense to repayment (DTR) claims, (b) liabilities stemming from closed school discharges, and (c) other conditions that may be detrimental to students?

▪ If so, what conditions, triggering events, metric-based standards, or other risk factors should the Department consider indicative of failing financial responsibility, administrative capability, or other standards?

▪ What should the consequences be for a violation? Letter of credit or other financial guarantee? Disclosure requirements and student warnings? Other consequences?

• If a letter of credit or other financial guarantee is required, how should the amount be determined?

including HBCUs, will not experience adverse impacts under these triggers. In addition, institutions, including HBCUs, will retain their existing rights of due process and continue to have the ability to present to the Secretary if there is any factual objection to the grounds for the required financial protection. Accordingly, the Secretary can consider additional information provided by an institution before requiring a letter of credit. Even in instances where the Department still requires a letter of credit over a school's objection, the school could raise such issues to the Department's Office of Hearing and Appeals.

Finally, we have made a number of changes to the proposed triggers that address the commenters' specific objections to particular triggers, to more sharply focus the automatic triggers on actions and events that are likely to affect a school's financial stability. For instance, as we stated in other sections of this preamble, in light of the significant comments received regarding the potential for serious unintended consequences if the accreditation action triggers were automatic, we are revising the accreditation trigger so that accreditation actions such as show cause and probation or equivalent actions are discretionary. We note that we address commenters' arguments with respect to additional specific financial protection triggers, and any changes we have made in the final regulations, in the sections of this preamble specific to those provisions.

Changes: None.

Comments: One commenter suggested that the Department ensure that its contractors are aware of the basis for borrower defense discharge claims and the accompanying process. The commenter noted that inconsistent servicing and debt collection standards impede borrowers' access to the benefit and other forms of relief. The commenters also suggested that the Department update its borrower-facing materials to reflect the availability and scope of the borrower defense discharge.

Discussion: We are committed to ensuring that our contractors and any borrower-facing material published by the Department provide accurate and timely information on the discharge standards and processes associated with a borrower defense to repayment. We have begun the process of updating applicable materials to reflect these final regulations and will continue working closely with our contractors to help ensure that they have the information they need to assist borrowers expeditiously and accurately.

Changes: None.

Comments: Several commenters requested that the Department make information available to the public on the number of borrowers who submitted borrower defense applications, the number of borrowers who received a discharge, the amount of loans discharged, the basis or standard applied by the Department in a successful discharge claim, discharged amounts collected from schools, a list of institutions against which successful borrower defense claims are made, and any reports relevant to the process. The commenters believed that this information would provide transparency and facilitate a better understanding of how the process is working as well.

Discussion: We are committed to transparency, clarity and ease of administration and will give careful consideration to this request as we refine our borrower defense process.

Changes: None.

Comments: Several commenters noted that they, as student loan borrowers, are taxpayers like every American citizen and that paying student loans that were fraudulently made on top of paying taxes is a double penalty. The commenters also requested that the Department permit a borrower to include all types of student loans—private student loans, FFEL, Perkins, Parent Plus—they received to finance the cost of higher education in a borrower defense claim.

Discussion: The Department is committed to protecting student loan borrowers from misleading, deceitful, and predatory practices of, and failure to fulfill contractual promises by, institutions participating in the Federal student aid programs. These final regulations permit a borrower to consolidate loans listed in § 685.220(b), including nursing loans made under part E of title VIII of the Public Health Service Act, to pursue borrower defense relief by consolidating those loans, as provided in proposed § 685.212(k). The Department does not have the authority to include private student loans in a Direct Loan consolidation.

Changes: None.

Comments: Several commenters stated that, in order to avoid another failure as serious as that of Corinthian, the Department should implement strong compliance and enforcement policies to proactively prevent institutions that engage in fraudulent activity from continuing to receive title IV, HEA funding. The commenters believe that institutions that do not meet statutory, regulatory or accreditor standards and that burden students with debt without providing a quality education should be identified early and subjected to greater scrutiny and sanctions so that a borrower defense is a last resort.

Discussion: The Department is committed to strong compliance and enforcement policies to proactively prevent institutions that engage in fraudulent activity from continuing to receive title IV, HEA funding. These final regulations establish the definitive conditions or events upon which an institution is or may be required to provide to the Department with financial protection, such as a letter of credit, to help protect students, the Federal government, and taxpayers against potential institutional liabilities.

Changes: None.

Comments: One commenter requested that the Department and the Internal Revenue Service develop a determination on the tax treatment of discharges of indebtedness for students with successful defense to repayment claims. While acknowledging that the Department does not administer tax law, the commenter stated that the Department should question, or at least weigh in on the matter, of the Internal Revenue Service's "decline to assert" policy on successful defense to repayment claims that currently applies to loans for students who attend schools owned by Corinthian, but not to loans for students who attend other schools.

Discussion: As noted by the commenter, the tax treatment of discharges that result from a successful borrower defense is outside of the Department's jurisdiction. However, the Department recognizes the commenter's concern and will pursue the issue in the near future.

Changes: None.

Borrower Defenses (Sections 668.71, 685.205, 685.206, and 685.222)

Federal Standard

Support for Standard

Comments: A group of commenters fully supported the Department's intent to produce clear and fair regulations that protect student borrowers and taxpayers and hold schools accountable for acts and omissions that deceive or defraud students. However, these commenters suggested that the Department has not fully availed ourselves of existing consumer protection remedies and have, instead, engaged in overreach to expand our enforcement options.

Another group of commenters noted that the proposed Federal standard is a positive complement to consumer protections already provided by State law. Another group of commenters offered support for the Federal standard specifically because it addresses complexities and inequities between borrowers in different States.

One commenter explicitly endorsed our position that general HEA eligibility or compliance violations by schools could not be used a basis for a borrower defense.

Another group of commenters noted that the proposed Federal standard provides an efficient, transparent, and fair process for borrowers to pursue relief. According to these commenters, the Federal standard eliminates the potential for disparate application of this borrower benefit inherent with the current rule's State-based standard, and enables those who are providing training and support to multiple institutions to develop standardized guidance.

A different group of commenters expressed support for the Federal standard, noting that it would be challenging for us to adjudicate claims based on 50 States' laws. Yet another group of commenters requested that the new Federal standard be applied retroactively when a borrower makes a successful borrower defense claim and has loans that were disbursed both before and after July 1, 2017.

Discussion: We appreciate the support of these commenters.

However, we do not agree with the commenters' contention that we are engaging in overreach to expand our enforcement options, nor have we disregarded existing consumer protection remedies. The HEA provides specific authority to the Secretary to conduct institutional oversight and enforcement of the title IV regulations. The borrower defense regulations do not supplant consumer protections available to borrowers. Rather, the borrower defense regulations describe the circumstances under which the Secretary exercises his or her long-standing authority to relieve a borrower of the obligation to repay a loan on the basis of an act or omission of the borrower's school. The Department's borrower defense process is distinct from borrowers' rights under State law. State consumer protection laws establish causes of action an individual may bring in a State's courts; nothing in the Department's regulation prevents borrowers from seeking relief through State law in State courts. As noted in the NPRM, 81 FR 39338, the limitations of the borrower defense process should not be taken to represent any view regarding other issues and causes of action under other laws and regulations that are not within the Department's authority.

As to the request to make the new Federal standard available to all Direct Loan borrowers, we cannot apply the new Federal standard retroactively when a borrower makes a successful borrower defense claim and has loans that were disbursed both before and after July 1, 2017. Loans made before July 1, 2017 are governed by the contractual rights expressed in the existing Direct Loan promissory notes. These promissory notes incorporate the current borrower defense standard, which is based on an act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. Promissory notes for loans made after July 1, 2017 will include a discussion of the new Federal standard for borrower defense claims.

Changes: None.

Evidentiary Standard

Comments: A number of commenters and an individual commenter remarked that the proposed Federal standard increases the risk to institutions by granting loan discharges when the borrower's case is substantiated by a preponderance of the evidence.

Another commenter expanded on this position, asserting that the evidentiary standard in most States for fraudulent misrepresentation is clear and convincing evidence. A few commenters echoed these viewpoints and suggested that the perceived minimal burden of proof may encourage bad actors to entice borrowers into filing false claims.

A couple of other commenters wrote that the standard is not clear enough to preclude students from asserting claims of misrepresentation without supporting evidence. These commenters suggested that the proposed regulations presume that all proprietary schools engage in deliberate misrepresentation.

Discussion: We do not agree that the ''preponderance of the evidence'' standard will result in greater risk to institutions. We believe this evidentiary standard is appropriate as it is the typical standard in most civil proceedings. Additionally, the Department uses a preponderance of the evidence standard in other proceedings regarding borrower debt issues. See 34 CFR 34.14(b), (c) (administrative wage garnishment); 34 CFR 31.7(e) (Federal salary offset). We believe that this evidentiary standard strikes a balance between ensuring that borrowers who have been harmed are not subject to an overly burdensome evidentiary standard and protecting the Federal government, taxpayers, and institutions from unsubstantiated claims. Under the standard, the designated Department official may determine whether the elements of the borrower's cause of action under the Federal standard for borrower defenses have been sufficiently alleged and shown. If the official determines that the elements have not been alleged or have not met the preponderance of evidence standard, the claim will be denied.

The Department is aware of unscrupulous businesses that prey upon distressed borrowers, charging exorbitant fees to enroll them in Federal loan repayment plans that are freely available. On January 28, 2016, the Department sent cease and desist letters to two third-party ''debt relief'' companies that were using the Department's official seal without authorization. The misuse of the Department's Seal is part of a worrying trend. Some of these companies are charging large up-front or monthly fees for Federal student aid services offered by the Department of Education and its student loan servicers for free. In April of 2016, the Department launched several informational efforts to direct borrowers to the Department's free support resources, as well as to share information regarding State and Federal entities that have the authority to act against companies that engage in deceptive or unfair practices. Although these or similar opportunists may seek to profit from filing false claims, the Department will be aggressive in curtailing this activity, and will remain vigilant to help ensure that bad actors do not profit from this process.

We do not agree that the Federal standard will incent borrowers to assert claims of misrepresentation without sufficient evidence to substantiate their claims. As explained in more detail under ''Process for Individual Borrowers,'' under § 685.222(a)(2), a borrower in the individual process in § 685.222(e) bears the burden of proof in establishing that the elements of his or her claim have been met. In a group process under § 685.222(f) to (h), this burden falls on the designated Department official. Borrower defense claims that do not meet the evidentiary standard will be denied. We also disagree with the commenters' interpretation of the borrower defense regulations as based on a presumption that all proprietary institutions engage in deliberate misrepresentation. These borrower defense regulations are applicable to and designed to address all institutions of postsecondary education participating in the Direct Loan Program; further, they contain no presumption regarding the activities of any institution, but instead provide a fair process for determining whether acts or omissions by any particular institution give rise to a borrower defense. We also discuss this issue in more detail under ''Substantial Misrepresentation.''

Changes: None.

Educational Malpractice

Comments: A group of commenters asked that we clarify the difference between educational malpractice and a school's failure to provide the necessary aspects of an education (such as qualified instructors, appropriately equipped laboratories, etc.).

Discussion: We do not believe that the regulations should differentiate between educational malpractice and a school's failure to provide the necessary aspects of an education, such as might be asserted in a claim of substantial misrepresentation or breach of contract. State law does not recognize claims characterized as educational malpractice, and we do not intend to create a different legal standard for such claims in these regulations. Claims relating to the quality of a student's education or matters regarding academic and disciplinary disputes within the judgment and discretion of a school are outside the scope of the borrower defense regulations. We recognize that there may be instances where a school has made specific misrepresentations about its facilities, financial charges, programs, or the employability of its graduates, and these misrepresentations may function as the basis of a borrower defense, as opposed to a claim regarding educational quality. Similarly, a borrower defense claim based on a breach of contract may be raised where a school has failed to deliver specific obligations, such as programs and services, it has committed to by contract.

Changes: None.

Intent

Comments: A number of commenters expressed concern that the proposed Federal standard does not require intent on the part of the institution. These commenters were concerned that inadvertent errors by an institution or its employees could serve as the basis for a borrower defense claim. Some commenters cited an example of an employee misstating or omitting information that is available to the borrower in a complete and correct form in publications or electronic media. One of these commenters noted that the six-year statute of limitations may exacerbate this issue, by permitting borrowers to present claims relying on distant memories of oral conversations that may have been misunderstood.

Discussion: Gathering evidence of intent would likely be nearly impossible for borrowers. Information asymmetry between borrowers and institutions, which are likely in control of the best evidence of intentionality of misrepresentations, would render borrower defense claims implausible for most borrowers.

As explained in more detail under ''Substantial Misrepresentation,'' we do not believe it is necessary to incorporate an element of intent or knowledge into the substantial misrepresentation standard. This reflects the Department's longstanding position that a misrepresentation does not require knowledge or intent on the part of the institution. The Department will continue to operate within a rule of reasonableness and will evaluate available evidence of extenuating, mitigating, and aggravating factors prior to issuing any sanctions pursuant to 34 CFR part 668, subpart F. We will also consider the totality of the circumstances surrounding any misrepresentation for borrower defense determinations. However, an institution will generally be responsible for harm to borrowers caused by its misrepresentations, even if they are not intentional. We continue to believe that this is more reasonable and fair than having the borrower (or taxpayers) bear the cost of such injuries. It also reflects the consumer protection laws of many States.

Similarly, we do not believe it is necessary or appropriate to adopt an intent element for the breach of contract standard. Generally, intent is not a required element for breach of contract, and we do not see a need to depart from that general legal principle here.

Regardless of the point in time within the statute of limitations at which a borrower defense claim is made, the borrower will be required to present a case that meets or exceeds the preponderance of the evidence standard.

Changes: None.

State Law Bases for the Federal Standard

Comments: A number of commenters advocated the continuation of State-based standards for future borrower defense claims. These commenters put forward several arguments in support of their position.

Several commenters suggested that the proposed Federal standard effectively reduces, preempts, or repeals borrowers' current rights under the current, State law-based standard.

According to another commenter, the proposed acceptance of favorable, nondefault, contested judgments based on State law suggests that allegations of State law violations should provide sufficient basis for a borrower defense claim. Another group of commenters contended that, when a Federal law or regulation intends to provide broad consumer protections, it generally does not supplant all State laws, but rather, replaces only those that provide less protection to consumers.

A group of commenters noted that the HEA's State authorization regulations require States to regulate institutions and protect students from abusive conduct. According to these commenters, the laws States enact under this authority would not be covered by the Federal standard unless the borrower obtained a favorable, nondefault, contested judgment.

Additionally, one commenter believed that providing a path to borrower defense based on act or omission of the school attended by the student that would give rise to a cause of action under applicable State law would preserve the relationship between borrower defense, defense to repayment, and the ''Holder in Due Course'' rule of the Federal Trade Commission (FTC).[5]

These commenters stated that the Department has not provided sufficient evidence to support its assertions that borrower defense determinations based on a cause of action under applicable State law results or would result in inequitable treatment for borrowers, or that the complexity of adjudicating State-based claims has increased due to the expansion of distance education. Further, these commenters also stated that the Department has not provided any examples of cases that would meet the standard required to base a borrower defense claim on a nondefault, contested judgement based on State law.

A group of commenters contended that State law provides the most comprehensive consumer protections to borrowers. Other commenters contended that State law provides clarity to borrowers and schools, as precedents have been established that elucidate what these laws mean with respect to the rights and responsibilities of the parties.

[5] The FTC's ''Holder Rule'' or ''Holder in Due Course Rule'' is also formally known as the ''Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses,'' 16 CFR part 433. The Holder Rule requires certain credit contracts to include a contractual provision that establishes that the holder of such a contract is subject to all claims and defenses which the debtor could assert against the seller of the goods or services obtained with the proceeds of the contract, with recovery by the debtor being limited to the amounts paid by the debtor under the contract.

Another commenter suggested that providing borrowers comprehensive options to claim a borrower defense, including claims based on violation of State law, should be an essential precept of borrower relief.

One commenter contended that the elimination of the State standard is at odds with the proposed ban on mandatory arbitration, as this ban will clear the way for borrowers to pursue claims against their schools in State court.

Several commenters noted that the Department will continue to apply State law standards to borrower defense claims for loans disbursed prior to July 2017, necessitating the continued understanding and application of State laws regardless of whether or not they remain a basis for borrower defense claims for loans disbursed after July 2017.

A group of commenters expressed concern that borrowers with loans disbursed before July 2017 can access the Federal standard by consolidating their loans; however, borrowers with loans disbursed after July 2017 can only avail themselves of the State standard by obtaining a nondefault, contested judgment. They contended that Department should not introduce this inequity into the Federal student loan programs.

Another group of commenters asserted that defining bases for future borrower defense claims based on past institutional misconduct may limit the prosecution of future forms of misconduct that are unforeseeable.

Several commenters noted that many borrowers lack the resources necessary to obtain a nondefault, contested judgment based on State law. Moreover, these borrowers would not have access to the breadth of data and evidence available to the Department.

Several commenters contended that borrowers whose schools have violated State law should not have to rely upon their State's Attorney General (AG) to access Federal loan relief.

One commenter wrote that creating multiple paths a borrower may use to pursue a borrower defense claim is unnecessarily complex.

A group of commenters remarked that the proposed Federal standard is both too complex and the evidentiary standard too low, suggesting that the prior State standard was more appropriate for borrower defense claims.

Discussion: We disagree that the Federal standard effectively reduces, preempts, or repeals borrowers' current rights under the State standard. Borrowers may still submit a claim based on violation of any State or Federal law, whether obtained in a court or an administrative tribunal of competent jurisdiction. As also explained in the ''Claims Based on Non-Default, Contested Judgments'' section of this document, the Department's borrower defense process is distinct from borrowers' rights to pursue judicial remedies in other State or Federal contexts and nothing in the Department's regulation prevents borrowers from seeking relief through State law in State courts.

We agree, as proposed in the NPRM and reflected in these final regulations, that the acceptance of favorable, nondefault, contested judgments based on State or Federal law violations may serve as a sufficient basis for a borrower defense claim. We believe it is important to enable borrowers to bring borrower defense claims based on those judgments, but we do not think this means that we should maintain the State-based standard.

We acknowledge that the HEA's State authorization regulations require States to regulate institutions and protect students from abusive conduct and that the laws States have enacted in this role would only be covered by the Federal standard where the borrower obtained a favorable, nondefault, contested judgment. However, we do not view this as a compelling reason to maintain an exclusively State-based standard, or a standard that also incorporates State law in addition to the Federal standard, for borrower defense.

We disagree that the Federal standard for borrower defense should incorporate the FTC's Holder Rule. We acknowledge that the current borrower defense regulation's basis in applicable State law has its roots in the Department's history with borrower defense.[6] However, we have decided that it is appropriate that the Department exercise its authority under section 455(h) of the HEA to specify ''which acts or omissions'' may serve as the basis of a borrower defense and establish a Federal standard that is not based in State law, for loans made after the effective date of these final regulations.

We have acknowledged that potential disparities may exist as students in one State may receive different relief than students in another State, despite having common facts and claims. This concern is substantiated, in part, by comments made by non-Federal negotiators and members of the public in response to the NPRM, asserting that consumer protections laws vary greatly from State to State.

We have also described how the complexity of adjudicating State-based claims for borrower defense has increased due to the expansion of distance education. As noted in the NPRM (81 FR 39335 to 39336), while a determination might be made as to which State's laws would provide protection from school misconduct for borrowers who reside in one State but are enrolled via distance education in a program based in another State, some States have extended their rules to protect these students, while others have not.

Additionally, we have discussed the administrative burden to the Department and difficulties Department has experienced in determining which States' laws apply to any borrower defense claim and the inherent uncertainties in interpreting another authorities' laws. 81 FR 39339.

We agree that borrower relief should include comprehensive options, including claims based on violations of State law. While we believe that the proposed standards will capture much of the behavior that can and should be recognized as the basis for borrower defenses, it is possible that some State laws may offer borrowers important protections that do not fall within the scope of the Department's Federal standard. To account for these situations, the final regulations provide that nondefault, contested judgments obtained against a school based on any State or Federal law, may be a basis for a borrower defense claim, whether obtained in a court or an administrative tribunal of competent jurisdiction. Under these regulations, a borrower may use such a judgment as the basis for a borrower defense if the borrower was personally affected by the judgment, that is, the borrower was a party to the case in which the judgment was entered, either individually or as a member of a class. To support a borrower defense claim, the judgment would be required to pertain to the making of a Direct Loan or the provision of educational services to the borrower.

[6] As explained in the ''Expansion of Borrower Rights'' section, before the Department enacted the borrower defense regulations in 1994 as part of its Direct Loan Program regulations, 59 FR 61664, the Department had preserved borrowers' rights under the FFEL Program to bring any claims a borrower may have against a school as defenses against the holder of the loan if the school had a referral or affiliation relationship with the lender. This was done by adopting a version of the FTC's Holder Rule language in the FFEL Master Promissory Note in 1994, and was later formalized in regulation at 34 CFR 682.209(g) in 2008. As further explained under ''*General,*'' in 1995, the Department clarified that the borrower defense Direct Loan Program regulation was meant to create rights for borrowers, and as to liabilities for schools corresponding to those that would arise under the FFEL Program.

While State law may provide clarity to borrowers and schools regarding the rights and responsibilities of the parties under established precedents, we believe that the Federal standard for borrower defenses more clearly and efficiently captures the full scope of acts and omissions that may result in a borrower defense claim.

We disagree that the elimination of the State standard is at odds with the ban on predispute arbitration clauses. Rather, we assert that prohibiting predispute arbitration clauses will enable more borrowers to seek redress in court and, as appropriate, to submit a nondefault, contested judgment in support of their borrower defense claim, including a claim based on State law.

We concur that the Department's continued application of State law standards to borrower defense claims for loans disbursed prior to July 2017, will require the continued interpretation of State law. However, the number of loans subject to the State standard will diminish over time, enabling the Department to transition to a more effective and efficient borrower defense standard and process.

We understand the commenters' concern that borrowers may be treated inequitably based on when their loans were disbursed. However, while it is true that borrowers with loans disbursed prior to July 2017 may consolidate those loans, as discussed in the NPRM (81 FR 39357), the standard that would apply would depend upon the date on which the first Direct Loan to which a claim is asserted was made. Therefore, the standard applied to these loans does not change by virtue of their consolidation.

We do not agree that the Federal standard supplants all State consumer protection laws, as borrowers may still pursue relief based on these laws by obtaining a nondefault, contested judgment by a court or administrative tribunal of competent jurisdiction.

We do not agree that the three bases for borrower defenses under the Federal standard limit the prosecution of future unforeseeable forms of misconduct. We expect that many of the borrower defense claims that the Department anticipates receiving will be addressed through the categories of substantial misrepresentation, breach of contract, or violations of State or Federal law that are confirmed through a nondefault, contested judgment by a court or administrative tribunal of competent jurisdiction. Additionally, the Department's borrower defense process is distinct from borrowers' rights or other Federal, State, or oversight agencies' authorities to prosecute or initiate claims against schools for wrongful conduct in State or other Federal tribunals. We recognize that, while the attainment of a favorable judgment can be an effective and efficient means of adjudicating a borrower's claim of wrongdoing by an institution, it can also be prohibitively time-consuming or expensive for some borrowers. The regulation includes a provision that enables a borrower to show that a judgment obtained by a governmental agency, such as a State AG or a Federal agency, that relates to the making of the borrower's Direct Loan or the provision of educational services to the borrower, may also serve as a basis for a borrower defense under the standard, whether the judgment is obtained in court or in an administrative tribunal. We do not agree that borrowers whose schools have violated State law will have to rely upon their State's AG to access Federal loan relief. These borrowers are still able to file borrower defense claims under the substantial misrepresentation or breach of contract standards, even if a nondefault, contested judgment is not obtained by the government entity. Moreover, the prohibition against predispute arbitration clauses and class action waivers will enable more borrowers to pursue a determination of wrongdoing on the part of an institution individually or as part of a class.

We do not agree that the State standard is less complex than the new Federal standard. As discussed, the current State law-based standard necessarily involves complicated questions relating to which State's laws apply to a specific case and to the proper and accurate interpretation of those laws. We believe the elements of the Federal standard and the bases for borrower defense claims provide sufficient clarity as to what may or may not constitute an actionable act or omission on the part of an institution. As discussed earlier, we also disagree that the State standard provides a higher evidentiary standard. Preponderance of the evidence is the typical standard in most civil proceedings. Additionally, the Department uses a preponderance of the evidence standard in other processes regarding borrower debt issues.

Changes: None.

Federal Standard as a Minimum Requirement

Comments: Several groups of commenters recommended that we establish a Federal standard that serves as a floor, or minimum requirement, to provide additional consumer safeguards to borrowers in States that have less robust consumer protection laws. One group of commenters suggested that this could assure consistency with the FTC Holder Rule. These commenters opined that expansion of the Federal standard to include Unfair, Deceptive or Abusive Acts and Practices (UDAP)[7] violations and breaches of contract would benefit borrowers and simplify borrower defense claim adjudication, as very few States would provide more robust consumer protections.

Another commenter opined that a strong Federal standard as a more robust minimum requirement, *i.e.,* one that requires only reasonable reliance to prove substantial misrepresentation and includes UDAP violations, would eliminate the need to maintain a State law standard.

Discussion: We disagree that the Federal standard requires expansion to include UDAP violations in order to ensure borrowers are protected or that the Federal standard should be established as a minimum requirement for borrower defense. As noted in the NPRM, reliance upon State law not only presents a significant burden for Department officials who must apply and interpret various State laws, but also for borrowers who must make the threshold determination as to whether they may have a claim. We believe that many of the claims the Department will receive will be covered by the standards proposed by the Department and that those standards will streamline the administration of the borrower defense regulations. The Department's substantial misrepresentation regulations (34 CFR part 668 subpart F) were informed by the FTC's Policy Guidelines on Deception, and we believe they are more tailored to, and suitable for, use in the borrower defense context. Under the borrower defense regulations, certain factors addressing specific problematic conduct may be considered to determine whether a misrepresentation has been relied upon to a borrower's detriment, thus making the misrepresentation ''substantial.'' With regard to unfair and abusive conduct, we considered the available precedent and determined that it is unclear how such principles would apply in the borrower defense context as stand-alone standards. Such practices are often alleged in combination with misrepresentations and are not often addressed on their own by the courts. With this lack of guidance, it is unclear

[7] Each State has consumer protection laws that prohibit certain unfair and deceptive conduct, which are commonly known as ''unfair and deceptive trade acts and practices'' or ''UDAP'' laws. The FTC also enforces prohibitions against unfair and deceptive conduct in certain contexts under section 5 of the FTC Act, 15 U.S.C. 45, which may also be described as Federal ''UDAP'' law.

how such principles would apply in the borrower defense context.

Moreover, many of the borrower defense claims the Department has addressed or is considering have involved misrepresentations by schools. We believe that the standard established in these regulations will address much of the behavior arising in the borrower defense context, and that this standard appropriately addresses the Department's goals of accurately identifying and providing relief to borrowers for misconduct by schools; providing clear standards for borrowers, schools, and the Department to use in resolving claims; and avoiding for all parties the burden of interpreting other Federal agencies' and States' authorities in the borrower defense context. As a result, we decline to adopt standards for relief based on UDAP.

As discussed earlier, we also disagree that the Federal standard for borrower defense should incorporate the FTC's Holder Rule, 16 CFR part 433, and believe that it is appropriate for the reasons discussed that the Department exercise its authority to establish a Federal standard that is not based in State law.

Notwithstanding the foregoing discussion, we appreciate that State law provides important protections for students and borrowers. Nothing in the borrower defense regulations prevents a borrower from seeking relief under State law in State court. Moreover, § 685.222(b) provides that if a borrower has obtained a nondefault, favorable contested judgment against the school under State or other Federal law, the judgment may serve as a basis for borrower defense. As explained further under ''Claims Based on Non-Default, Contested Judgments,'' we believe this strikes the appropriate balance between providing relief to borrowers and the Department's administrative burden in accurately evaluating the merits of such claims.

Changes: None.

Additional Grounds

State AGs

Comments: A number of commenters requested that the final regulations include a process for State AGs to petition the Secretary to grant relief based on State law violations. One group of commenters expanded on this request, suggesting that other law enforcement agencies and entities also be permitted to bring forward evidence in support of group claims, and to receive from the Department a formal response regarding its determination of the claim. Another group of commenters contended that State AGs uncover institutional wrongdoing before others do, and, accordingly, their direct participation in the borrower defense process would provide affected borrowers more timely access to relief.

Discussion: The group process for borrower defenses in § 685.222(f) provides for a process by which evidence for determinations of substantial misrepresentation, breach of contract, or judgments, might come from submissions to the Department by claimants, State AGs or other officials, or advocates for claimants, as well as from the Department's investigations. We recognize that these entities may uncover institutional wrongdoing early and may have relevant evidence in support of group claims.

The Department always welcomes cooperation and input from other Federal and State enforcement entities, as well as legal assistance organizations and advocacy groups. In our experience, such cooperation is more effective when it is conducted through informal communication and contact. Accordingly, we have not incorporated a provision requiring formal written responses from the Secretary, but plan to create a point of contact for State AGs to allow for active communication channels. We also reiterate that we welcome a continuation of cooperation and communication with other interested groups and parties. As indicated above, the Department is fully prepared to receive and make use of evidence and input from other stakeholders, including advocates and State and Federal agencies. We also discuss this issue in more detail under ''Group Process for Borrower Defense.''

Changes: None.

Unfair or Deceptive Acts or Practices (UDAP)

Comments: Several groups of commenters advocated the inclusion of State UDAP laws as a stand-alone basis for borrower defense claims.

One group of commenters opined that UDAP laws, which include prohibitions against misrepresentation, along with unfair, fraudulent, and unlawful business acts, have been refined by decades of judicial decisions, while the proposed substantial misrepresentation basis for borrower defense claims remains untested.

Another group of commenters argued that State UDAP laws incorporate the prohibitions and deterrents that the Department seeks to achieve and offer the flexibility needed to deter and rectify institutional acts or omissions that would be presented as borrower defenses under the Department's substantial misrepresentation and breach of contract standards. Another group of commenters noted that some acts that may violate State laws intended to protect borrowers may not constitute a breach of contract or misrepresentation.

Another commenter noted that multiple State AGs have investigated schools and provided the Department with their findings of wrongdoing based on their States' UDAP laws.

One group of commenters suggested that, if the Department did not opt to restore the State standard, the inclusion of a similar UDAP law provision would become even more important. These commenters assert that the additional factors that would favor a finding of a substantial misrepresentation would not close the gap between the Federal standard and States' UDAP laws. They recommend using State UDAP laws as the additional factors that would elevate a misrepresentation to substantial misrepresentation.

Discussion: As discussed above, we disagree that the inclusion of UDAP violations as a basis for a borrower defense claims is required to assure borrowers are protected by the Federal standard.

We believe that the Federal standard appropriately addresses the Department's interests in accurately identifying and providing relief to borrowers for misconduct by schools; providing clear standards for borrowers, schools, and the Department to use in resolving claims; and avoiding for all parties the burden of interpreting other Federal agencies' and States' authorities in the borrower defense context. While UDAP laws may play an important role in State consumer protection and in State AGs' enforcement actions, we believe the Federal standard addresses much of the same conduct, while being more appropriately tailored and readily administrable in the borrower defense context. As a result, we decline to include UDAP violations as a basis for borrower defense claims.

Changes: None.

Comments: One commenter stated that by foreclosing HEA violations from serving as a basis for borrower defense claims, the proposed regulations would effectively preempt State UDAP laws, which the commenter argued often use violations of other laws as a basis for determining that a practice is unfair or deceptive.

Discussion: The Department's borrower defense process is distinct from borrowers' rights under State law. State UDAP laws establish causes of action an individual may bring in a State's courts; nothing in the

Department's regulations prevents borrowers from seeking relief through State law in State courts. As noted in the NPRM, the specifics of the borrower defense process should not be taken to represent any view regarding other issues and causes of action under other laws and regulations that are not within the Department's authority.

Changes: None.

HEA Violations

Comments: One commenter requested that the regulations make clear that borrower defense claims do not include claims based on noncompliance with the HEA or sexual or racial harassment allegations, as described in the preamble to the NPRM. One commenter suggested that the explicit exclusion of sexual or racial harassment as the basis of a borrower defense claim is intended to protect public and non-profit schools.

Another commenter believed the current regulations would allow borrowers to base a claim for a borrower defense on an institution's violations of the HEA where those violations also constitute violations under State UDAP law. The commenter viewed the Department's position in the NPRM that a violation of the HEA is not, in itself, a basis for a borrower defense as a retroactive change to the standard applicable to loans made before July 2017. The commenter rejected the Department's assertion that this limitation is in fact based on a longstanding interpretation of the bases for borrower defense claims.

Discussion: It is indeed the Department's longstanding position that an act or omission by the school that violates an eligibility or compliance requirement in the HEA or its implementing regulations does not necessarily affect the enforceability of a Federal student loan obtained to attend the school, and is not, therefore, automatically a basis for a borrower defense. With limited exceptions not relevant here, the case law is unanimous that the HEA contains no implied private right of action for an individual to assert a claim for relief.[8] The HEA vests the Department with the sole authority to determine and apply the appropriate sanction for HEA violations.

A school's act or omission that violates the HEA may, of course, give rise to a cause of action under other law, and that cause of action may also independently constitute a borrower defense claim under § 685.206(c) or § 685.222. For example, advertising that makes untruthful statements about placement rates violates section 487(a)(8) of the HEA, but may also give rise to a cause of action under common law based on misrepresentation or constitute a substantial misrepresentation under the Federal standard and, therefore, constitute a basis for a borrower defense claim. However, this has always been the case, and is not a retroactive change to the current borrower defense standard under § 685.206(c).

As explained in more detail under ''Federal Standard,'' it has been the Department's longstanding position that sexual and racial harassment claims do not directly relate to the making of a loan or provision of educational services and are not within the scope of borrower defense. 60 FR 37769. We also note, moreover, that sexual and racial harassment are explicitly excluded as bases for borrower defense claims in recognition of other entities, both within and outside of the Department, with the authority to investigate and resolve these complaints, and not in an effort to protect public and non-profit schools.

Changes: None.

Claims Based on Non-Default, Contested Judgments

Comments: A group of commenters requested that the Department explain how, if continuing to operate under the State standard results in potentially inequitable treatment for borrowers, it is still reasonable to rely upon State law when judgments have been obtained, thereby providing borrower protections that vary by State.

Several commenters suggested that a borrower should be required to obtain a favorable judgment under State law in order to obtain a loan discharge. One commenter suggested that borrowers pursuing State law judgments receive forbearance on their Direct Loans while their cases are proceeding.

Discussion: When the Department relies upon a nondefault, contested judgment to affirm a borrower defense, it is not required to interpret State law. Rather, it relies upon the findings of a court or administrative tribunal of competent jurisdiction.

Although we expect that the prohibition against certain mandatory arbitration clauses will enable more borrowers to pursue a determination of wrongdoing on the part of an institution, we do not agree that it is appropriate to require borrowers to obtain a favorable judgment in order to obtain a loan discharge.

While the attainment of a favorable judgment can be an effective and efficient means of adjudicating a borrower's claim of wrongdoing by an institution, it can also be prohibitively time-consuming or expensive for some borrowers. We have included a provision under which a judgment obtained by a governmental agency, such as a State AG or a Federal agency, that relates to the making of the borrower's Direct Loan or the provision of educational services to the borrower, may also serve as a basis for a borrower defense under the standard, whether the judgment is obtained in court or in an administrative tribunal.

We agree that borrowers should receive forbearance on their Direct Loans while their cases are proceeding. Borrowers may use the General Forbearance Request form to apply for forbearance in these circumstances; we would grant the borrower's request, and the final regulations also will require FFEL Program loan holders to do the same upon notification by the Secretary. In addition, a borrower defense loan discharge based on a nondefault, contested judgment may provide relief for remaining payments due on the loan and recovery of payments already made.

Changes: None.

Comments: Several commenters stated that the Department's proposal to allow borrower defenses on the basis of ''nondefault, favorable contested judgments'' was unrealistic, and argued that such judgments are unlikely to occur. These commenters argued that both plaintiffs (either government agencies or students themselves) as well as institutions are under substantial pressure to settle lawsuits, and pointed to the lack of any current judgments against institutions that would meet this standard. One commenter argued that the lack of such nondefault favorable contested judgments effectively barred State causes of action and would force borrowers to rely on the Department's Federal standard as the only basis for relief.

Discussion: The Department recognizes that nondefault, favorable contested judgments may not be common, relative to the number of

[8] As stated by the Department in 1993:

[The Department] considers the loss of institutional eligibility to affect directly only the liability of the institution for Federal subsidies and reinsurance paid on those loans. . . . [T]he borrower retains all the rights with respect to loan repayment that are contained in the terms of the loan agreements, and [the Department] does not suggest that these loans, whether held by the institution or the lender, are legally unenforceable merely because they were made after the effective date of the loss of institutional eligibility.

58 FR 13,337. See, *e.g. Armstrong* v. *Accrediting Council for Continuing Educ. & Training*, 168 F.3d 1362 (D.C. Cir. 1999), *opinion amended on denial of reh'g*, 177 F.3d 1036 (D.C. Cir. 1999) (rejecting claim of mistake of fact regarding institutional accreditation as grounds for rescinding loan agreements); *McCullough* v. *PNC Bank*, 298 F.3d 1362, 1369 (11th Cir. 2002)(collecting cases).

lawsuits that are filed. The Department includes this basis for relief as a way for borrowers to avoid having to re-litigate claims actually decided on the merits. If no such determination against the institution has yet occurred, borrowers may bring claims to the Department for evaluation that satisfy the standards described for a substantial misrepresentation under § 685.222(d) or breach of contract under § 685.222(c). The Department will thus continue to recognize State law causes of action under § 685.222(b), but will require a tribunal of competent jurisdiction to decide the legal and factual basis for the claim.

Changes: None.

Comments: Several commenters stated that the proposed standard for nondefault, favorable contested judgments effectively narrows State law causes of action by putting what the commenters argued was a significant and unrealistic burden on borrowers to litigate claims to judgment. These commenters argued that the Department should not effectively remove these bases for relief. One of the commenters asked that the Department recognize settlements with the institution as a basis for relief, while another proposed that the Department recognize class action settlements in which the settlement has been approved by a judge or in which the plaintiff(s) have survived a motion for summary judgment. Another asked that claim preclusive court judgments and findings of fact and admissions in settlements should likewise serve as a basis for relief.

Discussion: As stated in the NPRM, 81 FR 39340, we decline to adopt a standard based on applicable State law due, in part, to the burden to borrowers and the Department in interpreting and applying States' laws. However, we recognize that State law may provide important protections for borrowers and students. We believe that a standard recognizing nondefault, favorable, contested judgments strikes a balance between recognizing causes of action under State or other Federal law and minimizing the Department's administrative burden in accurately evaluating the merits of such claims. For the reasons discussed here and in the NPRM, we decline to recognize settlements as a way to satisfy the standard in § 685.222(b). However, we welcome the submission of, and will consider, any orders, court filings, admissions, or other evidence from a borrower for consideration in the borrower defense process.

Changes: None.

Comments: One commenter stated that the Department's proposed language leaves it unclear whether the judgment against the institution must include a specific determination regarding the act or omission forming the basis of the borrower defense, and urged the Department to explicitly require such a determination. Another commenter argued that the carve-outs of certain claims that the Department would not consider to be borrower defenses are not explicitly included for judgments obtained against an institution, and urged that the Department include such carve-outs.

Discussion: For a judgment to form the basis of a borrower defense, it must include a determination that an act or omission that would constitute a defense to repayment under State or Federal law occurred and that the borrower would be entitled to relief under such applicable law. That said, the overarching principles established in § 685.222(a) apply to claims under all the standards established in § 685.222, including to judgments under § 685.222(b). Thus, under § 685.222(a)(3), the Department will not recognize a violation by the school of an eligibility or compliance requirement in the HEA or its implementing regulations as a basis for borrower defense under § 685.222 or § 685.206(c) unless the violation would otherwise constitute a basis for borrower defense. Similarly, borrower defense claims must be based upon an act or omission of the school attended by the student that relates to the making of a Direct Loan or the provision of educational services for which the loan was provided, under § 685.222(a)(5).

If a borrower, a class of consumers, or a government agency made a claim against a school regarding the provision of educational services and receives a favorable judgment that entitles the borrower to restitution or damages, but the borrower only obtained a partial recovery from the school on this judgment, under § 685.222(i)(8), we would recognize any unpaid amount of the judgment in calculating the total amount of relief that could be provided on the Direct Loan. If the borrower, a class of consumers, or a government agency obtained a judgment holding that the school engaged in wrongful acts or omissions regarding the provision of private loans, the borrower could demonstrate to the Department whether the findings of fact on which the judgment rested also established acts or omissions relating to the educational services provided to the borrower or the making of the borrower's Direct Loan that could be the basis of a borrower defense claim under these regulations. This borrower defense claim would be a basis for relief independent of the judgment that related exclusively to the private loans, and such relief would be calculated without reference to any relief obtained through that private loan judgment.

Changes: None.

Comments: Several commenters raised concerns about a student's ability to bring a borrower defense claim based on judgments obtained by government agencies. One of the commenters stated that it is not always clear when an agency is acting on behalf of the students.

Discussion: The final regulation recognizes that judgments obtained by governmental agencies may not be brought on the behalf of specific students, as opposed to having been brought, for example, on the behalf of a State or on the behalf of the United States. As described in the final regulation, a judgment under the standard brought by a governmental agency must be a favorable contested judgment obtained against the school. As discussed previously, such judgments must also meet the requirements of § 685.222(a).

Changes: None.

Comments: One commenter argued that the Department's judgment standard should only apply with respect to loans disbursed, or judgments obtained, after July 1, 2017.

Discussion: We believe that the standard does not represent any change from current practice. If a borrower submitted a nondefault, contested judgment from a court or administrative tribunal of competent jurisdiction deciding a cause of action under applicable State law for a loan first disbursed before July 1, 2017, the Department would apply principles of collateral estoppel to determine if the judgment would bar a school from disputing the cause of action forming the basis of the borrower's claim under 34 CFR 685.206(c).

Changes: None.

Comments: One commenter urged the Department to specify that the judgments referenced in § 685.222(b) must be obtained in court cases and not merely through administrative proceedings.

Discussion: As set forth in in § 685.222(b), the judgment must be obtained ''in a court or administrative tribunal of competent jurisdiction.'' The Department continues to believe that administrative adjudications serve an important role in determining the factual and legal basis for claims that could serve as borrower defenses. We do not believe further clarification is necessary on this point.

Changes: None.

Comments: One commenter stated that the Department should add language to the final regulations stating that it will also respect judgments in favor of the school as precluding a borrower defense claim.

Discussion: We will not incorporate an absolute bar on borrower defense claims where the borrower has already lost in a State proceeding because different underlying legal or factual bases may have been involved in the prior litigation. For example, a student might lose a breach of contract suit in State court premised on an institution's failure to provide job placement services, but have a valid claim that the institution misrepresented whether credits would be transferrable. The Department will, however, follow established principles of collateral estoppel in its determination of borrower defense claims.

Changes: None.

Comments: One commenter stated that the Department's proposed regulatory language would disrupt the adversarial process because institutions would be more likely to settle cases than risk a judgment that could lead to borrower defense liabilities, and also that institutions may be forced not to settle if the opposing party insists on admission of liability in the settlement that could form the basis of borrower defense liabilities. The commenter also argued that it would be unfair for the Department to consider past settlements retroactively. Another commenter argued that the Department should recognize default judgments against institutions obtained by a law enforcement agency such as the FTC, the Consumer Financial Protection Bureau (CFPB), or a State AG.

Discussion: We appreciate the concern that the new standard may cause disruptions to the strategy and risk calculus in other litigation by private parties as well as government agencies. The Department's purpose in this rulemaking is to create a Federal standard that will more efficiently and fairly determine whether a borrower is entitled to relief, and we consider this purpose to outweigh the concern raised about altering litigation strategies. We do not intend either to dissuade or encourage settlements between borrowers and institutions, and will give settlements and admissions in previous litigation the weight to which they are entitled. That said, a default judgment does not involve any determination of the merits, and therefore will require the Department to make an independent assessment of the underlying factual and legal basis for the claim. Settlements prior to July 1, 2017 will not be considered under this standard.

Changes: None.

Claims Based on Breach of Contract

Comments: Several commenters questioned why the Department would permit a breach of contract claim, but not any other State law claims. One commenter noted that evaluation of a breach of contract claim would require substantial Department resources, including choice-of-law decisions that may be especially complicated in cases of distance education. One commenter said that other contract-related causes of action should be open to borrowers, such as lack of consideration, lack of formation due to lack of capacity, and contract contrary to public policy, among others. Another commenter said that borrowers should be able to assert contract-related claims under State UDAP laws for signing forms saying they received materials that they never received.

Discussion: The comments suggest some confusion about the Department's standard for evaluating breach of contract claims. For loans first disbursed prior to July 1, 2017, the Department will continue to recognize any applicable State-law causes of action, in accordance with the State of the law prior to these regulations. That standard requires the Department to evaluate State law questions, including choice-of-law questions. For loans first disbursed after July 1, 2017, however, the Department will move to a Federal standard for misrepresentation and breach of contract claims, and will cease to recognize State-law bases that may exist for those causes of action. Some commenters appeared to question why the Department drew the line at accepting breach of contract claims but rejecting other traditional State law contract-related causes of action. As we explained in the NPRM, 81 FR 39341, breach of contract is a common allegation against schools, and the underlying facts for a breach of contract claim may very well not fit into the Department's substantial misrepresentation standard. Furthermore, breach of contract is a cause of action established in common law recognized across all States, and its basic elements are likewise uniform across the States. Developing a Federal standard in the particularized area of student-institution contracts will ultimately lead to better consistency and greater predictability in this area. That said, the Department will continue to recognize a borrower defense based on any applicable State law cause of action, provided that such a claim is litigated to a non-default, favorable contested judgment under § 685.222(b). Thus, we believe the final regulations strike an appropriate balance between the efficiency and predictability of a Federal standard, while still providing sufficient bases upon which a borrower entitled to debt relief may seek it.

Changes: None.

Comments: Several commenters asked the Department to incorporate the covenant of good faith and fair dealing when evaluating breach of contract claims. One commenter argued that these doctrines could be used to prevent institutions from relying on fine print disclaimers, ''job placement assistance'' that does not provide any targeted advice for students but instead refers them to Internet job-posting sites, and other tactics the commenter believes are unfair to students. Another commenter attached examples of current institutional agreements that seek to disclaim any promises beyond what are made in the enrollment agreement, and urged the Department not to honor such disclaimers.

Discussion: The Department's position on this issue is that it will rely on general, widely accepted principles of contract law in developing a Federal standard in this area. We decline to elaborate further on what specific types of contract claims might or might not be successful at this time. We believe that a Federal standard for breach of contract cases within the education context will ultimately be more helpful if developed on a case-by-case basis.

Changes: None.

Comments: Several commenters weighed in on the Department's position that documents beyond the enrollment agreement might serve as part of the contract. Some of these commenters noted that this position may lead to inconsistent results, since different State laws and circumstances may or may not allow a student to rely on other documents beyond the enrollment agreement. Some of the commenters argued for more clarity from the Department on which materials we would consider to constitute the contract, and one of these commenters pointed to cases varying on the treatment of such materials. One commenter invited us to specify that a contract would include any promise the borrower reasonably believed would be the institution's commitment to them. Other commenters argued that, by raising the possibility that a student might be able to point to course catalogues and similar documents as part of the ''contract,'' the Department's rule would have the effect of limiting the information schools provide to students. These commenters said that the uncertainty could pose practical obstacles for large institutions in particular, and asked the Department to explicitly exclude such material from the definition of contract. One commenter said that the ultimate effect of the current uncertainty might be to reduce recruitment from under-served student populations.

Discussion: We understand the concerns from both the student advocates and the institutional advocates regarding the lack of certainty in the NPRM language. However, the Department is unable to draw a bright line on what materials would be included as part of a contract because that determination is necessarily a fact-intensive determination best made on a case-by-case basis. The Department intends to make these determinations consistent with generally recognized principles applied by courts in adjudicating breach of contract claims.[9] To the extent that Federal and State case law has resolved these issues, we will be guided by that precedent. Application of the standard will thus be guided but not controlled by State law. Moreover, the Department will continue to evaluate claims as they are received and may issue further guidance on this topic as necessary.

Changes: None.

Comments: A commenter argued that allowing breach of contract as a basis for borrower defense claims will not be effective. The commenter said that most contracts in the for-profit education sector are written to bind the student and not the institution. The commenter also argued that the NPRM preamble failed to cite any successful breach of contract suits students have made against schools, arguing that the Department's citation to *Vurimindi* v. *Fuqua Sch. Of Business,* 435 F. App'x 129 (3d Cir. 2011) is inapposite.

Discussion: The Department appreciates this concern, and intends to follow general fairness and contract principles in its analysis of whether other promises made to a student beyond the enrollment agreement should be considered.

Changes: None.

[9] Section 455(h)of the HEA clearly gives the Secretary the power to create legal defenses, which until now has been done by adopting State law; this rulemaking adopts a Federal standard, the interpretation and application of which will require consideration of principles developed by Federal and State courts in deciding cases brought on claims for breach of contract or misrepresentation, as distilled, for example, in the restatements of the law.

Comments: A commenter argued that the Department should not refer to ''specific obligations'' in its preamble discussion of how a borrower could make out a breach of contract theory, saying it was unnecessarily confusing in light of well-developed State law on what kind of promises are sufficient to make out a breach of contract claim.

Discussion: We believe the phrase ''specific obligations'' is consistent with general contract principles that a breach of contract cannot be based on promises that are so abstract as to be unenforceable, and believe that determinations regarding an institution's obligations under a contract with a student will be highly fact-specific. Given that many borrowers may not be legally sophisticated regarding what constitutes an enforceable promise, we do not believe that any modification to the language is necessary.

Changes: None.

Comments: Several commenters were concerned that the proposed rule did not include a ''materiality'' element that a borrower would need to show in order to make out a breach of contract claim, which they worried might lead to numerous, frivolous claims as well as wide uncertainty as to potential future liabilities. One commenter further invited the Department to explain in the final rule what would constitute a ''de minimis'' claim that would lead a judge to dismiss a case. Other commenters asked that the Department focus on systemic problems and material breaches, and identify the standards it will use to make determinations. A group of commenters suggested the Department adopt the standards used for such cases in New York.

Discussion: We appreciate the concerns, first raised during the negotiated rulemaking, about the lack of a materiality element in the standard for a breach of contract borrower defense. As explained in the NPRM, 81 FR 39341, we believe it is appropriate that the regulations allow borrowers to assert a borrower defense based on any breach of contract that would entitle them to any relief—including relatively minor breaches—and thus do not include a materiality requirement. The Department will consider whether any alleged breach of contract by an institution is material in its assessment of whether the borrower would be entitled to relief, as well as whether such relief would be full or partial.

Changes: None.

Comments: Several commenters expressed concern that the proposed regulation contains an exception to the bar on using HEA violations for borrower defense claims if ''the violation would otherwise constitute a basis for a borrower defense.'' These commenters stated that this exception could swallow the rule to the extent a compliance violation could be restated as a borrower defense, and further noted that the HEA does not contain a private right of action. These commenters urged the Department to bar compliance violations asserted as breach of contract.

Discussion: We agree that the HEA does not itself contain a private right of action, but note that the underlying conduct constituting a violation of the HEA may also be a cognizable borrower defense. For example, the Department has the authority to prohibit and penalize substantial misrepresentations under the HEA, but such misrepresentations may also serve as the basis for a borrower defense which a borrower is undoubtedly entitled to pursue with the Department if the borrower can demonstrate proof of substantial misrepresentation under § 685.222(d), which also requires that a borrower demonstrate actual, reasonable reliance to their detriment for relief. For that reason, the final regulations strike a balance between allowing borrowers to pursue defenses based on misconduct that might also constitute HEA violations, but only so long as the underlying misconduct also satisfies a standard under which borrower defense claims may be brought as noted at § 685.222(a)(3).

Changes: None.

Comments: A commenter argued that the lack of a reliance element on a contractual promise could lead to borrower relief that is unwarranted. Other commenters argued the same for lack of an injury element.

Discussion: The Department will analyze breach of contract defenses under general and well established contract principles shared by State law. At this time, the Department has not set forth more fulsome details for what elements a borrower must show in the Federal standard to allow the standard to develop on a case-by-case basis. We believe that the Federal standard will ultimately be more useful if developed in light of actual student claims.

Changes: None.

Comments: Several commenters urged the Department to exclude any claims related to academic considerations, such as the quality of instructional materials, because such matters should be left to the institution or the institution's accreditor or State licensing agency.

Discussion: We do not see any present need for categorical exemptions. The Department will evaluate claims in accordance with well-established principles of contract law. Claims related to academic consideration may well be beyond the scope of a cognizable borrower defense or even the Department's jurisdiction, but that is something the Department will consider on a case-by-case basis in evaluating the borrower defense applications.

Changes: None.

Comments: One commenter argued that the Department should recognize defenses an institution could raise, such as compliance with contract terms, economic hardship, or that the borrower not be entitled to refund of monies already paid.

Discussion: The final regulations, like the proposed regulations, do not put limits on the defenses an institution can make in a proceeding before the Department.

Changes: None.

Comments: One commenter noted that the Department's proposed language was ambiguous as to whether the act or omission must give rise to the breach of contract or itself constitute a breach of contract.

Discussion: Consistent with the Department's interpretation of its authorizing statute, the act or omission by the school must be the breach of contract itself. We believe, however, that this reading is clear from the language in the final rule.

Changes: None.

Comments: One commenter asked the Department to clarify what kinds of actions it would consider to be within the scope of a borrower defense based on a breach of contract.

Discussion: We do not believe further detail or elaboration is necessary of helpful at this time, given the wide variety of allegations the Department expects to receive. Under the regulations, the Department will recognize as a borrower defense any breach of contract claim that reasonably relates to the student loan.

Changes: None.

Claims Based on Substantial Misrepresentation

Comments: A group of commenters expressed concern that the Department's substantial misrepresentation standard is too narrow. These commenters believed that the standard would allow schools to engage in problematic behavior, so long as they did not make untrue statements.

Discussion: We appreciate the concerns that the substantial misrepresentation standard does not capture all actions that may form causes of action under standards in State or other Federal law. However, as noted in the NPRM, 81 FR 39340, we believe that the standard appropriately addresses the Department's interests in accurately identifying and providing relief for borrowers and in providing clear standards for borrowers, schools, and the Department in resolving claims. We believe that § 668.71(c), which is referenced in § 685.222(d), will address much of the behavior the Department anticipates arising in the borrower defense context.

We disagree that the substantial misrepresentation standard would not necessarily capture institutional misconduct that did not involve untrue statements. As revised in these final regulations, § 668.71(c) defines a ''misrepresentation'' as including not only false or erroneous statements, but also misleading statements that have the likelihood or tendency to mislead under the circumstances. The definition also notes that omissions of information are also considered misrepresentations. Thus, a statement may still be misleading, even if it is true on its face. As explained in the NPRM, 81 FR 39342, we revised the definition of ''misrepresentation'' to add the words ''under the circumstances'' to clarify that the Department will consider the totality of the circumstances in which a statement occurred, to determine whether it constitutes a substantial misrepresentation. We believe the Department has the ability to properly evaluate whether a statement is misleading, but otherwise truthful, to a degree that it becomes an actionable borrower defense claim.

Changes: None.

Comments: Several commenters expressed concern that the substantial misrepresentation standard would apply only to proprietary institutions. One commenter stated that the standard should apply to all institutions of higher education, stating that many public colleges and universities also misrepresent the benefits and outcomes of the education provided. Another commenter stated that the proposed addition of misrepresentation through omissions would target only borrower defense claims that would be made by students attending proprietary institutions, and not students at traditional schools.

Other commenters stated that by limiting the subject matter covered by the substantial misrepresentation standard to just those related to loans, in their view, the standard would target only proprietary schools and exclude issues facing students at traditional colleges, such as campus safety or sexual discrimination in violation of title IX of the HEA.

Discussion: There appears to be some confusion about the institutions covered under the scope of both 34 CFR part 668, subpart F and proposed § 685.222(d). Even prior to the proposed changes in the NPRM, § 668.71 was applicable to all institutions, whether proprietary, public, or private non-profit. Similarly, the current borrower defense regulation at § 685.206(c) does not distinguish between types of schools. The proposed and final regulations do not represent a change in these positions.

As discussed under the ''Making of a Loan and Provision of Educational Services'' section of this document, the Department's long-standing interpretation has been that a borrower defense must be related to the making of a loan or to the educational services for which the loan was provided. As a result, the Department has stated consistently since 1995 that it does not does not recognize as a defense against repayment of the loan a cause of action that is not directly related to the loan or to the provision of educational services, such as personal injury tort claims or actions based on allegations of sexual or racial harassment. 60 FR 37768, 37769. Such issues are outside of the scope of these regulations, and we note that other avenues and processes exist to process such claims. We also disagree with commenters that such issues are the only types of issues that may be faced by students at public and private non-profit institutions. While the Department acknowledges that the majority of claims presently before it are in relation to misconduct by Corinthian, we believe that scope of claims that may be brought as substantial misrepresentations that relate to either the making of a borrower's loan, or to the provision of educational services, is objectively broad in a way that will capture borrower defense claims from any type of institution.

Changes: None.

Comments: A few commenters opposed the proposed changes and argued that the proposed substantial misrepresentation standard either exceeds the Secretary's authority under the law or is contrary to Congressional intent. One commenter argued that the Department's proposal to use § 668.71 as the basis for borrower defense exceeds the Department's statutory authority under section 487 of the HEA, 20 U.S.C. 1094(c)(3)(A), which authorizes the Department to bring an enforcement action for a substantial misrepresentation for a suspension, limitation, termination, or fine action. The commenter also argued that the HEA does not authorize the Department to seek recoupment from schools for relief granted for a borrower defense claim based on substantial misrepresentation. Another commenter suggested that the borrower defense standard should be based only on contract law.

Other commenters stated that the substantial misrepresentation standard was in violation of the Congressional intent in the HEA, as proposed. One commenter said that, in its view, Congress' intent in Section 455(h) was that borrower defenses should be allowed only for acts or omissions that are fundamental to the student's ability to benefit from the educational program and at a level of materiality that would justify the rescission of the borrower's loan obligation. In discussing the use of § 668.71 for borrower defense purposes, another commenter acknowledged that, while misrepresentation is not defined in the HEA, the penalties assigned to misrepresentation by statute are severe. From its perspective, the commenter stated that this indicates that Congress did not intend for the misrepresentation standard to be as low as negligence and suggested keeping the original language of § 668.71.

A few commenters argued that the Department lacks justification for the proposed changes to § 668.71, given that the Department last changed the definition in a previous rulemaking.

Discussion: We disagree that the Department lacks the statutory authority to designate what acts or omissions may form the basis of a borrower defense. Section 455(h) of the HEA clearly authorizes the Secretary to ''specify in regulations which act or omissions of an institution of higher education a borrower may assert as a defense to repayment under this part,'' without any limitation as to what acts or omissions may be so specified. As explained previously, we believe that the substantial misrepresentation standard, with the added requirements listed in § 685.222(d), will address not only much of the behavior that we anticipate arising in the borrower defense context, but also our concerns in accurately identifying and providing relief for borrowers. We believe it is within the Department's discretion to adopt the substantial misrepresentation standard for loans first disbursed after July 1, 2017 in § 685.222(d), with the added requirements of that section, to address borrower defense claims. No modification has been proposed to § 668.71(a), which establishes that the Department may bring an enforcement action for a substantial misrepresentation for a suspension, limitation, termination, or fine action. We discuss the Department's authority to recover from schools on the basis of borrower defense under ''General.''

We do not agree that the Department lacks authority to similarly specify the scope of the acts or omissions that may form the basis of a borrower defense. The Department understands that, generally, the rescission of a contract refers to the reversal of a transaction whereby the parties restore all of the property received from the other,[10] usually as a remedy for a material or significant breach of contract.[11] However, in stating that ''in no event may a borrower recover . . . an amount in excess of the amount such borrower has repaid on the loan,'' section 455(h) clearly contemplates that an amount may be recovered for a borrower defense that is less than the amount of a borrower's loan, as opposed to a complete rescission of a borrower's total loan obligation. This position also echoes the Department's consistent approach to borrower defenses to repayment. The Direct Loan borrower defense regulation that was promulgated in 1994 clearly established that a borrower may assert a borrower defense claim based upon ''any act or omission of the school. . .that would give rise to a cause of action against the school under applicable State law,'' without qualification as to whether the act or omission warrants a rescission of the borrower's loans. 34 CFR 685.206(c)(1). The regulation also stated that relief may be awarded as either ''all or part of the loan.'' *Id.* at § 685.206(c)(2). As explained by the Department in 1995, the Direct Loan borrower defense regulations were intended to continue the same treatment for borrowers and the same potential liability for institutions that existed in the FFEL Program. 60 FR 37769–37770. Under the FFEL Program at the time, a borrower was allowed to assert a defense to repayment on the ground that all or part of his or her FFEL Loan was unenforceable. *Id.* at 37770.

We also disagree that the HEA does not give the Department the discretion to define ''substantial misrepresentation,'' whether for the Department's enforcement purposes in § 668.71 or for use for the borrower defense process. As noted, the HEA does not define ''substantial misrepresentation,'' thus giving the Secretary discretion to define the term. With regard to the commenter who expressed concern that the proposed revisions to the definition of ''misrepresentation'' constitute a lessening of the standard to negligence,[12] we note that even absent the proposed revisions, a misrepresentation under § 668.71 does not look to the actor's intent or the materiality of the statement, but considers whether the statement is false, erroneous, or misleading.

We disagree that there is no justification for the changes to 34 CFR part 668, subpart F. Since the Department's last negotiated rulemaking in 2010 on 34 CFR part 668, subpart F, the Department utilized its authority in 2015 under the substantial misrepresentation enforcement regulations to issue a finding that Corinthian had misrepresented its job placement rates. The subsequent closure of Corinthian led to thousands of claims relating to the misrepresentations at issue by Corinthian borrowers under borrower defense. These claims prompted, in part, this effort by the Department to establish rules and procedures for borrower defense, which in turn led to a review of and the proposed changes to the Department's regulations at 34 CFR part 668, subpart F. These changes were discussed extensively as part of the negotiated rulemaking process for borrower defense where reasons for each specific change to § 668.71 were explained and discussed.

Changes: None.

Comments: Many commenters generally stated that the proposed standard for substantial misrepresentation is vague and suggested that the regulation include an element of intent or distinguish between intentional and unintentional acts. These commenters expressed concern that inadvertent and innocent, but erroneous, statements or mistakes would lead to a large number of frivolous claims by borrowers and result in significant financial liabilities for schools. Another commenter stated that the standard, absent intent, is unconstitutionally vague and does not give fair notice of the conduct that is being required or prohibited.

[10] *See* Restatement (Third) of Restitution and Unjust Enrichment § 54 (2011).

[11] *See* Restatement (Third) of Restitution and Unjust Enrichment § 37, comment c (2011) (''Any breach of contract that results in quantifiable injury gives the plaintiff a remedy in damages, but the remedy of rescission is available only in cases of significant default. Short of a repudiation, the defendant's breach must be 'material,' 'substantial,' 'essential,' or 'vital'; it must 'go to the root' of the defendant's obligation, or be 'tantamount to a repudiation.' To replace this familiar catalogue of adjectives, both Restatements of Contracts employ the expression 'total breach.' '').

[12] Generally, ''negligence'' refers to a failure to exercise a reasonable duty of care and does not consider whether the failure was intentional. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 3 (2010).

Other commenters stated that students' own misunderstandings may lead to claims, even for schools that provide training and inspections to ensure compliance with pertinent guidelines, regulations, and standards. One commenter expressed concern that unavoidable changes to instructional policies and practices could lead to borrower defense claims for substantial misrepresentation. Another commenter expressed concern that the proposed standard would lead to allegations of substantial misrepresentation by students, even where a variety of reasons unrelated to the alleged misrepresentation may have contributed to a student outcome, which may not yet be apparent.

Several commenters supported using § 668.71 as a basis for borrower defense, but objected to the proposed changes to the definition in § 668.71(c), that would change the word ''deceive'' in the sentence, ''A misleading statement includes any statement that has the likelihood or tendency to deceive,'' to ''mislead under the circumstances.'' These commenters stated that the proposed change would give the same weight to inadvertent or unintentional misrepresentations as to a willful deception by a school. Some such commenters appeared to believe that, without the revisions reflected in proposed subpart F of part 668, the standard for substantial misrepresentation is a standard for fraud and requires proof of intentional deception.

One commenter stated that the borrower defense process does not provide for a contextualized analysis of whether a statement is misleading in the same manner as the FTC, and argued that this would lead to significant consequences for schools and would undercut FTC precedent.

Several commenters agreed with the Department that the standard should not require an element of institutional intent generally, stating that the Department's approach is consistent with existing State and other Federal law, citing the FTC's definition of deception as an example. One commenter stated that institutions should be responsible for the harm to borrowers caused by misrepresentations, even absent intent, and that proving intent would be very difficult for borrowers.

Other commenters supported the specific amendment of the definition to include ''mislead under the circumstances.'' One commenter stated that the amendment was appropriate to provide more context as to whether a statement is misleading. Another commenter stated that the Department's amendments are consistent with State consumer protection law and cited examples of States where courts consider an individual's or the target audience's circumstances in assessing whether an act is deceptive or unfair. The commenter also noted that the amendments are in keeping with the approaches used by other Federal agencies, such as the FTC, the CFPB, and the Office of the Comptroller of the Currency. The commenter noted that in its experience working with student loan borrowers, consideration of the circumstances of a misrepresentation is important, because many schools target borrowers in specific circumstances who may be more likely to trust a school's representations and rely upon promises tailored to such students. Another commenter noted that the Department's proposed rule is in keeping with well-established consumer protection legal precedent under State law, which is that schools are liable for deceptive and unfair trade practices, including a failure to deliver educational services of the nature and quality claimed. This commenter supported the Department's preamble statement, 81 FR 39337 to 39338, that educational malpractice is not a tort recognized by State law, but also stated that educational malpractice is to be narrowly construed.

One commenter supported the Department's reasoning for including omissions among misrepresentations for borrower defense purposes, but stated that intent should be a factor for the Department's enforcement actions based upon § 668.71. The commenter agreed that a school should be responsible for even an unintentional error that harms borrowers, but believed that that intent or knowledge of the school should be a required factor for the purposes of institutional eligibility and penalties.

One commenter stated that substantial misrepresentation should be limited to false and erroneous statements, and not include true but misleading statements. The commenter raised concerns about the adequacy of the Department's process for gathering evidence and the Department's experience and expertise in making such determinations.

Discussion: We disagree with the commenters who opined that the proposed regulations are broad, vague or subjective. As explained previously, section 455(h) of the HEA provides that the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part. The regulations in § 685.222(d), which adopt the regulations in subpart F of part 668 and establish certain other requirements, set forth the types of activities that constitute misrepresentation by an institution and describe the process and procedure by which borrowers may receive relief based upon a substantial misrepresentation by a school. The regulations in § 685.222 also set forth the process by which the Secretary will evaluate borrower defenses and recover such losses from the institutions at issue. The proposed changes to the regulations strengthen the Department's regulatory authority to evaluate and determine borrower defense claims. Further, they not only establish what constitutes a misrepresentation for borrower defense claims, but they also clarify the definition for the Department's enforcement purposes under part 668, subpart F. We believe that aligning the definition and types of substantial misrepresentations for borrower defense with the Department's long-held authority to bring enforcement actions under part 668, subpart F, will provide more clarity for schools and reduce their burden in having to interpret and adjust for the new borrower defense standards.

There appears to be some confusion as to whether the definition for misrepresentation in part 668, subpart F, requires a demonstration of intent, as would be required in common law fraud. In proposing to replace the word ''deceive'' with ''mislead under the circumstances'' in § 668.71(c), the Department is not seeking to remove any intent element, but rather to clarify the definition to more accurately reflect the position it expressed in 2010 as to part 668, subpart F. As noted in the NPRM, 81 FR 39342, the word ''deceive'' may be viewed as implying knowledge or intent. However, in the Department's 2010 rulemaking on part 668, subpart F, we explicitly declined to require that a substantial misrepresentation under the regulation require knowledge or intent by the school. 75 FR 66915. We believe that an institution is responsible for the harm to borrowers caused by its misrepresentations, even if such misrepresentations cannot be attributed to institutional intent or knowledge and are the result of inadvertent or innocent mistakes. Similarly, we believe this is the case even for statements that are true, but misleading. We believe this is more reasonable and fair than having the borrower, or the Federal government and taxpayers, bear the cost of such injuries. As noted by some commenters, this approach is in accord with other

Federal and State consumer protection law regarding misrepresentation, and we believe it is appropriate for not only the Department's enforcement purposes, but also for borrower defense. As explained later in this preamble, we believe that we have the capability to evaluate borrower defense claims based upon substantial misrepresentations and anticipate establishing procedural rules that will provide schools with the opportunity to present evidence and arguments in accordance with due process, similar to what is available in the Department's proceeding in part 668, subparts G and H.

In 2010, the Department stated that, in deciding to bring an enforcement action under part 668, subpart F, it would operate within a rule of reasonableness and consider the circumstances surrounding any misrepresentation before determining an appropriate response. 75 FR 66914. In response to the comment that the proposed standard does not view the misrepresentation in context, the Department's addition of the words ''under the circumstances'' is intended to clarify and make explicit the Department's long-standing position that misrepresentations should be viewed in light of all of the available underlying facts. As explained in the NPRM, 81 FR 39342 to 39343, this also echoes the approach taken by the FTC with regard to deceptive acts and practices.[13] In determining whether a statement is a misrepresentation, the Department will consider the totality of the circumstances in which the statement occurred, including the specific group at which the statement or omission was targeted. The Department will also consider whether the situation was such that the borrower would have had reason to believe he or she could rely on the information being given to the borrower's detriment, such as because the statement was made by an individual by whom the borrower believed could be trusted to give accurate information, such as a school admissions officer.

Changes: None.

Comments: Some commenters supported the proposed inclusion of omissions in the definition under § 668.71. One commenter stated that the inclusion of omissions, as well as the additional factors listed in § 685.222(d)(2), would improve the information provided to students. One commenter stated that, in their experience, the inclusion of omissions was needed, to prevent schools from taking advantage of the asymmetry of information and bargaining power between themselves and students. This commenter emphasized that omissions should be considered in the context of the specific audience targeted and cited schools that may target immigrants with little experience with the United States' higher education system and limited English ability as an example. Another commenter emphasized that the amendment would benefit first generation and low income students, who may not know what information is important or what questions to ask prior to enrolling at an institution. One commenter specifically supported the proposed language providing that a misrepresentation include omissions of ''information'' in such a way as to make a statement false, erroneous, or misleading.

Other commenters disagreed with the inclusion of omissions of information as part of the definition of substantial misrepresentation. One commenter stated that such language provides assistance to students attending career colleges, but not students attending traditional schools. One commenter stated that amending the standard to include omissions would create a strict liability standard that would not account for a school's actions or intent, and that the standard should distinguish minor and unintentional claims from material and purposeful misrepresentations.

Other commenters stated that the inclusion of omissions would not benefit students. One commenter stated that amending the definition of misrepresentation to include omissions could cause schools to provide students with numerous and confusing qualifications or to provide students with minimal information to avoid making misrepresentations. Another commenter stated that the inclusion of omissions would hinder the flow of advice to students and cause schools to expend time and money reviewing materials for misrepresentations.

One commenter stated that the Department's proposal to amend the definition to include omissions runs counter to the position the Department expressed in its 2010 rulemaking on 34 CFR part 668, subpart F, when it rejected commenters' suggestions that omissions be included in the definition.

One commenter stated that the Department's proposed amendment to include omissions, absent an intent element, runs counter to the limit established by the D.C. Circuit in the case *Ass'n of Private Sector Colls. & Univs.* v. *Duncan,* 681 F.3d 427, 452 (D.C. Cir. 2012) that a substantial misrepresentation under part 668, subpart F cannot include true and nondeceitful statements that have only the tendency or likelihood to confuse.

One commenter requested clarification regarding the effect of disclosures posted on the school's Web site or in printed materials. The commenter inquired about whether the school needed to disclose information about investigations, pending civil rights or legal matters; information about the qualifications and availability of faculty to teach certain courses or levels of students; and how a school's compliance with a State's required disclosures would be evaluated. This commenter also asked whether the Department would consider limiting the application of the new standard to only schools governed by States without a reasonable oversight mechanism. This commenter also asked for clarification as to what constitutes ''information,'' and asked whether information would include aspirational goals or speculative plans; subjective beliefs or internal questions about the school's educational programs, financial charges, or the employability of its graduates; concerns about, the possibility, or existence of an upcoming audit; items listed in a title IV Audit Corrective Action Plan; items identified by the institution or an accreditor for improvement; or an institution's efforts to seek voluntary accreditation.

One commenter expressed concern that the inclusion of omissions in the standard would place schools with high default rates at risk. The commenter cited news articles calling for schools with default rates higher than graduation rates, which would include some HBCUs and community colleges, to lose their title IV eligibility. The commenter stated that students could argue that a failure to disclose such a measure constitutes a substantial misrepresentation under the proposed standard.

Discussion: We appreciate the support received from some commenters and agree with these commenters who stated that the inclusion of omissions will improve the information provided by schools.

As discussed earlier in this section, the commenters who stated that the revision to § 668.71 would apply only to proprietary institutions are incorrect. The final regulation applies to all schools. We also discuss our reasons for not including an intent element earlier in this section and our reasons for not including a materiality element later in this section.

[13] *See* FTC Policy Statement on Deception, 103 F.T.C. 110, 174 (1984) (appended to Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984)), available at *www.ftc.gov/bcp/policystmt/ad-decept.htm.*

We disagree that the revision is contrary to the Department's purpose in revising part 668, subpart F, in its 2010 rulemaking. We believe that amending the definition to include ''any statement that omits information in such a way as to make the statement false, erroneous, or misleading'' merely clarifies the Department's original intent, aligns the definition of misrepresentation used for the Department's enforcement actions with the standard to be used in evaluating borrower defense claims, and is appropriate given the Department's experiences since 2010.

In 2010, the Department declined to include omissions in the definition of misrepresentation during its rulemaking on part 668, subpart F, on the basis that the Department's regulations require schools to provide accurate disclosures of certain information. 75 FR 66917 to 66918. The Department emphasized that the purpose of the regulations was to ensure that all statements made by an institution are truthful, *id.,* and that whether such a statement was a misrepresentation would be viewed in context of the circumstances. *Id.* at 66914. As noted earlier, however, the Department has had more experience with omissions in the context of its substantial misrepresentation regulations at part 668, subpart F, since that 2010 rulemaking. In 2014, the Department issued a fine of $29,665,000 to Heald College, of the Corinthian Colleges, in part, as a result of a finding that Heald College had omitted essential and material information concerning the methodology used to calculate job placement rates.[14] This same finding, concerning omissions, has resulted in thousands of borrower defense claims filed with the Department. As noted by some commenters, given the close connection between borrower defense and the Department's purpose of ensuring truthful statements by schools when viewed in the entirety of a situation, we believe it is appropriate to adopt the regulations at part 668, subpart F, with some added requirements, for the borrower defense regulations and to revise the definition at § 668.71 to better meet that purpose and enact the Department's long-standing purpose for part 668, subpart F, enforcement actions.

We disagree with the commenter that the inclusion of omissions in the definition, absent an intent element, runs counter to the limit established by the D.C. Circuit in *Ass'n of Private Sector Colls. & Univs.,* 681 F.3d 427. In that case, the court held that a substantial misrepresentation under part 668, subpart F, cannot include true and non-deceitful statements that have only the tendency or likelihood to confuse. However, the court also stated that it agreed with the Department that a misrepresentation can be a true statement that is deceitful, and specifically disagreed with the appellant that an intent element should be a required part of the definition. *Id.* We believe that the inclusion of omissions of information that may make a statement false, erroneous, or misleading clarifies the context under which a misrepresentation may be a true statement that is deceitful and does not infringe upon the court's ruling regarding statements with a likelihood to confuse. We also note that it is our understanding that many States' laws and other Federal consumer protection law also include omissions of information within prohibitions on deceptive acts and practices, and the proposed revision is in keeping with such precedent.

With respect to the commenters who expressed concern about how these regulations may affect schools' behaviors in their provision of certain types of information to students and prospective students, including information regarding investigations, pending civil rights or legal matters, faculty qualifications or availability, the school's compliance with State law, or a school's default rates, among others, the final regulation explicitly states that the Department will consider whether the statement omitting any such information is misleading ''under the circumstances.'' As noted earlier, the Department will consider the totality of the circumstances to determine whether a statement is misleading—including whether the school is or is not under an affirmative legal obligation to disclose such information, or whether concerns such as privacy requirements prevent the disclosure or disclosure in full of such information. For borrower defense, § 685.222(d) also requires that the Department consider the reasonableness of the borrower's detrimental reliance on the misrepresentation.

We note, however, that it should not matter where or how a misrepresentation, whether as an omission or an affirmative statement, takes place, particularly as it pertains to the nature of a school's educational program, its financial charges, or the employability of its graduates. As we stated in 2010, 75 FR 66918, what is important is to curb the practice of misleading students regarding an eligible institution. We continue to strongly believe that institutions should be able to find a way to operate in compliance with these regulations. As discussed later in this section, disclosures made by a school in publications or on the Internet may be probative evidence as to the reasonableness of a borrower's reliance on an alleged misrepresentation, depending on the totality of the circumstances.

Changes: None.

Comments: One commenter argued that it would be inappropriate to apply the FTC Policy Statement on Deception to cases of misrepresentation in higher education. The commenter stated that the FTC policy focuses specifically on deception perpetrated through advertising and is not aimed at establishing individual claims. The commenter noted that borrowers have more extensive interactions with their schools that may constitute fraud, and that absent the elements of materiality, reliance, and harm, the proposed Federal standard would fail to provide adequate protection.

Discussion: We disagree that the substantial misrepresentation standard in either part 668, subpart F, or in § 685.222(d) is the same as the FTC's prohibition on deceptive acts and practices. We considered a wide variety of both State and Federal legal precedents in developing the ''substantial misrepresentation'' definition in § 668.71 and have added specific elements, such as a reasonable reliance requirement, to address specific borrower defense claims in § 685.222(d).

Changes: None.

Comments: Some commenters stated that, for borrower defense purposes, the standard should specify that misrepresentations must be material, in order to avoid frivolous claims or claims based upon inadvertent errors or omissions. One commenter stated that such a materiality standard should not capture small deviations from the truth. Another commenter stated that the standard should allow only claims at a level of materiality that would justify the rescission of the loan at issue. One commenter expressed concern that under the standard without an accompanying materiality requirement, inadvertent or partial omissions of information would give rise to borrower claims.

One commenter stated that the Department should incorporate an express materiality requirement, emphasizing that the lack of such a standard is of particular concern because the standard does not incorporate an element of intent. The

[14] *See* Dept. of Educ., Notice of Intent to Fine Heald College, OPE–ID: 00723400 (Apr. 14, 2015), *available at www2.ed.gov/documents/press-releases/heald-fine-action-placement-rate.pdf.*

commenter also stated that the need for a materiality standard is enhanced, because the Department's proposed standard does not seem to require proof of detriment to a student as a result of his or her actual, reasonable reliance. The commenter stated that the definition in § 668.71 only requires that an individual show that he or she could have relied on a misrepresentation and expressed concern about the Department's proposal to include a presumption of reliance for group claims, in the absence of a materiality requirement.

Several commenters stated that the inclusion of omissions, related to the provision of any educational service, is too broad without an accompanying materiality requirement in the regulation. These commenters expressed concern that students would be able to present claims for substantial misrepresentation by claiming that schools had failed to provide contextual information, such as how faculty-student ratio information works.

Discussion: As discussed in the NPRM, 81 FR 39344, we do not believe that a materiality element is required in either the proposed amendments to the definition for the Department's enforcement authority under § 668.71 or as the definition is adopted for the substantial misrepresentation borrower defense standard under § 685.222(d). We believe that the regulatory definition of ''substantial misrepresentation'' is clear and can be easily used to evaluate alleged violations of the regulations. *See* 75 FR 66916; 81 FR 39344. Generally, under both Federal deceptive conduct prohibitions and common law, information is considered material if it would be important to the recipient, or likely to affect the recipient's choice or conduct.[15] By noting specifically in section 487(c)(3) of the HEA, 20 U.S.C. 1094(c)(3), that the Department may bring an enforcement action against a school for a substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates, Congress indicated its intent that information regarding the nature of a school's educational program, its financial charges, or the employability of its graduates should be viewed as material information of certain importance to students. *See Suarez* v. *Eastern Int'l Coll.,* 50 A.3d 75, 89–90 (N.J. Super. 2012).

As also noted in the NPRM, 81 FR 39344, we believe that by requiring that students demonstrate actual, reasonable reliance to the borrower's detriment under § 685.222(d), the borrower defense regulations incorporate similar concepts to materiality. As discussed, materiality refers to whether the information in question was information to which a reasonable person would attach importance in making the decision at issue. By requiring reasonable reliance to the borrower's detriment, the Department would consider whether the misrepresentation related to information to which the borrower would reasonably attach importance in making the decision to enroll or continue enrollment at the school and whether this reliance was to the borrower's detriment. This would be the case both for individual claims, and for the presumption of reliance applied in the process for group claims under § 685.222(f)(3). We discuss the rebuttable presumption of reasonable reliance in greater detail in the ''Group Process'' section of this document. As a result, we disagree it should include a materiality element in the standard.

Changes: None.

Comments: Many commenters expressed concerns about the requirement for borrowers to assert reliance under the substantial misrepresentation standard. One commenter expressed concern that a borrower could establish that a substantial misrepresentation had occurred by providing evidence of the misrepresentation and showing that he or she could have reasonably relied upon it to his or her detriment, notwithstanding the requirement in § 685.222(d) that the borrower demonstrate actual reasonable reliance upon the misrepresentation.

One commenter supported the use of a reasonable reliance standard, given that the standard may allow claims for statements, particularly unintentional statements, that are not accurate or complete.

A couple of commenters suggested that the Department should not require that borrowers actually and reasonably rely upon misrepresentations to obtain relief for borrower defense purposes, but rather that borrowers should be entitled to relief so long as actual reliance is demonstrated without regard for the reasonableness of that reliance. Alternatively, one commenter suggested that if a reasonable reliance standard were maintained, then the reasonableness of the reliance should be judged according to the circumstances of the misrepresentation and the characteristics of the audience targeted by the misrepresentation, which the commenter stated would be in keeping with State consumer protection law.

One group of commenters suggested that the Department use the same standard for reliance for the Department's enforcement activities under § 668.71, as for borrower defenses under § 685.222(d), so that a borrower may assert a claim for borrower defense without having to show that he or she actually relied on the misrepresentation at issue. These commenters stated that neither State nor Federal consumer protection law typically requires actual reliance and that requiring actual reliance would increase the burden on both the borrower and the trier of fact without serving the purpose of deterring misrepresentations. The commenters also stated that actual reliance is not needed to protect schools from frivolous claims given the fact-finding process and separate proceedings that would be initiated by the Department to recover from schools under the proposed rule.

Another commenter also supported using a standard that did not require actual reliance, as opposed to showing that a borrower could have reasonably relied upon the misrepresentation. However, the commenter stated that in the alternative, borrowers should only be required to certify that they relied upon the misrepresentation, without any further proof, to satisfy the reliance requirement of the standard.

Discussion: There appears to be some confusion as to whether the substantial misrepresentation standard for borrower defense would require actual, reasonable reliance to a borrower's detriment. Although the definition of substantial misrepresentation in § 668.71 requires that, for a misrepresentation to be substantial, it must be one upon which a person ''could reasonably be expected to rely, or has reasonably relied, to that person's detriment,'' the standard for substantial misrepresentation under § 685.222(d) requires that the borrower show that he or she ''reasonably relied on'' the misrepresentation at issue—in other words, that the borrower actually and reasonably relied upon the misrepresentation. As discussed later in this section, the Department acknowledges that the language of § 685.222(d) is confusing as to whether the borrower must also prove that he or she actually relied upon the misrepresentation to his or her detriment. As a result, we will to modify the language of proposed § 685.222(d) to

[15] *See, e.g.,* F.T.C. Policy Statement on Deception, 103 F.T.C. at 182; *see also* Restatement (Second) of Torts § 538 (1977) (''The matter is material if (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.'').

clarify that actual, reasonable reliance to the borrower's detriment must be demonstrated under the borrower defense substantial misrepresentation standard.

We disagree that the purpose of the borrower defense regulations would be served if an actual reliance standard (without a reasonableness component) or a standard that did not require actual reliance was adopted. As explained in the NPRM, 81 FR 39343, a standard that does not require actual reliance serves the Department's interest in the public enforcement of its regulations: The Department requires title IV-participating institutions not to make false statements on which borrowers could reasonably rely to their detriment, and the Department appropriately will impose consequences where an institution fails to meet that standard. However, the Department will grant borrower defenses to provide relief to borrowers who have been harmed by an institution's misrepresentation, not borrowers who could have been harmed but were not; and an actual, reasonable reliance requirement is the mechanism by which borrowers demonstrate that they were indeed actually reasonably relied upon the misrepresentation to their detriment. The requirement also allows the Department to consider the context and facts surrounding the misrepresentation to determine whether other similar students and prospective students would have acted similarly.[16] We believe that the actual, reasonable reliance requirement for a borrower defense based upon a substantial misrepresentation enables the Department to provide relief for borrowers while properly avoiding discharges and payments by the Federal government, taxpayers, and institutions. What may be deemed sufficient evidence to prove whether a borrower has reasonably relied upon a misrepresentation to his or her detriment will differ from case to case. As a result, we reject the suggestion that a certification of reliance should necessarily and in all cases by itself be found to be adequate proof of reliance for all borrower defense claims the Department may receive in the future.

Changes: We have revised § 685.222(d) to clarify that a borrower must have relied upon a substantial misrepresentation to his or her detriment.

Comments: One commenter expressed concern that the Department's proposed standard does not require that the borrower allege injury or damages as a requirement to assert substantial misrepresentation. Another commenter stated that students should be required to establish the extent of their injuries or damages, so that discharges are not granted where students received what they bargained for and so that claims are not filed for harmless errors by schools. Another commenter stated that the standard should require the borrower to show proof of detriment sufficient to deprive the student of the intended benefits of the tuition funded by the loan at issue.

Discussion: To assert a borrower defense under proposed § 685.222(d), the borrower must demonstrate that they reasonably relied upon a substantial misrepresentation in accordance with 34 CFR part 668, subpart F, in deciding to attend, or continue attending, the school. A ''substantial misrepresentation'' is defined in § 668.71 as a misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment.

The Department understands that, generally, ''detriment'' refers to any loss, harm, or injury suffered by a person or property.[17] When §§ 668.71 and 685.222(d) are read together, a borrower may assert a borrower defense for a misrepresentation, if also in accordance with the other requirements of 34 CFR part 668, subpart F, if he or she can demonstrate that the misrepresentation was one on which the borrower actually reasonably relied, to the borrower's detriment, in deciding to attend, or continue attending, the school at issue. However, we acknowledge that the language of § 685.222(d) may be confusing. For this reason, we are clarifying in § 685.222(d) that the borrower must show reasonable detrimental reliance.

In contrast to detriment, ''damages'' refers to money claimed by, or ordered to be paid to, a person as compensation for loss or injury.[18] We do not believe that the term ''damages'' is appropriate in the context of borrower defense, because the Department is limited by statute to providing relief to the borrower on his or her Direct Loan and may not provide a borrower with the complete amount or types of compensation that might traditionally be considered to be damages at law.

There is no quantum or minimum amount of detriment required to have a borrower defense claim, and the denial of any identifiable element or quality of a program that is promised but not delivered due to a misrepresentation can constitute such a detriment. In contrast, proposed § 685.222(i) provides that the trier-of-fact, who may be a designated Department official for borrower defenses determined through the process in § 685.222(i) or a hearing official for borrower defenses decided through the processes in § 685.222(f) to (h), will determine the appropriate amount of relief that should be afforded the borrower under any of the standards described in § 685.222 and § 685.206(c), including substantial misrepresentation. We explain the considerations for triers-of-fact for relief determinations under the ''Borrower Relief'' section of this document.

Changes: We have revised § 685.222(d) to clarify that a borrower must have relied upon a substantial misrepresentation to his or her detriment.

Comments: Several commenters expressed concern about the factors listed in proposed § 685.222(d)(2). A couple of commenters suggested that all of the additional factors listed in § 685.222(d)(2) should be removed. One commenter argued that the factors do not establish the falsity or misleading nature of a substantial misrepresentation claim. Another commenter stated that the factors are subjective and would be difficult to prove or disprove and thus should be removed in their entirety.

A couple of commenters disagreed with specific factors listed in proposed § 685.222(d)(2). One commenter stated that the factor pertaining to failure to respond to information was unnecessary, because passive and requested disclosures are already enforceable through existing consumer compliance requirements. Another

[16] It is our understanding that several other Federal agencies charged with consumer protection, such as the FTC and the CFPB, when bringing enforcement actions for violations of prohibitions of deceptive acts and practices, are not required to prove actual reliance by consumers upon alleged misrepresentations. However, we note that such agencies have prosecutorial discretion in bringing such cases, and are not charged with evaluating and deciding individual claims for relief by consumers as the Department is seeking to do with these regulations. Furthermore, such agencies obtain relief for consumers from the culpable actor, while the Department will be providing relief through public resources, with a possibility of recovery from the actor in some cases. In contrast to the laws these other Federal agencies enforce, many, if not all, States allow consumers to bring private actions under their consumer protection laws. However, it is the Department's understanding that the requirements as to whether reliance is required at all, or if the courts will consider the reasonableness of such reliance, varies. *See, e.g.,* National Consumer Law Center, Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes, at 20, 22 (2009); Schwartz & Silverman, Commonsense Construction of Consumer Protection Acts, 54 U. Kan. L. Rev. 1, 18–19 (Oct. 2005).

[17] *See* Black's Law Dictionary (10th ed. 2014).

[18] *See* Black's Law Dictionary (10th ed. 2014).

commenter stated that the factors should not include failures to respond to information, or that this factor should be revised to include only purposeful failures to provide requested information. The commenter argued that a failure to respond promptly may be due to routine events or extraneous factors, such as an enrollment officer's vacation or workload issues, or a student's own delay of enrollment. A commenter also requested clarification as to the ''unreasonable emphasis on unfavorable consequences of delay'' language. This commenter argued that under this factor, routine, truthful provisions of information regarding timelines and possible late fees or other consequences as a result of actions such as late enrollment or making late housing arrangements may be viewed as improper conduct.

One commenter expressed support for the factors listed in § 685.222(d)(2), stating that it agreed with the Department that misrepresentations should be viewed in the context of circumstances, including the possible use of high pressure enrollment tactics.

One commenter expressed concern that decision makers would expect to see one or more of the newly added factors before finding that a substantial misrepresentation exists. This commenter suggested that the Department clarify that a borrower need not show the factors to have a claim for substantial misrepresentation under borrower defense.

Several commenters stated that the factors listed in proposed § 685.222(d)(2) were insufficient as part of the standard for substantial misrepresentation, as many problematic practices relating to high pressure and abusive sales practices do not necessarily involve misrepresentations as opposed to puffery or abusive or unfair practices.

Discussion: We disagree with the commenters' suggestion to remove the non-exhaustive list of factors in § 685.222(d)(2). We appreciate the concerns that the factors do not necessarily prove whether a statement was erroneous, false, or misleading. However, as explained in the NPRM, 81 FR 39343, we believe it is appropriate to consider factors that may have influenced whether a borrower's or student's reliance upon a misrepresentation to his or her detriment is reasonable, thus elevating the misrepresentation to a substantial misrepresentation under § 668.71 and § 685.222(d) for the purposes of evaluating a borrower defense claim. We recognize that such factors consider the viewpoint of the borrower as to his or her reliance on a misrepresentation and may be subjective. However, in evaluating whether a statement is a misrepresentation, the Department will consider whether the statement is a misrepresentation ''under the circumstances'' and consider the totality of the situation, in addition to the reasonable reliance factors listed in § 685.222(d)(2). We also disagree with commenters that the factors are insufficient as part of the substantial misrepresentation standard. As discussed earlier in this section, we decline to include standards such as unfair or abusive acts or practices, which some commenters have stated would address issues such as puffery and abusive sales practices that may occur absent a misrepresentation, because of a lack of clear precedent and guidance. We believe that consideration of the factors, if the trier-of-fact determines that they are warranted under § 685.222(d)(2), strikes a balance between the Department's interests in establishing consistent standards by which the Department may evaluate borrower defenses; providing borrowers and schools with clear guidance as to conduct that may form the basis of a borrower defense claim, and providing appropriate relief to borrowers who have been harmed.

We understand the concern raised by commenters that a failure to respond to a borrower's requests for more information, including regarding the cost of the program and the nature of any financial aid, 34 CFR 685.222(d)(iv), may be due to unintentional and routine events such as an employee's oversight and vacation schedule. However, as discussed earlier in this section, we disagree that the substantial misrepresentation standard should include an element of intent. We also disagree that the factor is unnecessary, as different States and oversight entities may have differing disclosure standards and institutions' compliance with such standards may vary.

Section 685.222(d)(2)(ii) notes that in considering whether a borrower's reliance was reasonable, that an ''unreasonable'' emphasis on the unfavorable consequence of a delay may be considered. Generally, we do not believe that routine and truthful provisions of information such as timelines and fees to a borrower are unreasonable. However, as discussed, the standard requires that a consideration of any of the factors listed in § 685.222(d)(2) also include consideration of whether a statement is a misrepresentation under the circumstances or, in other words, in the context of the situation.

We also disagree that further modification of the regulations is needed to clarify that the factors do not need to exist for a borrower to have a borrower defense under § 685.222(d). We believe that in stating that the Secretary ''may consider, if warranted'' whether any of the factors listed in § 685.222(d)(2) were present, that the Department's intent is clear that the factors do not need to be alleged for a substantial misrepresentation to be established.

Changes: None.

Comments: One commenter stated that the preponderance of evidence standard established in the regulation, combined with the lower proof standard of preponderance of the evidence for misrepresentation, would open the door to frivolous claims. One commenter expanded on this position, asserting that the evidentiary standard in most States for fraudulent misrepresentation is clear and convincing evidence.

One commenter requested clarification regarding the reasonable reliance and the preponderance of evidence standard for the purposes of the substantial misrepresentation, raising as an example, that an error or oversight in one publication should not satisfy the preponderance of the evidence standard for substantial misrepresentation, if the statement was otherwise correct and complete in all of the school's other publications.

Discussion: We disagree that a ''preponderance of the evidence'' is a lesser standard of proof than what is used currently. As explained in the NPRM, 81 FR 39337, we believe that this evidentiary standard is appropriate as it is both the typical standard in most civil proceedings, as well as the standard used by the Department in other processes regarding borrower debt issues. See 34 CFR 34.14(b), (c) (administrative wage garnishment); 34 CFR 31.7(e) (Federal salary offset).

We understand that some commenters have concerns about baseless charges and frivolous claims that may be brought by borrowers as borrower defenses and lead to liabilities for schools. However, as established in § 685.222(e)(7) and (h), in determining whether a school may face liability for a borrower defense claim or a group of borrower defense claims, the school will have the opportunity to present evidence and arguments in a fact-finding process in accordance with due process. If, for example, during the course of such a fact-finding process, the school provides proof that a misstatement or oversight in one publication was otherwise correct and complete in the school's other publications, such evidence may be determinative as to whether a borrower's reliance on the original misrepresentation was reasonable under the circumstances, as required under § 668.71 and § 685.222(d). However, the probative value of such evidence will vary depending on the facts and circumstances of each case. We also discuss comments relating to the evidentiary standard under ''General.''

Changes: None.

Comments: Several commenters suggested that we provide schools with specific safe harbors or defenses to substantial misrepresentation borrower defense claims. One commenter suggested such safe harbors could include a demonstration that an alleged misstatement is found to be true and not misleading when made; proof that a student participated in Student Loan Entrance counseling despite a claim that the student did not understand repayment requirements; proof that a borrower failed to obtain a professional license due to his or her own behavior despite having been provided with information on professional licensing requirements; a showing that the student has been made whole by the school; proof that the student has signed acknowledgements as to the information about which the student is claiming to have been misled; or underlying circumstances that are based on standard operational or institutional changes.

Another commenter stated that schools should be provided with defenses in the form of proof that the misrepresentation had been subsequently corrected by the school or that the institution had policies, procedures, or training in place to prevent the misrepresentation at issue.

Discussion: We disagree with commenters that specific defenses or safe harbors should be included in the regulations. Many of the factors listed by commenters, such as whether a student participated in entrance or exit counseling, proof of the availability of or receipts of accurate information by a student, or proof of underlying circumstances that are based on standard operational or institutional changes that should have been apparent to the borrower or student may be important evidence in the Department's consideration of whether a borrower's reliance upon an alleged misrepresentation is reasonable, as required by § 685.222(d). However, determinations as to the impact of such factors may vary significantly depending on the type of allegations made and the facts and circumstances at issue. As a result, we do not believe that the inclusion of such factors is appropriate.

Similarly, other factors noted by commenters, such as a showing that a student has already been made whole by the school may, depending on the specific circumstances, be important considerations for the Department in its determination of whether a borrower may be entitled to relief or to the determination of the amount of relief under § 685.222(i), which in turn will affect the amount of liability a school may face in either the separate proceeding for recovery under § 685.222(e)(7) or in the group process described in § 685.222(h). Given that the importance of such factors will vary depending on the circumstances of each case, we also do not believe that the inclusion of such factors is appropriate for the regulations.

Section 668.71 defines a ''misrepresentation'' as any false, erroneous, or misleading statement. If an alleged misstatement can be proven to be true statement of fact when made, not false or erroneous, and it is not misleading when made, then such statements would not be actionable misrepresentations under the standard. However, as explained previously in this section, to determine whether a statement that was true at the time of its making was misleading, the Department will consider the totality of the situation to determine whether the statement had ''the likelihood or tendency to mislead under the circumstances'' or whether it ''omit[ted] information in a way as to make the statement false, erroneous, or misleading.'' The Department will also look to whether the reliance by the borrower was reasonable. This would include a consideration of whether a misrepresentation has been corrected by the school in such a way or in a timeframe so that the borrower's reliance was not reasonable. This would also mean that, generally, claims based only on the speaker's opinion would not form the basis of a borrower defense claim under the standard, if it can be determined that under the circumstances borrowers would understand the source and limitations of the opinion.[19] For the same reason, it is our understanding that claims based on exaggerated opinion claims, also known as ''puffery,'' would also generally not be able to form the basis of a misrepresentation under State or Federal consumer protection law.[20] However, the determination of whether a statement is an actionable misrepresentation will necessarily involve consideration of the circumstances under which the representation was made and the reasonableness of the borrower's reliance on the statement.

We do not believe that the existence of policies, procedures, or training to be a defense to the existence of a substantial misrepresentation. As discussed earlier in this section, the Department does not consider intent in determining whether a substantial misrepresentation was made and believes that a borrower should receive relief if the borrower reasonably relied upon a misrepresentation to his or her detriment.

Changes: None.

Comments: Several commenters expressed concerns regarding the subject matter or topics upon which a substantial misrepresentation may be based. A few commenters expressed concerns that the substantial misrepresentation standard narrows the scope of borrower defenses by not including claims relating to campus safety and security, as well as those for sexual or racial harassment. One commenter expressed the view that not including such non-loan related issues is inconsistent with the purpose of the HEA and the borrower defense regulations. Another commenter said that by excluding such topics, the substantial misrepresentation standard targets just proprietary institutions and excludes traditional colleges.

Another commenter asked whether statements about topics such as cafeteria menu items, speakers hosted by a school, or opponents on a team's athletic schedule would be considered substantial misrepresentations.

One commenter supported using 34 CFR part 668, subpart F, as the basis for borrower defense claims, including limiting substantial misrepresentation claims to the categories listed in subpart F.

Discussion: We explain earlier our reasons for why subjects that do not relate the making of a borrower's loan or the provision of educational services for which the loan was provided, such as sexual or racial harassment and campus safety or security, are included within the scope of the borrower defense regulations.

[19] It should be noted, however, that a claim phrased as an opinion may still form the basis of a substantial misrepresentation, if the borrower reasonably interpreted the statement as an implied statement of fact, *see, e.g.,* FTC Policy Statement on Deception, 103 F.T.C. at 184, or if any of the factors listed in § 685.222(d)(2) existed so as to affect the reasonableness of the borrower's reliance on the misrepresentation.

[20] *See, e.g., Rasmussen* v. *Apple Inc.,* 27 F. Supp. 3d 1027 (N.D. Cal. 2014); FTC Policy Statement on Deception, 103 F.T.C. 110.

As also discussed earlier in this section, we disagree that the substantial misrepresentation standard targets proprietary institutions and excludes issues facing public and private non-profit schools.

In response to questions about whether misrepresentations on specific topics may form the basis of a borrower defense, we note such determinations will necessarily be fact and situation specific-dependent inquiries. As proposed, the substantial misrepresentation standard considers a number of factors in determining whether a borrower defense claim may be sustained. Proposed § 685.222(d) specifies that the borrower defense asserted by the borrower must be a substantial misrepresentation in accordance with 34 CFR part 668, subpart F, that the borrower reasonably relied on when the borrower decided to attend, or to continue attending, the school. 34 CFR part 668, subpart F, specifically limits the scope of substantial misrepresentation to misrepresentations concerning the nature of an eligible institution's educational program, 34 CFR 668.72; the nature of an eligible institution's financial charges, *id.* at § 668.73; and the employability of an eligible institution's graduates, *id.* at § 668.74. If a misrepresentation falls within one of these categories, then it may be a misrepresentation upon which a borrower may assert a borrower defense claim. However, as required by the revised language of § 668.71, the Department would consider the totality of the situation to determine whether the statement was false, erroneous, or misleading ''under the circumstances.'' Additionally, the borrower would have to show that he or she reasonably relied upon the misrepresentation to his or her detriment in deciding to attend the school or in continuing his or her attendance at the institution under proposed § 685.222(d). If such requirements are met, then it is possible that a substantial misrepresentation may form the basis of a borrower defense claim.

Changes: None.

Comments: Several commenters expressed concern that the standard would result in schools being held liable for misrepresentations of contractors and others acting on their behalf. According to one commenter, this standard is acceptable for enforcement activities conducted by and guided by the Department in its discretion, but is not suitable for borrower defense. Another commenter stated that, as proposed, § 685.222 is unclear, because under § 685.222(a), a borrower defense is limited to the act or omission of the school, whereas under § 685.222(d), it does not appear to be clear that the act or omission may be by the school's representatives.

Discussion: In response to concerns in 2010 that institutions may be held accountable for false or misleading statements made by persons with no official connection to a school, the Department narrowed the scope of substantial misrepresentation to statements made by the school, the school's representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs or those that provide marketing, advertising, recruiting, or admissions services. 75 FR 66916. As explained in 2010, such persons actually either represent the school or have an agreement with the school for the specific purposes of providing educational programs, marketing, advertising, recruiting, or admissions services. Section § 685.222(d) similarly names the persons and entities making a substantial misrepresentation upon which a borrower may assert a claim and echoes the official relationships in § 668.71. We believe the definition provided in proposed § 685.222(d) does not need further clarification. We also believe that the specific persons and entities identified in § 685.222(d) upon whose substantial misrepresentation a borrower may assert a borrower defense claim is appropriate for the same reasons stated in 2010 as to their appropriateness for § 668.71 and decline to make any changes in this regard.

Changes: None.

Comments: One commenter requested that borrower defense claims extend to guaranty agencies and, specifically, suggested that § 685.222(d)(2) be revised to enable the Secretary to consider certain factors, listed in § 685.222(d)(2), to determine whether a guaranty agency's reliance on a substantial misrepresentation is reasonable.

Discussion: The Department's authority to regulate borrower defenses arises from Section 455(h) of the HEA, which describes borrower defenses that may be asserted by a borrower to the Department for loans made under the Direct Loan Program. We do not believe that it is appropriate to include guaranty agencies, which are not participants in the Direct Loan Program, in the borrower defense regulations and decline the commenter's suggestion.

Changes: None.

Comments: One commenter concurred with the Department's goal of deterring misrepresentations, but requested that the Department exempt foreign institutions with relatively small numbers of American students from the regulation. The commenter stated that eligible foreign institutions are governed by different countries' laws and oversight regimes, and that there are no indicators that the issues giving rise to borrower defense claims have affected Americans enrolled in foreign institutions.

Discussion: We do not agree that it would be appropriate to ignore any potential harm to students that may constitute the basis of a borrower defense from schools participating in the Direct Loan Program, whether such institutions are foreign or domestic. The standards proposed in § 685.222 for borrower defense were drafted for the purpose of ensuring that students receive consistent and uniform treatment for borrower defense claims, regardless of the type of institution. Exempting some institutions from the borrower defense process, whether partially or fully, would undermine the effectiveness of the regulation in providing relief for borrowers and providing the Department with information on misconduct forming the basis of borrower defenses among institutions participating the Direct Loan Program.

Changes: None.

Limitations on Department Actions To Recover

Comments: Commenters objected to the proposal to remove the limitations period in current § 685.206(c) to Department action to recover from the school for losses arising from borrower defense claims on both loans made before July 1, 2017, and those made thereafter. Section 685.206(c) refers to § 685.309(c), which in turn refers to the three-year record retention requirement in § 668.24. The current regulations also provide that the three-year limitation would not apply if the school received actual notice of the claim within the three-year period. Commenters objected for a variety of reasons.

Several commenters argued that it would be unduly burdensome and expensive for institutions to retain records beyond the mandatory three-year record retention period. These commenters also argued that it would be unfair for an institution to have to defend itself if it no longer has records from the time period in question. One commenter also noted that it would be difficult for the Department to assess claims in the absence of records. One commenter disagreed with the Department's statements in the NPRM that institutions have not previously relied on the three-year limitations period and student-specific files are likely unnecessary to a borrower defense claim. A commenter asserted that the records to which the current record retention rule applies—including the Student Aid Report (SAR), documentation of each borrower's loan eligibility, documentation of each borrower's receipt of funds, documentation of exit counseling, documentation of the school's completion rates, among numerous other categories of documents—would be relevant and that the Department had failed to demonstrate that resolution of borrower defense claims would rarely, if ever, turn on the records to which the three-year record retention rule now applies. The commenter contended that these records will likely go to the heart of borrower claims concerning misrepresentation regarding student loans.

Some commenters stated that schools have tied their general record retention policies to the three-year student aid record retention regulation. Other commenters contended that the proposal would place an unfair, and unnecessary burden on schools by requiring them to retain records indefinitely, even though a borrower would reasonably be expected to know within a few years after attendance whether the student had a claim regarding the training he or she had received. Some commenters argued that due process requires a defined limitations period so that borrowers and schools would know how long to retain relevant records. These commenters also suggested that a defined limitation period would promote early awareness of claims, and proposed a six-year period for recovery actions on both misrepresentation and contract claims.

A commenter asserted that periods of limitation are enacted not merely to reduce the risk of failing memories and stale evidence, but to promote finality of transactions and an understanding of the possible risks that may arise from transactions. This proposed change, the commenter asserts, frustrates these objectives served by periods of limitation. One commenter contended that an unlimited record retention period would increase the risk that data security lapses could occur.

One commenter suggested that the limitation period for recovery actions should be tied to the rule adopted by the school's accreditor, or to the statute of limitations in the State, as even non-student specific records, such as catalogs (which the Department noted are likely be the basis of borrower defense claims), are likely to be destroyed at the end of these retention periods. Another commenter viewed the proposal as an impermissible retroactive regulation, by converting what was enacted as defense to repayment into an affirmative recovery claim, available to the Department for recovery for losses from actions of the school that occurred before the new regulation took effect.

Discussion: We fully address in the NPRM at 81 FR 39358 the contention that removing or extending a limitation period is unconstitutional and beyond the power of the Department.[21] As to the objections that the change would be unfair because schools in fact relied on the record retention rules, we note first that these record retention rules require the school to retain specific, particular student-aid related records. We include the specific records that must be maintained in order to provide the context in which to address the commenters' assertion that these records would go to the heart of borrower defense claims. 34 CFR 668.24. The commenters identify no lawsuits in which resolution of the dispute actually turned on any of the records listed here and, with minor exceptions, we are aware of no lawsuits against schools by borrowers or government entities, or borrower defense claims presented to the Department, in which the records described here are dispositive. In a handful of instances, recognition of borrower defenses under § 685.206 turned on records showing whether refunds owed to students had in fact been made, a requirement ordinarily examined in the routine required compliance audit and in Department program reviews. In a few other cases, Department reviews have identified instances in which the school falsified determinations of satisfactory academic progress, another matter commonly examined in routine audits and program reviews, and we are amending the false certification discharge provisions to ensure that the Department can implement relief when this particular failure is identified. In contrast, even a cursory review of claims raised by students and student borrowers over the years that would constitute potential borrower defense claims have turned not on the individualized aid-specific records itemized in the Department's record retention regulations, but on broadly disseminated claims regarding such matters as placement rates,[22] accreditation status,[23] and employment prospects.[24]

Whether a school actually retains records relevant to the borrower's claim does not determine the outcome of any claim, because the borrower—and in group claims, the Department—bears the burden of proving that the claim is valid. The borrower, or the Department, must therefore have evidence to establish the merit of the claim, a prospect that becomes more unlikely as time passes. If the borrower or the Department were to assert a claim against the school, the school has the opportunity to challenge the evidence proffered to support the claim, whether or not the school itself retains contradictory records.

We acknowledge, however, that institutions might well have considered their potential exposure to direct suits by students in devising their record retention policies for records that may in fact be relevant to borrower defense type claims. Although we consider applicable law to support collection of claims by offset without regard to any previously applicable limitation period, we recognize that the burden of doing so may be unwarranted after the limitation period otherwise applicable had expired and the institution had no reason to expect that claims would arise later. Under current regulations, there is no limit on the time in which the Department could take recovery action if the institution received notice of a claim within the three-year period. Under the current regulation, an institution must have ''actual notice of a claim'' to toll the three-year period. An institution would in fact have ample warning that the claims may arise from other events besides receipt of a claim from an individual, such as lawsuits

[21] We add only that statutes of limitation applicable to government actions to collect these claims affect only the ability to recover by a particular action, and do not extinguish claims. Thus, a suit by the government to collect a liability arising in title IV, HEA program remains governed by the limitation periods in 28 U.S.C. 2415(a), while actions to collect by Federal offset have not, since subsection (i) was added to § 2415 by the 1982 Debt Collection Act to exempt actions to collect by administrative offset under 31 U.S.C. 3716, which originally imposed a 10-year statute of limitations, until amended in 2008 to remove any limitation period from collection by Federal offset.

[22] See *Armstrong* v. *Accrediting Council for Continuing Educ. & Training, Inc.,* 168 F.3d 1362, 1369 (D.C. Cir. 1999), *opinion amended on denial of reh'g,* 177 F.3d 1036 (D.C. Cir. 1999)

[23] *California* v. *Heald Coll.,* No. CGC–13–534793, Sup. Ct. Cty of San Francisco (March 23, 2016); *Consumer Fin. Prot. Bureau* v. *Corinthian Colls., Inc.,* No. 1:14–CV–07194, 2015 WL 10854380 (N.D. Ill. Oct. 27, 2015); *Ferguson* v. *Corinthian Colls., Inc.,* 733 F.3d 928 (9th Cir. 2013); *Moy* v. *Adelphi Inst., Inc.,* 866 F. Supp. 696, 706 (E.D.N.Y. 1994) (upholding claim of common law misrepresentation based on false statements regarding placement rates.); *Lilley* v. *Career Educ. Corp.,* 2012 IL App (5th) 100614–U (Oct. 25, 2012); *Fed. Trade Comm'n* v. *DeVry Educ.Group, Inc.,* C.A. No. 15–CF–00758 (S.D. Ind. Filed Jan. 17, 2016).

[24] *Suarez* v. *E. Int'l Coll.,* 428 N.J. Super. 10, 50 A.3d 75 (App. Div. 2012).

involving the same kind of claim, law enforcement agency investigations, or Department actions. State law, moreover, already commonly recognizes that the running of limitation periods may be suspended for periods during which the claimant had not yet discovered the facts that would support a claim, and may impose no limit on the length of the suspension, effectively allowing a claim to be asserted long after the otherwise applicable limitation period had run. The limitation period applicable to a particular recovery claim will thus depend—for current loans—on the limitation period State law would impose on an action by the student against the institution for the cause of action on which the borrower seeks relief, as that period may be affected by a discovery rule, as well as whether an event has occurred within that period to give the institution notice. The current three-year limit would be retained, subject to the notice provisions, if that limit exceeded the applicable State law limitation. For new loans, the applicable periods would be those in § 685.222(e)(7) and § 685.222(h)(5); for actions based on judgments, no limitation would apply.

We recognize that the retention of records containing personally identifiable information poses data security risks. However, the school already faces the need to secure such information, and we expect the school to have already adopted steps needed to do so. The regulation does not impose any new record retention requirement.

Changes: We have amended § 685.206(c) to remove the provision that the Secretary does not initiate a recovery action later than three years after the last year of attendance, and we have modified § 685.206(c)(3) to provide that the Department may bring a recovery action against the school within the limitation period that would apply to the cause of action on which the borrower defense is based, unless within that period the school received notice of the borrower's claim. We have further modified the regulations to state that notice of the borrower's claim includes actual notice from the borrower, a representative of the borrower, or the Department, of a claim, including notice of an application filed pursuant to § 685.222 or § 685.206(c); receipt of a class action complaint asserting relief for a class that may include the borrower for underlying facts that may form the basis of the borrower defense claim; and notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that it is initiating an investigation into conduct of the school relating to specific programs, periods, or practices that may affect the student for underlying facts that may form the basis of the borrower defense claim.

We have also revised § 685.222(h)(5) and (e)(7) to provide that the Department may bring a recovery action against the school for recovery of claims brought under § 685.222(b) at any time, and may bring a recovery action for recovery of claims brought under § 685.222(c) or (d) within the limitation period that would apply to the cause of action on which the borrower defense is brought, unless within that period the school received notice of the borrower's claim. The Department further modifies § 685.222(h)(5) to include the same description of events that constitute notice as described above.

Comments: One commenter requested that the Department continue the three-year statute of limitations period for loans disbursed prior to July 1, 2017. Another commenter suggested it would be unfair for the Department to hold an institution accountable for claims going back more than ten years.

Discussion: As noted in the NPRM, the Department will continue to apply the applicable State statute of limitations to claims relating to loans disbursed prior to July 1, 2017. We also note that we will apply all aspects of relevant State law related to the statute of limitations as appropriate, including discovery rules and equitable tolling. However, these comments may reflect a drafting error in the NPRM that suggested loans disbursed prior to July 1, 2017, would be subject to the new limitations period established by the final regulations.

Changes: We have revised § 685.222(a)(5) to make clear that the six-year statute of limitations period established under that section does not apply to claims under § 685.206(c).

Expansion of Borrower Rights

Comments: A number of commenters noted that the regulations in proposed § 685.206(c) expand the rights of borrowers by allowing borrowers to assert defenses regardless of when the loan was disbursed. Under the current regulations, a defense to repayment is available only when collection on a Direct Loan has been initiated against a borrower, such as wage garnishment or tax offset proceedings. The commenters asserted that the revisions to the borrower defense regulations have reconstituted current defenses to collection, so they now serve as the bases for expanded borrower rights to initiate an action for affirmative debt relief at any time.

Discussion: We disagree that proposed § 685.206(c) would be an expansion of borrowers' rights as to the context in which a borrower defense may be raised. As explained by the Department in 1995, 60 FR 37769–37770, the Direct Loan borrower defense regulations were intended to continue the same treatment for borrowers and the same potential liability for institutions that existed in the FFEL Program—which allowed borrowers to assert both claims *and* defenses to repayment, without regard as to whether such claims or defenses could only be brought in the context of debt collection proceedings. Specifically, FFEL borrowers' ability to raise such a claim was pursuant the Department's 1994 inclusion in the FFEL master promissory note for all FFEL Loans a loan term [25]—that remains in FFEL master promissory notes to this day—stating that for loans provided to pay the tuition and charges for a for-profit school, ''any lender holding [the] loan is subject to *all the claims and defenses* that [the borrower] could assert against the school with respect to [the] loan'' (emphasis added).[26] *See also* Dept. of Educ., Dear Colleague Letter Gen 95–8 (Jan. 1995) (stating the Department's position that borrower defense claims would receive the same treatment as they were given in the FFEL program, which allowed borrowers to not only assert defenses but also claims under applicable law).

We also disagree that the revisions to § 685.206(c) expand any timeframe for a borrower to assert a borrower defense. As explained above, the Department's borrower defense regulation at § 685.206(c) was based upon the right of FFEL borrowers to bring claims and defenses, which in turn was adopted from the FTC's Holder Rule provision. The FTC has stated that applicable State law principles, such as statutes of limitations as well as any principles that would permit otherwise time-barred claims or defenses against the loan holder, apply to claims and defenses brought pursuant to a Holder Rule provision.[27] The Department's position on the application of any applicable statutes of limitation or principles that

[25] This loan term was adapted from a similar contract provision, also known as the Holder Rule, required by the Federal Trade Commission (FTC) in certain credit contracts. *See* 40 FR 533506.

[26] The substance of this loan term was also adopted as part of the FFEL Program regulations at 34 CFR 682.209(g) in 2009.

[27] Letter from Stephanie Rosenthal, Chief of Staff, Division of Financial Practices, Bureau of Consumer Protection, FTC to Jeff Appel, Deputy Under Secretary, U.S. Dep't. of Educ. (April 7, 2016), *available at www.ftc.gov/policy/advisory-opinions/letter-stephanie-rosenthal-chief-staff-division-financial-practices-bureau.*

may permit otherwise time-barred claims is the same as the FTC's. We do not seek to change this position in revising § 685.206(c), which would apply to loans first disbursed before July 1, 2017.

Changes: None.

Administrative Burden

Comments: A group of commenters questioned the validity of the Department's argument that maintaining a State-based standard would be administratively burdensome. The commenters suggested that the Department could establish a system for determining which State's laws would pertain to students enrolled in distance education programs.

Several commenters criticized the Federal standard as being too broad and vague to provide sufficient predictability to institutions. One of these commenters asserted that the proposed regulations could encourage borrowers to file unsubstantiated claims. Many commenters noted that borrowers have existing avenues to resolve issues with their schools, using the complaint systems provided by institutions, accrediting agencies, and States, as well as judicial remedies.

One commenter suggested that the implementation of the proposed regulations would hamper interactions between school employees and students by creating an environment where any interaction could be misconstrued and used as a basis for borrower defense. The commenter concluded that this dynamic would increase the burden on schools as they seek to implement means of communicating to and interacting with borrowers that mitigate risk.

Several commenters recommend that the Federal standard describe the specific acts and omissions that would and would not substantiate a borrower defense claim. Another commenter suggested that the final rule include examples of serious and egregious misconduct that would violate the Federal standard.

Discussion: Reliance upon State law not only presents a significant burden for Department officials who must apply and interpret various State laws, but also for borrowers who must make the threshold determination as to whether they may have a claim. Contrary to the commenter's assertion, this challenge cannot be resolved through the Department's determination as to which State's laws would provide protection from school misconduct for borrowers who reside in one State but are enrolled via distance education in a program based in another State. Some States have extended their rules to protect these students, while others have not.

We agree with commenters that the Federal standard does not provide significant predictability to institutions regarding the number or type of borrower defense claims that may be filed or the number of those claims that will be granted. However, the purpose of the Federal standard is not to provide predictability, but rather, to streamline the administration of the borrower defense regulations and to increase protections for students as well as taxpayers and the Federal government. That being said, the bases for borrower defense claims under the new Federal standard—substantial misrepresentation, breach of contracts, and nondefault, contested judgments by a court or administrative tribunal of competent jurisdiction for relief—do provide specific and sufficient information to guide institutions regarding acts or omissions pertaining to the provision of Direct Loan or educational services that could result in a borrower defense claim against the institution.

We do not agree that implementation of the Federal standard will hamper interactions between school personnel and students. Institutions that are providing clear, complete, and accurate information to prospective and enrolled students are exceedingly unlikely to generate successful borrower defense claims. While individuals may continue to misunderstand or misconstrue the information they are provided, a successful borrower defense claim requires the borrower to demonstrate by a preponderance of the evidence that a substantial misrepresentation or breach of contract has occurred.

We decline to describe the specific acts and omissions that would and would not substantiate a borrower defense claim, as each claim will be evaluated according to the specific circumstances of the case, making any such description illustrative, at best. We believe the elements of the Federal standard and the bases for borrower defense claims provide sufficient clarity as to what may or may not constitute an actionable act or omission on the part of an institution.

Changes: None.

Authority

Comments: A group of commenters expressed concern that the proposed Federal standard exceeds the Department's statutory authority. This same group of commenters opined that the proposed Federal standard violates the U.S. Constitution.

Two commenters suggested that the proposed regulations have exceeded the Department's authority to promulgate regulations for borrowers' defenses to repayment on their Federal student loans when advanced collection activity has been initiated. One of these commenters suggested that loan discharges based on institutional misconduct should be pursued only when the Department has court judgments against a school, final Department program review and audit determinations, or final actions taken by other State or Federal regulatory agencies, after the school has been afforded its due process opportunities.

Discussion: The Department's authority for this regulatory action is derived primarily from Sections 454, 455, 487, and 498 of the Higher Education Act, as discussed in more detail in the NPRM. Section 454 of the HEA authorizes the Department to establish the terms of the Direct Loan Program Participation Agreement, and section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. Sections 487 and 498 authorize the adoption of regulations to assess whether an institution has the administrative capability and financial resources needed to participate in the title IV, HEA programs.[28]

Support for regulating in particular areas is also found in Section 432(a) of the HEA, which authorizes the Secretary to issue regulations for the FFEL program, enforce or compromise a claim under the FFEL Program; section 451(b) provides that Direct Loans are made under the same terms and conditions as FFEL Loans; and section 468(2) authorizes the Secretary to enforce or compromise a claim on a Perkins Loan.

Section 452(j) of the GEPA authorizes certain compromises under Department programs, and the Administrative Dispute Resolution Act, 31 U.S.C. 3711, authorizes a Federal agency to compromise or terminate collection of a debt, subject to certain conditions.

The increased debt resolution authority is provided in Public Law 101–552 and authorizes the Department to resolve debts up to $100,000 without approval from the Department of Justice (DOJ).

The HEA vests the Department with the sole authority to determine and

[28] This discussion addresses the Department's authority to issue regulations in the areas described below. As discussed earlier, the Department's authority to recoup losses rests on common law as well as HEA provisions included among those cited here.

apply the appropriate sanction for HEA violations. The Department's authority for the regulations is also informed by the legislative history of the provisions of the HEA, as discussed in the NPRM.

Changes: None.

Making of a Loan and Provision of Educational Services

Comments: Several commenters expressed support for the Department's efforts to limit the scope of borrower defense claims by focusing the proposed regulations on acts or omissions that pertain to the provision of educational services. However, these commenters also suggested that the phrase, ''provision of educational services'' was open to interpretation and, as such, may not effectively constrain potential claims. One commenter suggested revising the phrase to read, ''provision of educational services related to the program of study.''

A number of commenters requested that the clarification included in the preamble to the NPRM, explaining that claims pertaining to personal injury, allegations of harassment, educational malpractice, and academic or disciplinary actions are not related to the making of a borrower's Direct loan or the provision of educational services be included in the regulatory text, as they viewed these specific examples as particularly helpful clarifications.

Two commenters listed a number of specific circumstances that may or may not fall within the scope of providing educational services, and requested that the Department provide an analysis of these acts and omissions.

Another commenter remarked that the Department's efforts to limit the scope of borrower defense claims by focusing the proposed regulations on acts or omissions that pertain to the provision of educational services fell short of its objective. Similar to other commenters, this commenter requested that the Department provide explicit descriptions of the claims that would and would not meet the proposed standard.

Another commenter who shared this view suggested the Department include in the final regulations a discussion of the factors that would be considered in determining whether a borrower defense claim pertained to the provision of educational services.

Discussion: We appreciate the support for our efforts to appropriately limit the scope of borrower defense claims to those that are related specifically to the provision of educational services or the making of a Direct Loan. We understand the commenters' interest in further clarification. However, we do not believe it is appropriate to provide detailed institutional-borrower scenarios, or a hypothetical discussion of the analytic process the Department would undertake to ascertain whether a specific borrower's claim related to the provision of educational services or the making of a Direct Loan at this time. As is often the case in matters that address an individual's experience as part of the Federal Student Aid process, the Department's determination of whether a claim pertains to the provision of educational services or the making of a Direct Loan will depend greatly upon the specific elements of that claim.

For example, while it may appear to be a relatively straightforward clarifying change to amend the regulatory language to read, ''provision of educational services related to the program of study,'' such a change could be interpreted to mean that claims related to more general concerns associated with the institution's provision of educational services would not be considered. That is not our intent, and we believe the regulatory language as proposed best captures the intended scope of borrower defense claims.

Similarly, we do not believe that including in the regulatory language specific examples of acts or omissions that would not be considered in a borrower defense is appropriate at this time. These circumstances may evolve over time, necessitating a re-evaluation of their relevance. The Department can provide additional clarification, as needed, through other documents, such as a Dear Colleague Letter, Electronic Announcement, or the FSA Handbook.

Changes: None.

Comments: One commenter recommended that the phrase ''making of a Direct Loan'' be revised to include the phrase ''for enrollment at the school,'' to ensure consistency with the proposed regulatory language in § 685.222(a)(5). The commenter suggested that this modification would be required to ensure that all Direct Loans a borrower has obtained attend a school are covered by the regulation.

Discussion: We agree with the commenter that such a change would ensure consistency throughout the regulation.

Changes: We have revised § 685.206(c) to include the qualifying phrase, ''for enrollment at the school'' when referring to the ''making of the loan.''

Comments: Several commenters expressed concern that the proposed borrower defense regulations would limit borrower defense claims to acts or omissions that occurred during the same academic year in which the borrower obtained a Direct Loan for which he or she is now seeking a loan discharge. One commenter suggested this concern could be ameliorated by amending the regulatory language in § 685.222(a)(5) to include acts and omissions that occur prior to enrollment (*e.g.,* marketing, recruitment) and after the borrower has left the school (*e.g.,* career placement).

Another commenter expressed concern that the limitation of scope would create of discrepancy between loan proceeds that were used to pay for tuition and loan proceeds used to pay for other elements of the institution's cost of attendance.

Discussion: The preamble to the NPRM explicitly acknowledged that the proposed standard described in § 685.206(c) and § 685.222(b), (c), and (d), would include periods of time prior to the borrower's enrollment, such as when the borrower was being recruited by the school, and periods of time after the borrower's enrollment, such as when the borrower was seeking career advising or placement services. 81 FR 39337.

The regulatory language in § 685.222(a)(5) refers to the making of a Direct Loan that was obtained in conjunction with enrollment at the school. This would include all eligible elements of the school's cost of attendance for which a Direct Loan can be obtained. The language in § 685.222 does not restrict potential borrower relief to the portion of a Direct Loan used to pay for tuition.

Changes: None.

Comments: None.

Discussion: In further reviewing proposed § 685.222(a)(6), the Department has determined that including an affirmative duty upon the Department to notify the borrower of the order in which his or her objections, if he or she asserts other objections in addition to borrower defense, to his or her loan will be determined is too burdensome because it would require the expenditure of administrative resources and time, even if not desired by the borrower. The borrower may contact the Department to find out the status of his or her objections, including borrower defense, if desired.

Changes: We have revised § 685.222(a)(6) to remove the requirement that the Department notify the borrower of the order in which his or her objections to a loan will be determined.

Limitation Periods (Statute of Limitations)

Comments: Several commenters requested that the Department allow students to recoup loan funds already paid beyond the proposed six-year statute of limitations. These commenters argued that students often do not know that they are entitled to relief for many years. Some commenters stated that the beginning of the time limit would be difficult for borrowers to determine, since it could vary depending on the specifics of the alleged misconduct. Another commenter stated that some institutions have been defrauding borrowers for decades. One commenter stated that since there is no time limit for false certification discharges, there should not be a time limit for borrower defenses. A group of commenters argued that since there is no limit on the Department's ability to collect student debt, there should not be a limit on the ability of borrowers to recover. Other commenters pointed to the relatively smaller number of borrower applications, as opposed to numbers of borrower estimated to be eligible for relief, from Corinthian as evidence that many borrowers do not know they have claims.

Discussion: As noted in the NPRM, the six-year statute [29] of limitations is only applicable to students' claims for amounts already paid on student loans. A borrower may assert a defense to repayment at any time. This rule comports with the FTC Holder Rule [30] and general State law principles, as well as general principles relating to the defense of recoupment. *See, e.g., Bull* v. *United States,* 295 U.S. 247, 262 (1935) (''Recoupment is in the nature of a defense arising out of some feature of a transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.'') We understand that students may not always be in a position to bring borrower defense claims immediately, but believe the final regulations strike a balance between allowing borrowers sufficient time to bring their claims and ensuring that the claims are brought while there is still evidence available to assess the claims.

Changes: None.

General Process

Comments: Many commenters and groups of commenters expressed concerns about potential due process issues with the process proposed in § 685.222(e) for individual borrowers to pursue borrower defense claims. These commenters asserted that the Department should allow institutions to actively participate in all aspects of the process, starting with a right to be notified of the claim and an opportunity to review the claimant's assertions and supporting documentation. These commenters further proposed that the Department's hearing official should advise the institution about the specific arguments and documents used in the fact-finding process. Some commenters offered proposed timeframes for each step in the review process, while emphasizing that most determinations should be made based solely on document review.

Some of these commenters acknowledged the value of not establishing a purely adversarial process, but emphasized the need to balance the interests of providing relief to students who were treated unfairly with the rights of schools to defend themselves, especially in light of the possible financial and legal exposure to institutions and potentially taxpayers.

Several commenters also contended that the exclusion of school participation in the individual process is especially problematic because of the fact-specific nature of such claims. These commenters expressed their belief that most individual cases cannot be thoroughly investigated without school input. Some commenters suggested that the proposed regulations flip the presumption of innocence that applies in many processes on its head and unfairly burdens institutions without an adequate process to vindicate their claims.

While many commenters emphasized that the proposed process tilts too favorably toward claimants, a few commenters asserted that it may not always fully protect the rights of adversely affected borrowers. Additionally, they noted that the Department's proposal removed not only the option of arbitration, but also the borrower's choice in the makeup of and the representation for the group. These commenters asserted that the rights of an individual claimant could be adversely affected because of some defect in a group claim that the Department interprets will cover the affected individual. They further stated that borrowers have no recourse to challenge the Department official's determination, who they allege will be acting under a set of obtuse and poorly defined rules, resulting in determinations benefitting borrowers who were not wronged and possibly denying relief to deserving claimants.

Discussion: Schools will not be held liable for borrower defense claims until after an administrative proceeding that provides them due process. The Department already runs such proceedings in its Office of Hearings and Appeals on matters such as assessing a school's liability to the Department or limiting, suspending, or terminating a school's title IV participation.

We disagree that moving a claimant from the individual process into the group process negatively impacts the borrower. In fact, we believe the borrower may receive a faster decision using the group process. Additionally, the borrower maintains the ability to request reconsideration if there is new evidence that was not previously considered. Finally, the borrower retains the right to ''opt-out'' of the group process.

The Department will outline specific procedures, including other details requested by the commenters, in a separate procedural rule. We believe this is the most appropriate place for such detail.

Changes: None.

Comments: Many commenters expressed concerns relating to proposed § 685.222(e)(3), which provides for a Department official to administer the individual borrower process. Many of these commenters were concerned that these officials would have too much authority in deciding what evidence to review and use in decision making. Some of these commenters also argued that giving the Department's official the sole discretion over disposition of the claims actually denies borrowers certain rights.

Several commenters claimed that the Department official would be subject to political influence and not necessarily the unbiased, independent, and impartial party needed in this role.

Discussion: Department officials make independent decisions daily regarding the merit of objections to loan enforcement raised by borrowers who default on their loans, and borrower defense would be no different. Department officials also make decisions regarding institutional liabilities to the Department and enforcement actions against institutions. These officials do so in accordance with established standards in the APA for such decisions made by administrative agencies, such as ensuring that decision makers do not report to individuals responsible for managing or protecting the funds of an agency.

---

[29] In the NPRM, we explain our reasoning for establishing a six-year statute of limitations for the breach of contract and substantial misrepresentation standards under § 685.222(c) and (d). Further, we note that six-year period echoes the period applicable to non-tort claims against the United States under 28 U.S.C. 2401(a). *See also* 31 U.S.C. 3702.

[30] The FTC Holder Rule is explained in more detail elsewhere in the ''State Standard'' and ''Expansion of Borrower Rights'' sections.

As discussed during negotiated rulemaking, the Department also plans to outline more specific details about the process for schools and borrowers in forthcoming procedural rules.

Changes: None.

Comments: Commenters argued that the Department's proposed structure in § 685.222(e) places too much authority with the Department and its officials, creating a conflict of interest. These commenters had misgivings about designating an official who would have the ability to perform multiple functions, including adjudicating cases, creating groups from individual claims, as well as advocating on behalf of the group. Several commenters called for separation between the investigative and adjudicative functions.

Many of these commenters expressed concern that the entire process created conditions that would inevitably lead to unfair treatment of schools. This argument is based on the hypothesis that the inherent conflicts in the proposed investigative and adjudication processes will result in a high number of vindicated claims and the cost associated with high levels of loan forgiveness will force the Department to seek indemnification from schools regardless of the legitimacy of the claims.

Numerous commenters also expressed concerns that some of the Department officials hearing cases may not have the requisite experience to properly and dispassionately evaluate and decide these cases. Several commenters specifically offered alternatives to the Department's officials, including using independent hearing officials, administrative law judges, or a third party such as a member of the American Arbitration Association to decide cases. Some commenters specifically suggested this separation to ensure the decision maker would be more insolated form political pressures.

One commenter also noted that the proposed rule does not provide for review of determinations by the Secretary, which specifically limits the Secretary's authority.

Discussion: As we make clear elsewhere here, the Department will undertake any action to recover against a school under specific procedures that are being developed and will ensure an opportunity for the school to present its defenses and be heard. The process will be comparable to that provided under part 668, subpart G for actions to fine, or to limit, suspend or terminate participation of, a school, and under part 668, subpart H for audit and program review appeals. The hearing will be conducted by a Department official who is independent of the component of the Department bringing the action. This is currently done for appeals under subparts G and H, and like those procedures, the new procedures would include an opportunity for an appeal to the Secretary. Any final decision reached in these proceedings would be reviewable under section 706 of the APA, 5 U.S.C. 706, as are final decisions under subparts G and H. The separation of functions under those subparts fully complies with the requirements that would apply under the APA, to which some commenters have alluded, and would be mirrored in the procedure used for recoveries against schools. However, neither the APA nor other applicable law requires the Department to provide an appeal from an administrative decision maker to the Secretary or other senior authority, and the decision of the official designated the authority to adjudicate individual claims is final agency action, similarly reviewable in an action brought under section 706 of the APA. The Department has conducted a great number of such individual adjudications of borrower objections to Federal payment offset and wage garnishment over the past decades, and neither those procedures, nor those used for Federal salary offset, include any provision for an appeal from the decision of the designated official to the Secretary. 34 CFR 30.33, 34 CFR part 31, 34 CFR part 34.

Changes: None.

Comments: One commenter expressed support for restricting borrowers from receiving relief where relief was already granted for the same complaint through a separate source. Conversely, another commenter requested additional legal recourse to collect damages beyond the borrower defense to repayment process.

Discussion: The individual application process in § 685.222(e)(1)(i)(C) requires the borrower to inform the Department of any other claim based on the same information and any payments or credits received resulting from such a claim. The NPRM included performance bond holders and tuition recovery programs as examples of sources of these payments or credits. The statutory authority in section 455(h) of the HEA provides for defense to repayment of a Direct Loan. The Department's ability to provide relief for borrowers is predicated upon the existence of the borrower's Direct Loan, and that relief is limited to the extent of the Department's authority to take action on such a loan. By providing relief appropriate to the borrower's loss, and based on the amount borrowed, the Department would provide relief under the relevant statutory authority. A borrower may pursue the payment of other damages for costs not covered by the Direct Loan in court or via other available avenues without restriction.

Changes: None.

Comments: Several commenters expressed concern for frivolous, false, exaggerated, or politically driven claims and the accompanying administrative burden and cost this process will place on institutions and the Department. Commenters suggested a firm statute of limitations for filing claims, increasing the burden of proof for the student, limiting opportunities to reopen cases, and a prominently stated penalty for filing false claims on the application form to prevent false or exaggerated claims.

Discussion: We believe the commenters' suggestions, though well intentioned, would do little to reduce any potential frivolous claims. As outlined earlier, we believe we have established a strong position for the limitations periods and the burden of proof in these regulations.

Additionally, an individual borrower may only request reconsideration of an application when he or she introduces new information not previously considered. The borrower defense application form includes a certification statement that the borrower must sign indicating that the information contained on the application is true and that making false or misleading statements subjects the borrower to penalties of perjury. We believe these protections against false or frivolous claims are sufficient.

Changes: None.

Comments: Several commenters and groups of commenters contended that the Department should provide equal relief to Direct Loan and FFEL borrowers. These commenters objected to the Department's proposed process in § 685.206, which would require FFEL borrowers who want to apply for a borrower defense to consolidate their FFEL Loans into the Direct Consolidation Loans. These commenters noted that over 40 percent of borrowers with outstanding Federal loans have FFEL Loans and conveyed that borrowers were typically not able to choose among Federal loan programs. One commenter noted the inequities pertain not only to borrowers, but also to schools. Institutions with significant FFEL volume face reduced risk of Department efforts to recover funds. One commenter specifically indicated that requiring FFEL borrowers to consolidate obliterates the use of the group process because FFEL borrowers cannot be automatically included in the group without further action on their part.

These commenters also noted inequities in relief for FFEL borrowers, which includes no mechanism to seek refund of amounts already paid by the borrower. Thus, the commenters asked the Department to stop all collection activities upon receipt of a FFEL borrower's application to at least reduce the amount the borrower pays on the loan. Additionally, these commenters requested that the Department apply forbearance to FFEL borrowers in the same manner as with Direct Loan borrowers.

While expressing a strong preference for identical treatment of Direct Loan and FFEL borrowers, one commenter also recognized that this might not be possible, and suggested that the Department could lessen the imbalance by specifying that a referral relationship existed between lenders and institutions when a large number of borrowers at a school had the same lender. Another commenter suggested that the Department make findings of groups of borrowers entitled to discharge of their loans and require FFEL lenders to comply with them.

One commenter articulated that the Department could take additional steps to assist FFEL borrowers in multiple ways. First, the commenter suggested that the Department could compel a lender or guaranty agency to discharge a loan. This commenter further suggested that borrowers who dispute a FFEL Loan who are denied can appeal a lender or guaranty agency's decision to the Secretary, giving the Department final authority in each case. Finally, the commenter indicated that the Department could move groups of loans under the Department's responsibility as it would in cases where a guaranty agency closes. The commenter claimed that the Department previously took such action for false certification and closed school discharges.

Discussion: We seek to provide an effective process for all borrowers within the Department's ability under applicable laws and regulations.

Current regulations do not require a FFEL lender to grant forbearance under these circumstances except with regard to a FFEL borrower who seeks to pay off that FFEL Loan with a Consolidation Loan, and that requirement provides a time-limited option. 34 CFR 682.211(f)(11). Because the Secretary has designated that section of the final regulations for early implementation, lenders may implement this provision before it becomes a requirement on July 1, 2017. Thus, when these borrower defense regulations take effect on July 1, 2017, FFEL Program lenders must grant administrative forbearance when the Department makes a request on behalf of a borrower defense claimant, pursuant to § 682.211(i)(7).

We also do not believe we have adequate data to identify those lenders and schools that established a referral relationship.

We believe we have outlined the best possible path to relief for the remaining FFEL borrowers within our legal abilities. We appreciate the commenters' suggestions for other ways to assist FFEL borrowers in pursuing borrower defenses, but do not believe those suggestions are practicable. We recognize that this process requires additional steps for FFEL borrowers. To mitigate this, as described in the preamble to the NPRM, we will provide FFEL borrowers with a preliminary determination as to whether they would be eligible for relief on their borrower defense claims under the Direct Loan regulations, were they to consolidate their FFEL Loans into a Direct Consolidation Loan. FFEL borrowers may receive such a determination without having to establish a referral relationship between the lender of the underlying FFEL Program Loan and the school. The notice of preliminary determination will provide information on the Loan Consolidation process and instructions on how to begin the process. As described in § 685.212(k), after the borrower consolidates into the Direct Loan program, he or she may receive an appropriate amount of relief on the principal balance.

Changes: None.

Process for Individual Borrowers (§ 685.222(e))

Comments: Multiple commenters and groups of commenters suggested that the Department unfairly limited the rights of institutions and exceeded its authority to recoup funds resulting from borrower defense claims. They noted that they believe that the HEA grants no such authority. Moreover, these commenters pointed out the difference between such silence and the specific authority in the HEA regarding closed school discharges, false certification discharges, and regarding Perkins Loans.

The same commenters who asserted that the Department exceeded its authority with recoupment of successful borrower defense claims stated that the Department should outline the details of its process if it proves it has such authority. Several commenters requested more information about the recovery process from schools, focusing on the institution's involvement in the process. Furthermore, some commenters requested a specific appeal process for attempts to recover funds from schools.

Discussion: As discussed more fully elsewhere in this preamble, the Department has ample legal authority to recover losses on borrower defenses from schools, and the absence of explicit statutory provision authorizing such recovery does not affect its authority. We are developing specific procedures for conducting such recovery actions that will reflect current regulations for appeals of audit and program review claims and actions to fine the school, or to limit, suspend, or terminate its participation.

Changes: None.

Comments: Multiple groups of commenters supported the preponderance of evidence standard in the Department's individual process proposed in § 685.222(e) and appreciated that borrowers would not need legal counsel to pursue a borrower defense. Multiple commenters also commented on the desire that the process not penalize borrowers for the absence of written documentation. They noted that many borrowers may not have items such as enrollment agreements or other items that might assist the Department in reviewing their claims. The commenters added that this should not be held against the borrowers, as schools frequently do not provide borrowers with copies of such documents, and borrowers may encounter difficulties in obtaining them.

One commenter suggested that, when documents are not available because of the school's failure to provide the borrower with proper documentation, the burden should shift to the school to disprove the claims from the borrower's attestation.

Another commenter suggested that the Department specify that it will accept a student's sworn testimony, absent independent corroborating evidence contradicting it, as fulfilling the preponderance of the evidence standard (which requires the borrower to persuade the decision maker that it is more likely than not that events happened or did not happen as claimed). In other words, the commenter suggested that, when a borrower submits sworn testimony but does not submit corroborating evidence, the Department should not take this to mean that there was no substantial misrepresentation or breach of contract. Another group of commenters suggested that the Department track similar claims and consider those claims as evidence when reviewing applications.

Another group of commenters recommended that the Department accept information on the application form as sufficient for the claim, requesting additional information only when necessary. This group of commenters pointed out that misrepresentations were often from oral statements made to the borrower that did not include any written evidence. Furthermore, this group of commenters requested that the Department fully use all available information it and other Federal agencies possess, rather than requesting it from borrowers.

Discussion: We disagree that the final regulations should specify what weight might be given to different types of evidence, such as borrower testimony or statements, under the preponderance of the evidence standard specified in § 685.222(a)(2) for borrower defenses under the Federal standard for loans first disbursed after July 1, 2017. Under § 685.222(a)(2), the borrower has the burden of demonstrating, by a preponderance of the evidence, that it is more likely than not that the facts on which his or her borrower defense claim rests have been met. However, § 685.222(e)(3) provides that for individually filed borrower defense applications, the designated Department official will also consider other information as part of his or her review of the borrower's claim. As noted in the NPRM, 81 FR 39337, in practice, the decision maker in a borrower defense proceeding would assess the value, or weight, of all of the evidence relating to the borrower's claim that has been produced to prove that the borrower defense claim as alleged is true. The kind of evidence that may satisfy this burden will necessarily depend on the facts and circumstances of each case, including factors such as whether the claimant's assertions are corroborated by other evidence. Accordingly, we decline to elaborate further on what specific types of evidence may or may not be viewed as satisfying the preponderance of evidence standard.

Changes: None.

Comments: Several groups of commenters encouraged the Department to adopt a simple, accessible, and transparent process for borrowers. These commenters indicated support for a process that reduces inequities in resources so that borrowers interact only with the Department, even when additional information is needed from the school. In particular, numerous commenters expressed appreciation that, under the proposed regulations, borrowers would not be pitted against institutions, which generally possess significantly more resources.

While generally supportive of the Department's process, another group of commenters expressed concern for the potentially overwhelming number of applications that would be filed in connection with potential borrower defense claims and questioned the Department's capacity to employ enough capable staff to handle the large workload. The same group noted the benefits of specifying timeframes for actions within the process, despite recognizing the difficulty in doing so.

Discussion: With these regulations, the Department works toward evening the playing field for students. Individual claims will be decided in a non-adversarial process managed by a Department official, and group claims would be brought by the Department against the school, not by students. Thus, the process does not require students to directly oppose schools. We appreciate the support that some commenters expressed for these processes.

As we discussed in the NPRM, the Department may incur administrative costs and may need to reallocate resources depending on the volume of applications and whether a hearing is required.

After having received only a few borrower defense claims in over 20 years, the Department has now received more than 80,000 claims in just over two years. We responded by building an entirely new process and hiring a new team to resolve these claims. Our ability to resolve claims quickly and efficiently has grown and will continue to grow. Particularly because we are still growing our capacity, we are unable to establish specific timeframes at this point for processing claims. Additionally, processing time is considerably affected by the varied types and complexities of claims.

Changes: None.

Comments: One group of commenters strongly supported the Department's pledge to provide written determinations to borrowers who submit borrower defense claims.

Discussion: We appreciate the support of these commenters.

Changes: None.

Comments: Another group of commenters noted the difficulty that many borrowers face in completing even seemingly simple forms and in explaining wrongdoing in a way that clearly makes a complex legal argument.

Discussion: We appreciate the commenters' concern and do not expect borrowers to submit a complicated, lengthy narrative requiring any legal analysis by the borrower to apply for relief. We specifically set out to design a process that would not be onerous for borrowers and that would not require third-party assistance, such as but not limited to an attorney.

Changes: None.

Comments: Two commenters suggested using existing school complaint processes to resolve borrower defense claims prior to a Department review to reduce administrative burden on the Department and on institutions.

Discussion: Nothing in these regulations prohibits a borrower from directly contacting an institution to resolve a complaint. Additionally, a borrower may pursue other paths to relief, such as filing a claim with a State consumer bureau or filing a lawsuit. However, at the point where a borrower approaches the Department for assistance, we take seriously the obligation to review the claim and to respond to the borrower. We believe this process provides the best avenue for relief when a borrower applies for a borrower defense claim. In addition to using data collected from the Department's ''FSA Feedback System,'' the Department will also continue to partner with other Federal agencies that are engaged in the important work aimed of protecting the rights of students. Depending on the specifics of the case, these agencies may include the CFPB, DOJ, FTC, the SEC, and the Department of Defense among others. The Department will also look to State officials and agencies responsible for education quality, student financial assistance, law enforcement, civil rights, and consumer protection.

Changes: None.

Comments: Multiple commenters expressed support for the proposed prohibition on capitalization of interest when the Department suspends collection activity following receipt of a borrower defense application. However, one of these commenters objected to the Department prohibiting interest capitalization when collection resumes as a result of the borrower's failure to submit appropriate documentation. The commenter believed this could lead to false claims by borrowers seeking to avoid repayment.

Discussion: We appreciate the commenters' support for the prohibition of interest capitalization and believe it is in line with our concept of the appropriate use of capitalization, as the borrower is not newly entering repayment. Accordingly, we disagree with the commenter who objected to prohibiting capitalization upon resumption of collection activity where a borrower did not submit appropriate documentation. We believe more legitimate avenues exist for struggling borrowers to postpone or reduce payment rather than filing false borrower defense claims, and do not believe that the prohibition of interest capitalization in this narrow circumstance provides significant incentive for borrowers to incur the significant risks associated with filing false claims.

Changes: None.

Comments: One group of commenters noted the importance of reconsideration of borrower defense claims, especially for borrowers completing applications without assistance. This group, however, encouraged the Department to clearly explain the borrower's right to reconsideration, rather than merely allowing borrowers to request reconsideration with the Department having discretion on whether to consider the application.

Multiple commenters and groups of commenters expressed concern with the borrower's ability to introduce new evidence for reconsideration in proposed § 685.222(e)(5). Specifically, these commenters noted concerns that individual claims could continue indefinitely. These commenters indicated that the Department should include reasonable time limitations for reconsideration of claims.

Another commenter suggested that the Department official who made the determination of the original claim should not be permitted to review a request for reconsideration and suggested using a panel or board for such claims.

Discussion: We highlight the distinction between reconsideration of an application and an appeal process. A borrower must submit new evidence in order for the Department to reconsider an application, and there is no appeal process. We believe it is important to allow a borrower to submit new evidence, which he or she may have only recently acquired. We do not intend to limit borrowers' rights. However, there needs to be finality in the borrower defense process as well, and we do not believe it is appropriate to consider applications regarding claims that have already been decided unless there is clear demonstration that new evidence warrants that reconsideration. We will consider the commenters' suggestions regarding the explanation of the reconsideration process in our communications with borrowers.

We believe the limitations periods for borrower defense claims adequately address the concern about time limits and do not agree with imposing an artificial limitation on borrower applications for reconsideration for new evidence based on a specific number or time period.

We see no basis for requiring this evaluation of new evidence to be made by an individual other than the original decision maker. This is a reconsideration, not an appeal, and the original decision maker is in a position to efficiently make that decision.[31] Therefore, we do not prohibit the same official from hearing the reconsideration claim.

Changes: None.

Comments: One commenter asked that we restrict a borrower's ability to present new evidence in support of a claim already rejected. The commenter said that borrowers should be required to show good cause for why the evidence was not previously available.

Discussion: We disagree that borrowers should be required to show good cause for why evidence was not previously available. We recognize that borrowers may not have the same access to information that the Department or the school may have. Furthermore, we believe that the requirements for ''new evidence'' provide clear guidelines for what is required. Section 685.222(e)(5)(i) specifies that ''new evidence'' must be evidence that the borrower did not previously provide, but also must be relevant to the borrower's claim, and was not identified by the decision-maker as being relied upon for the final decision. For ''new evidence'' to meet this standard, the evidence cannot just be cumulative of other evidence in the record at the time, but must also be relevant and probative evidence that might change the outcome of the decision being reconsidered.

Changes: None.

Comments: Multiple commenters suggested that the Department specifically permit schools to appeal decisions on any individual claim. One commenter added that schools would not file frivolous appeals, as the resulting workload is too time-consuming. The commenter further suggested that if schools are not provided with an appeal process, that the Department should provide schools with an opportunity to challenge the Department official's decision during any related recoupment action.

Discussion: We do not include an appeals procedure in the individual borrower claim process. We believe the reconsideration process adequately allows borrowers to submit new evidence. However, as one commenter requested, the regulations do afford an opportunity to present a defense when the Department seeks to hold a school liable and recover funds in both the individual and group claim processes.

Changes: None.

Comments: Although the Department outlined a separate process to recover funds from an institution, a group of commenters stated that the Department needed to include the borrower to ensure a fair process for the institution.

Discussion: We believe that using a separate proceeding to determine whether a group of borrowers have meritorious claims, and if so, to recover from the school for losses on those claims, is an appropriate method to achieve a fair result. The procedure will accord the institution the right to confront witnesses on whom the Department would rely, and to call witnesses on its own, as it currently has under procedures under subpart G of part 668. We also note that under § 685.222(j), borrowers are required to reasonably cooperate with the Secretary in any such separate proceeding.

Changes: None.

Comments: One commenter suggested that borrowers should not be permitted to bring individual claims when the facts and circumstances have already been considered by hearing official in a group claim. The commenter expressed concern that proposed § 685.222(h) would allow for this to happen, effectively providing borrowers a second bite at the apple and violating the legal principle of res judicata.

Discussion: We discuss the treatment of individual claims from a student who opted out of a group proceeding, or who disputes the outcome of the group proceeding decision as it pertains to his or her claim, in our discussion of the group process.

Changes: None.

Comments: A group of commenters suggested that the Department modify language in proposed § 685.222(e)(1)(i)(A) so that references to the school more clearly emphasize that we mean the school named on the borrower defense to repayment application.

Discussion: We agree that the commenter's suggested change clarifies the intent of the regulation.

Changes: We revised § 685.222(e)(1)(i)(A) to reference ''the'' named school.

Comments: One commenter suggested that the Department make available on an annual basis a list of all borrower

[31] This is hardly unusual: Under Social Security regulations, the hearing officer who conducts the disability hearing ordinarily conducts the reconsideration determination. 20 CFR 404.917(a). In addition, requests for relief from judgments—a somewhat comparable plea to the request for reconsideration at issue here are routinely considered by the judge that issued the original decision. Fed. R. Civ. P. 60.

defense applications submitted (minus any personally identifiable information) along with outcome of the request. The goal of this list would be to provide transparent information to borrowers.

Discussion: We support transparency in this process and will consider this suggestion as we move forward with implementation of the individual and group processes.

Changes: None.

Comments: One commenter suggested that the Department proactively conduct a review of all federally guaranteed loans back to 1995 (when the commenter considers the regulations to have been last considered) to determine potentially eligible loans for a defense to repayment. The commenter recommended that the Department identify loans for which there is a high likelihood of granting a discharge stemming from lawsuits, investigations, etc.

Discussion: We do not believe that the Department possesses adequate information to accurately identify potentially eligible loans on such a large scale. As borrowers have had the ability to bring borrower defense claims under the current regulations for some time, we do not believe a review of data over more than 20 years is warranted. Additionally, the Department cannot determine through such a review whether specific students were subjected to misrepresentation, for example, whether they relied on such misrepresentations, and how they were affected if they did so. The Department must determine if relief is warranted, and merely obtaining a loan to attend an institution is not adequate to suggest relief is due.

Changes: None.

Comments: None.

Discussion: In further reviewing proposed § 685.222(e)(3)(ii), we have determined that including an affirmative duty upon the Department to identify to the borrower records that may be relevant to the borrower's borrower defense claim is too burdensome because it would require the expenditure of administrative resources and time, even if not desired by the borrower. As a result, we have revised the § 685.222(e)(3)(ii) to provide that the Department will identify records upon the borrower's request.

We note that we expect that consideration of individual borrower defense claims will lead to information gathering as part of enforcement investigations. When such an investigation is ongoing, we may defer release of records obtained in that investigation to individual claimants to protect the integrity of the investigation. If requested, records will be made available to individual claimants after the investigation is complete and prior to the borrower defense decision. We may defer consideration of individual claims where we determine that releasing potentially relevant records prior to the completion of the investigation would be undesirable.

We have also determined that the parallel identification of records to schools, which under the proposed regulations was permissive, would also cause unnecessary administrative delay, given that the fact-finding process described in § 685.222(e) will not decide any amounts schools must pay the Secretary for losses due to the borrower defense at issue. The school will have the right and opportunity to obtain such evidence, and present evidence and arguments, in the separate proceeding initiated by the Secretary under § 685.222(e)(7) to collect the amount of relief resulting from the individually filed borrower defense claim.

Changes: We have revised § 685.222(e)(3)(ii) to provide that the designated Department official will identify to the borrower the records the Department official considers relevant to the borrower defense upon request. We have also revised § 685.222(e)(3)(ii) to remove the identification of records to schools.

Comments: One commenter expressed support for the Department's proposal to allow claims made by individuals as well as groups. However, the commenter suggested that a right of appeal for both institutions and borrowers be provided in the individual claims process as to open schools.

Discussion: During the negotiated rulemaking sessions, the Department heard from negotiators as to the importance of a timely and streamlined process for borrower defense claims. In consideration of such concerns, the Department believes that it is appropriate that decisions made by the designated Department official presiding over the fact-finding process for individually filed applications be final agency decisions to avoid delays that may be caused by an appeals process. Borrowers are able to seek judicial review of final agency decisions in Federal court if desired. *See* 5 U.S.C. 702 & 704. Additionally, the borrower will also be able to request that the Secretary reconsider his or her claim upon the identification of new evidence under § 685.222(e)(5).

Although the fact-finding process described in § 685.222(e) provides schools with an opportunity to submit information and a response, as discussed in the NPRM, 81 FR 39347, the fact-finding process for individually filed applications do not determine the merits of any resulting claim by the Department for recovery from the school. Rather, § 685.222(e)(7) provides that the Secretary may bring a separate proceeding for recovery, in which the school will be afforded due process similar to what schools receive in the Department's other administrative adjudications for schools. Given that the institution's potential liability for the Department's recovery is to be adjudicated in this separate process, the Department does not believe that an appeal right for schools should be included in the § 685.222(e) fact-finding process. As discussed earlier in this section, the Department is developing rules of agency practice and procedure for borrower defenses that will be informed by the Department's rules and protections for its other administrative adjudications.

Changes: None.

Comments: None.

Discussion: In further reviewing proposed § 685.222(e)(5), the Department has determined that if a borrower defense application is under review because a request for reconsideration by the Secretary has been granted under § 685.222(e)(5)(i) or because a borrower defense application has been reopened by the Secretary under § 685.222(e)(5)(ii), the borrower should be granted forbearance or, if the borrower is in default on the loan at issue, then the procedure for a defaulted loan should be followed, as when the borrower filed an initial borrower defense to repayment application.

Changes: We have revised § 685.222(e)(5) to provide that the forbearance and defaulted loan procedures will be followed when the Secretary has granted a request for reconsideration or has reopened a borrower defense application.

Group Process for Borrower Defenses

Statutory Authority

Comments: Some commenters argued that the Department's proposed group borrower defense process would violate the HEA. These commenters stated that section 455(h) of the HEA specifically limits the Department's authority to specifying acts or omissions that an individual borrower, as opposed to a group, may assert as a defense to repayment. These commenters argued that the creation of a process that would award relief to a borrower who has not asserted a defense to repayment exceeds the Department's statutory authority. A few commenters also stated that the HEA does not authorize the Department to act as a class action attorney, and stated that such authority requires specific statutory authorization. One commenter suggested that any provision providing that the Secretary may identify borrowers who have not filed a borrower defense application as part of a group process for borrower defense should be removed.

One commenter stated a recent recommendation from the Administrative Conference of the United States found that, while the APA does not specifically provide for aggregate adjudication, it does not foreclose the possibility of such procedures. The recommendation also stated that agencies generally have broad discretion in formal and informal adjudications to aggregate claims.

Discussion: We disagree with commenters' assertion that the proposed group process is in violation of the HEA. The Department's statutory authority to enact borrower defense regulations is derived from section 455(h) of the HEA, 20 U.S.C. 1087e(h), which states that ''the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan. . . .'' While the language of the statute refers to a borrower in the singular, it is common default rule of statutory interpretation that a term includes both the singular and the plural, absent a contrary indication in the statute. *See* 1 U.S.C. 1. We believe that, in giving the Secretary the discretion to ''specify which acts or omissions'' may be asserted as a defense to repayment of loan, Congress also gave the Department the authority to determine such subordinate questions of procedure, such as the scope of what acts or omissions alleged by borrowers meet the Department's requirements, how such claims by borrowers should be determined, and whether such claims should be heard contemporaneously as a group or successively, as well as other procedural issues. *See FCC* v. *Pottsville Broad. Co.,* 309 U.S. 134, 138 (1940).

We believe that this discretion afforded the Secretary under the statute not only allows it to determine borrower defense claims on a group basis and to establish such processes and procedures, but also authorizes the Department to proactively identify and contact borrowers who may qualify for relief under the borrower defense regulations based upon information in its possession. As described in § 685.222(f), the Department would notify such borrowers of the opportunity to participate in the group process, and inform such borrowers that by opting out, the borrower may choose to not assert a borrower defense. By such notice and opt-out, borrowers who had not previously filed an application for borrower relief may assert a borrower defense for resolution in the group borrower defense process.

In response to comments that the Department is not authorized to act as a class action attorney, we note that, in bringing cases before a hearing official in the processes described in § 685.222(f), (g), and (h), the Department would not be bringing claims as the representative of the borrowers. Although the Department would be presenting borrower defense claims for borrowers, with their consent as described above, the Department official would be bringing claims on its own behalf as the administrator of the Direct Loan Program, or alternatively as a beneficiary of the fiduciary relationship between the school and the Department as explained earlier in ''Borrower Defenses—General.'' *See also Chauffeur's Training School* v. *Spellings,* 478 F.3d 117 (2d Cir. 2007). We believe that the group process we adopt here will facilitate the efficient and timely adjudication of not only borrower defense claims for large numbers of borrowers with common facts and claims, but will also conserve the Department's administrative resources by also adjudicating any contingent claim the Department may have for recovery from an institution.

Changes: None.

Independence of Hearing Officials

Comments: Many commenters expressed concerns that the group borrower defense process would present conflict of interest or separation of powers issues and would be unfair, given that the proposed process involves a Department-designated employee presenting evidence to a hearing official who also has been appointed by the Secretary, with appeals to be decided by the Secretary. Several commenters stated that this issue was of particular concern, given the limited or unclear role afforded to institutions to participate in the borrower defense process and to appeal decisions proposed by the Department. One commenter acknowledged that while other Federal agencies, such as the FTC, allow agencies to act as both prosecutor and judge, such proceedings are governed by the APA, 5 U.S.C. 554. The commenter stated that the APA provides statutory safeguards that ensure fair proceedings, such as prohibitions on ex parte communications and prosecutorial supervision of the employee presiding over the proceeding. This commenter suggested that group borrower defense claims be presided over by the Department's Office of Hearings and Appeals.

One commenter stated that determinations in the group process should be made by a representative who is not affiliated with the Department. Another commenter stated that the office responsible for presenting the claim on behalf of a group in a group borrower defense proceeding should not be the same office that decides the group claim. Several commenters suggested specifically that determinations be made by administrative law judges or their equivalent, who have a level of expertise and independence from the Department. One commenter stated that the regulations should provide for determinations in group borrower defense processes to be made by an administrative judge.

One commenter stated that the Department should seek and use independent hearing officials with experience in handling complex disputes, given the large numbers of students that may be impacted by such proceedings.

One commenter stated that the Department's proposed group borrower defense process violates both the separation of powers doctrine in Article III and the jury trial requirement of the Seventh Amendment of the Constitution, by vesting in the Department exclusive judicial power to determine private causes of action without a jury.

Discussion: The Department understands the concerns raised by commenters regarding the objectivity and independence of the hearing official in group borrower defense cases. However, administrative agencies commonly combine both investigatory and adjudicative functions, *see Winthrow* v. *Larkin,* 421 U.S. 35 (1975), and due process does not require a strict adherence to the separation of those functions, *see Hortonville Joint School District No. 1* v. *Hortonville Educ. Ass'n.,* 426 U.S. 482, 493 (1976). The Department is no different and performs both investigative and adjudicative functions in other contexts, including those that involve borrower debts [32] and institutional liabilities.[33]

We disagree that the regulations should specify that the hearing official presiding over the fact-finding processes in § 685.222(f) to (h) must be an administrative law judge or an administrative judge. As explained in the NPRM, 81 FR 39340, the Department uses the term ''hearing official'' in its other regulations, such as those at 34 CFR part 668, subparts G and H. In those contexts, hearing officials make decisions and determinations independent of the Department employees initiating and presenting evidence and arguments in such proceedings. Similarly, the Department would structure the group borrower defense fact-finding processes so that they are presided over by hearing officials that are independent of the employees performing investigative and prosecutorial functions for the Department.

As stated in the NPRM, 81 FR 39349, the group borrower defense process involving an open school [34] under § 685.222(h) would be structured to provide the substantive and procedural due process protections both borrowers and the school are entitled to under applicable law, including any required under the APA, 5 U.S.C. 554. The Department is developing rules of agency procedure and practice governing the fact-finding processes described in both § 685.222(e) and § 685.222(f) to (h), which will be informed by the procedures and protections established by the Department in its other administrative proceedings, such as 34 CFR part 668, subparts G and H.

As explained under ''General,'' we also disagree that the proposed regulations violate Article III and the Seventh Amendment of the Constitution. The rights at issue in the proposed borrower defense proceedings have the character of public rights, which may be consigned by Congress to the Department for adjudication.

Changes: None.

Single Fact-Finding Process

Comments: One commenter stated that the Department's proposed single fact-finding process for group claims described in § 685.222(f) to (h), where a hearing official makes determinations as to both institutional liability and relief for borrower defense claims, is not justified. This commenter stated that the Department had not presented a factual basis for the change from the approach in § 685.206(c), which states that the Department may initiate a proceeding to require the school to pay the amount of the loan to which a successful borrower defense lies.

A group of commenters stated that the Department should not engage in a single fact-finding process for group claims. These commenters suggested that the Department should gather and consider evidence regarding borrower defenses, render a decision on borrower relief, and then initiate a separate proceeding for recovery from schools. The commenters stated that this approach would be similar to the Department's proceedings for group borrower defense claims against closed schools and for individually filed applications, as well as the Department's proposed processes for closed school and false certification discharges.

Discussion: We disagree with commenters that relief for borrower defense claims should be determined in a separate proceeding from the Department's right to recovery from schools for the open school group borrower defense process described in § 685.222(h). For borrower defenses asserted as to an open school, the Department is not only responsible for making determinations on relief for claims, but may also be entitled to recover against the school. This right to recover, which will also turn on the facts of the borrower defense claim, must be decided in a proceeding where the school is afforded procedural and substantive due process protections. Particularly in situations where the Department has determined that there are multiple claims against a school with common facts and claims, we believe that a single fact-finding proceeding to determine both borrowers' rights to relief, the amount of relief to be provided, and the Department's contingent right of recovery against an institution will better serve the interests of adjudicative efficiency and of conserving agency resources than individual borrower defense determinations followed by separate proceedings against the school.

Changes: None.

Group Process: Bifurcation

Comments: One commenter suggested that the Department use a bifurcated process so that the group process is used to resolve comment questions of fact and law, and then require borrowers in the putative group to file individual claims to determine the appropriate amount of relief. Such bifurcated proceedings, argued the commenter, would avoid windfalls to borrowers who would not have otherwise sought out relief and provide exact damages to students seeking relief.

Discussion: Section 685.222(f)(1) provides the Department with the discretion to form groups that may be composed only of borrowers who have filed applications through the process in § 685.222(e) or who the Department has identified from other sources, as well as groups that may include borrowers with common facts and claims who have not filed applications. In situations when groups may be composed only of borrower defense applicants, or if the hearing official determines that relief for a group with non-applicants can be ascertained without more individualized evidence, bifurcated proceedings may not be necessary or suitable. However, we believe that the regulations do not prevent a hearing official from using his or her discretion to structure a fact-finding process under § 685.222(g) or (h) as necessary based upon the circumstances of each group case, and including ordering a bifurcated process if appropriate.

Changes: None.

Meet and Confer Prior to Initiation of Group Process

Comments: Several commenters suggested the Department require or allow borrowers to confer with institutions to allow schools to remedy claims, prior to a borrower's participation in the Department's borrower defense process.

Discussion: We acknowledge that borrowers and schools may communicate and confer outside of the formal processes established for borrower defense. However, we do not believe it is necessary that the regulations include a specific requirement for schools and borrowers to meet and confer prior to a borrower's participation in a group borrower defense process under § 685.222(f) to (h).

Changes: None.

---

[32] For example, the Department provides both schools and borrowers the opportunity to request and obtain an oral evidentiary hearing in both offset and garnishment actions against a borrower and in an offset action against a school. *See* 34 CFR 30.25 (administrative offset generally); 34 CFR 30.33 (federal payment offset); 34 CFR 34.9 (administrative wage garnishment).

[33] *See* 34 CFR part 668, subparts G and H (proceedings for limitation, suspension, termination and fines, and appeal procedures for audit determinations and program review determinations).

[34] As described in § 668.222(g), the ''closed school'' group borrower defense process would apply only when the school in question has both closed and provided no financial protection available to the Secretary from which to recover losses arising from borrower defenses, and for which there is no entity from which the Secretary may recover such losses. Or, in other words, when there is no entity from whom the Department may obtain a recovery.

Initiation of Group Process: Secretarial Discretion

Comments: Many commenters supported the inclusion of a group borrower defense process. However, these commenters objected to the Department's proposal in § 685.222(f) that the initiation of a group borrower defense process be at the discretion of the Secretary. Some commenters argued that the discretion to initiate a group borrower defense process should not be given to the Secretary, whose decision may be influenced by policy or political considerations. These commenters also objected to the Department's proposal that the decision to initiate a group process would consider fiscal impact as a possible factor for consideration, stating that the decision to grant relief to large numbers of students should not be based upon cost.

Other commenters stated that the Department should provide clear guidelines, triggers, or conditions for requiring the initiation of a group process, particularly for groups of borrowers who have not filed applications with the Department (also referred to as automatic group discharges). A group of commenters suggested that such conditions should include petitions presenting plausible prima facie cases, evidence found by the Department that might present plausible *prima facie* cases, or some threshold number of cases. One commenter suggested that the regulation include provisions whereby multiple individual claims would be grouped together if the borrowers had attended the same school or trigger an investigation by the Department as the claims and the feasibility of initiating a group process. Another commenter suggested that the regulation include a non-exhaustive list of situations that would require the initiation of a group process, absent a written explanation from the Department as to why such a group process is not appropriate, or why borrowers who had not filed an application were not included if a group process was initiated.

One commenter stated that borrowers should be allowed to initiate group borrower defense claims, either for themselves or through representation by consumer advocates, legal aid organizations, or other entities, in addition to the Secretary. This commenter stated that possible concerns that allowing independent representation would give rise to an industry seeking to take advantage of borrowers, do not apply if claims are submitted by entities such as legal aid organizations, consumer advocates, and law enforcement agencies.

A few commenters stated that borrowers should be allowed to access borrower defense discharges as a group on the bases of actions by local, State, and Federal entities.

One commenter stated that to protect taxpayers, group claims should be initiated only in extreme cases, and should only come after a final, non-appealable decision has been made by a Federal or State agency or court in a contested proceeding.

Discussion: We disagree with commenters that factors or conditions mandating the initiation of a group process should be included in the regulation. As explained in the NPRM, 81 FR 39348, we believe that the Department is best positioned to make a determination as to whether the circumstances at hand would warrant the initiation of a group process. We also believe that it is also appropriate for the Department to consider the factors listed in § 685.222(f), such as the existence of common facts and claims among a putative group of borrowers, fiscal impact, and the promotion of compliance. As explained earlier in this section and elsewhere in this preamble, the group process will not only determine relief for borrower defenses for the group, but will also serve as the method by which the Department will receive an adjudication as to its right of recovery against a school on the basis of its losses from any relief awarded to borrowers in the group. We believe that it is important that the Department retain the discretion to decide if the circumstances warrant the initiation of a group process to decide its right of recovery from a school. However, we do not believe that the initiation of the group process will prevent borrowers from being able to proactively seek relief. Borrowers may choose to file individual applications for relief under § 685.222(e) or, even if their applications are identified by a designated Department official for a group process, choose to opt-out of the group process and receive determinations through the individual application process if desired. As noted in the NPRM, 81 FR 39348, the Department welcomes information from any source, including State and other Federal enforcement agencies, as well as legal aid organizations, that may assist it in deciding whether to initiate group borrower defense process under § 685.222(f), (g), and (h).

We explain our reasoning as to the different standards that may form the basis of a borrower defense in the respective sections for those standards. We believe it is appropriate that group proceedings should be initiated for claims based upon any of the allowed standards, as opposed to just one of the standards or standards outside of those described in the regulations.

Changes: None.

Third-Party Petitions for Initiation of Group Process

Comments: Many commenters stated that outside entities, such as student advocates, State AGs, and legal aid attorneys should be given a formal role in the group borrower defense process. Some of these commenters urged the Department to adopt language proposed at the third session of negotiated rulemaking in March 2016, which would have explicitly established that State or Federal enforcement agencies, or legal aid organization, may submit a written request to the Department identifying a group of borrowers for the initiation of a group borrower defense process. Under this proposed language, the Department would have responded to such requests in writing. These commenters argued that such entities have direct contact with borrowers and are likely to have necessary information for proving borrower defense claims. Commenters also stated that allowing third party petitions is important, given that the borrower defense process only allows an individual borrower to dispute a group borrower defense decision in the proposed regulation by filing an individual application. One commenter stated that allowing such third party requests will result in faster adjudications for borrowers and administrative cost-savings for taxpayers. Another commenter stated that a formal referral process would recognize both the states' role in the triad of higher education oversight and the States' efforts to protect consumers through State general consumer protection laws.

A group of commenters argued that a right for such outside entities should be included given that group determinations will result in the most widespread relief, will be the easiest way for borrowers to access relief, and are the only proposed method by which borrowers who have not filed applications may access relief.

In response to the Department's reasoning in the NPRM, 81 FR 39348, that informal communication facilitates cooperation with such entities, one commenter stated that providing such third parties with a formal petition in the regulation would not preclude informal contact and communication, but would rather increase transparency and efficiency. The commenter also suggested that, to address any concerns that parties that may take advantage of borrowers, that the final rule should allow the Secretary to decline to respond to a petition if the organization does not appear to be a bona fide organization that represents borrowers.

Discussion: We disagree that a formal right of petition for entities such as State AGs, advocacy groups, or legal aid organizations should be included in the regulations. As explained in the NPRM, 81 FR 39348, in the Department's experience, cooperation with such outside entities has been best facilitated through informal communication, which allows for more candor and flexibility between the Department and interested groups and parties. The Department always welcomes cooperation and input from other Federal and State enforcement entities, as well as legal assistance organizations and advocacy groups. To this end, the Department anticipates creating a designated point of contact for State AGs to allow for active communication on borrower defense issues and also actively encourages a continuation of cooperation and communication with other interested groups and parties. As also reiterated in the NPRM, *id.,* the Department is ready to receive and make use of evidence and input from any interested party, including advocates and State and Federal agencies.

We also reiterate our position that the determinations arising from the borrower defense process should not viewed as having any binding effect on issues, such as causes of actions that borrowers may have against schools under State or other Federal law, that are not properly within the purview of the Department. We also encourage borrowers and their representatives to weigh all available avenues for relief, whether it is through the borrower defense process or through avenues outside of the Department.

Changes: None.

Challenges to the Initiation of a Group Process

Comments: Many commenters expressed concern that the group borrower defense process would not include an opportunity for schools to dispute the initiation of a group process and the formation of the group. One commenter stated that the lack of a provision for schools to contest the formation of the group was in violation of due process. Several commenters expressed concern that schools are not given a right to contest the Department's decision as to whether there are ''common facts and claims'' to initiate a group process and requested clarification of that factor. Several commenters stated that the Department's proposal effectively would allow the Department to certify a class, without any of the procedural protections available to defendants in a class proceeding under Federal Rule of Civil Procedure 23. One commenter expressed concern that the proposed regulation does not require that the Department initiate a group process only where common facts and claims are found among the borrowers in the group, but rather gives the Secretary discretion to consider a nonexclusive list of factors. One commenter stated that the Department should define the sources of information the Department would use to identify borrowers for inclusion in a group process.

One commenter stated that by not providing a review of the Department's initiation or group certification decision by the hearing official or allowing a challenge by the school, and by proposing that the Department's decision to initiate a group process may consider the factor of ''compliance by the school or other Title IV participants,'' that the purpose of the group borrower defense process is to hold schools accountable and make them examples to the industry, and not to efficiently handle claims before the Department.

Discussion: We disagree that the regulations should include an explicit step by which an institution may dispute the formation or composition of a group under § 685.222(f). As discussed previously in this section, the Department is developing agency rules of practice and procedure for borrower defense, which will be informed by the legal requirements for administrative adjudications and the due process protections provided in the Department's other administrative adjudications. For instance, we will consider the proceedings including those under 34 CFR part 668, subparts G and H, which allow for standard motion practice and interlocutory appeals. We believe that, as proposed, § 685.222(f), (g), and (h) provides hearing officials with the flexibility and discretion to allow motions by parties as is deemed appropriate.

We believe that it is appropriate that § 685.222(f) notes that the Department may generally consider a nonexhaustive list of factors in deciding to initiate a group claim. As described earlier, we believe it is important for the Department to retain discretion in deciding whether to initiate a proceeding to adjudicate its right of recovery from a school, as a contingent claim to a hearing official's relief determination for the borrower defense claims of a group of borrowers in the same process. Similarly, we believe that it is important for the Department to retain the flexibility to bring groups of varying sizes or types before a hearing official in a group process, including groups that are formed in a manner more akin to a joinder of parties under Federal Rule of Civil Procedure 20 than to a class action under Federal Rule of Civil Procedure 23.

Regarding the sources of information the Department will use to identify borrowers for inclusion in a group process, as explained in the NPRM, in addition to applications submitted through the process in § 685.222(e), the Department also may identify borrowers from records within its possession or from information that may be provided to the Department by outside sources. We do not believe further clarification as to such sources of the information is necessary.

We disagree that consideration of the compliance impact of a group borrower defense claim is inappropriate for the initiation of a group process and also disagree that this factor lends an appearance of bias or unfairness to the fact-finding processes described in § 685.222(f), (g), and (h). As discussed above, the procedure we will use for the group process will provide the institution with due process protections very similar to those that the Department now uses when it fines an institution or terminates the eligibility of an institution to participate in the title IV, HEA programs, which are found in current subpart G of part 668. These rules do not preclude motion practice, nor will the rules we develop. Moreover, given that such proceedings will involve the Department's right of recovery against schools, we believe that is appropriate for the regulations to reflect that the Department will consider a number of factors in its decision whether to initiate a process for the adjudication of such recovery by the Department. As stated in the NPRM, the group borrower defense process is intended to provide simple, accessible, and fair avenues to relief for borrowers, and to promote greater efficiency and expediency in the resolution of borrower defense claims, and we believe this structure furthers that goal.

Changes: None.

Members of the Group

Comments: Many commenters supported the Department's proposal under § 685.222(f)(1)(ii) that borrowers who may not have filed an application for borrower defense may be included as members of a group for a determination of relief. Such commenters urged the Department to establish criteria requiring the initiation of such a group process.

A number of other commenters opposed the proposal and suggested that only borrowers who have filed an individual claim be included in the group process. These commenters stated that limiting group members to applicants would ensure that only borrowers who have actually been harmed would receive relief. Other commenters also argued that non-applicants should not be included in the group process, due to concerns about the use of borrowers' personal information and consent.

Other commenters stated that borrowers should only be allowed to participate in the group process if they affirmatively opt-in to the process. Several of these commenters also cited concerns about the use of borrowers' personal information and consent if an opt-out method is used.

Discussion: We appreciate the commenters' support for the use of a group process to resolve claims for a group with non-applicant borrowers as described in § 685.222(f)(1)(ii). However, as discussed earlier in this section, we believe that it is appropriate that the Department retain the discretion to initiate the group process, given that the Department will have the most information regarding the circumstances and the Department's contingent interest in the proceedings.

We disagree with the commenters that suggested that the group processes described in § 685.222(f), (g), and (h) should only include borrower defense applicants or that we should require borrowers to affirmatively opt-in to the process. We believe that, where the Department has decided to bring a group borrower defense proceeding and non-applicant borrowers with common facts and claims can be identified, such borrowers should also be entitled to the benefits of the designated Department official's advocacy and the opportunity to obtain relief and findings in such proceedings. Additionally, providing such borrowers with an opportunity to opt-out of the proceedings, given sufficiency of the notice to be provided by the Department to such borrowers, follows well-established precedent in class action law. *See, e.g., Phillips Petroleum Co.* v. *Shutts,* 472 U.S. 797 (1985).

The Department will continue to safeguard borrowers' personal information in this process, according to its established procedures.

Changes: None.

Comments: None.

Discussion: In further reviewing proposed § 685.222(f)(2), the Department has determined that if a group process for borrower defense is initiated, and the Secretary has identified a borrower who has not filed a borrower defense application pursuant to § 685.222(f)(1)(ii), the borrower should be granted forbearance or, if the borrower is in default on the loan at issue, then the procedure for a defaulted loan should be followed, as if the borrower had filed a borrower defense to repayment application under § 685.222(e)(2).

Changes: We have revised § 685.222(f)(2) to provide that the forbearance and defaulted loan procedures will be followed for members of a group identified by the Secretary who have not filed a borrower defense application.

Opt-Out for Group Discharge; Reopening by the Secretary After Determination Is Made

Comments: A number of commenters objected to the Department's proposal in § 685.222(i)(2) that borrowers would be given an opportunity to opt-out of a group determination of relief. One commenter stated that providing borrowers with an opt-out would provide borrowers with the ability to bring successive, identical claims in the group and individual processes, and would create unpredictability and administrative inefficiencies. The commenter stated that borrowers who have agreed to be part of the group process should be bound by any resulting decision. One commenter stated that allowing only one opportunity for a borrower to opt-out of the group process would be consistent with Federal Rule of Civil Procedure 23, prevent uncertainty and inconsistency, and would further the purpose of the group borrower defense process to promote efficiency and expediency in the resolution of claims.

Other commenters stated that allowing borrowers to opt-out of a denial of a group claim, to file an individual claim, would place an undue burden on schools to defend the same claim multiple times. Some of these commenters stated that this situation would deprive schools of protection from double jeopardy. These commenters expressed concern that the financial resources schools would have to expend to defend such claims would lead to tuition increases for students. Several commenters stated that allowing such an opt-out would allow students to file multiple, unjustified claims for the purpose of delaying repayment.

One commenter also suggested that a time limit be imposed upon the Secretary's ability to reopen a borrower's application is bound by any applicable limitation periods. Several commenters stated that relief in the group process should be opt-out only.

Discussion: We appreciate the concern raised by commenters that allowing an opt-out for borrowers after a determination for relief has been made will subject schools to continuing litigation risk and uncertainty. As a result, we will modify § 685.222(i) to remove the post-determination opt-out opportunity for borrowers in group proceedings.

We disagree that a time limit should be placed on the Secretary's ability to reopen a borrower's application. We believe that if the Department becomes aware of new evidence that would entitle a borrower to relief under the regulations, then the borrower is entitled to relief regardless of the passage of time.

Changes: We have revised § 685.222(i) to remove the opportunity for a borrower to opt-out of the proceedings after a determination for relief has been made in a group proceeding.

Comments: None.

Discussion: In further reviewing proposed § 685.222(g)(4) and (h)(4), the Department has determined that if a borrower defense application is under review because a borrower defense application has been reopened by the Secretary under § 685.222(e)(5)(ii), the borrower should be granted forbearance or, if the borrower is in default on the loan at issue, then the procedure for a defaulted loan should be followed, as when the borrower filed an initial borrower defense to repayment application.

Changes: We have revised § 685.222(g)(4) and (h)(4) to provide that the forbearance and defaulted loan procedures will be followed when the Secretary has reopened a borrower defense application.

Due Process Proceedings

Comments: Several commenters stated that the proposed regulations do not provide details of how and what schools may dispute in the group borrower defense fact-finding process, and requested clarification in the final regulations. Other commenters expressed concern that the proposed group fact-finding process does not provide sufficient due process protections for schools. These commenters emphasized that participation by schools would create a more fair process and increase the reliability of the results.

One commenter stated that the limited protections in the proposed group borrower defense process does not provide schools with an opportunity to confront and cross-examine adverse witnesses and thus does not satisfy the due process requirements established in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); and *Greene* v. *McElroy,* 360 U.S. 474 (1959) for depriving schools of their property rights to funds already received. Several commenters suggested that the Department use the procedures in 34 CFR part 668, subpart H, to ensure due process protections for schools.

Commenters expressed concern about institutions' opportunities to receive notice and evidence in the proposed group borrower defense process. Many of these commenters expressed concern and requested clarification regarding the Department's proposal in § 685.222(f)(2)(iii) that notice to the school of the group process would occur ''as practicable.'' One commenter suggested that we include language specifying that no notice will be provided if notice is impossible or irrelevant due to a school's closure. Other commenters expressed concern that the proposed regulations do not specify whether the scope of a group will be disclosed to schools and stated that schools must be aware of the members of the group in order to be able to raise a defense. Another commenter expressed concern that the proposed regulations do not require the Department to notify the school as to the basis of the group; the initiation of the borrower defense process; of any procedure or timeline for requesting records, providing information to the Department, or making responses; or provide schools with an opportunity to appear at a hearing.

Several commenters stated that institutions should be provided with notice and copies of all the evidence presented underlying the borrower defense claims in a group process. Another commenter stated that the proposed regulation gives the Department complete discretion as to what evidence the trier of fact will use to make decisions. This commenter stated that, when combined with the proposal that the persons advocating for students, as well as the persons making decisions, in the group borrower defense process are all chosen by the Department, this discretion appears to favor students over schools in the group process.

Several commenters also stated that institutions should be given an opportunity to provide a written response to the substance of the group borrower defense claim within a certain number of days (45 or 60) after the resolution of any appeal on the Department's basis for a group claim or of the notification to the school of the group process if no challenge to the group is filed, provided with copies of any evidence and records to be considered or deemed relevant by the hearing official, be allowed to present oral argument before the hearing official, and provided with a copy of the hearing official's decision in the group process. One commenter emphasized that the decision should identify the calculation used by the hearing official for the amount of relief given by the decision. These commenters also stated that institutions should be provided with a right of appeal to the hearing official's decision in both the closed and open school group processes. One commenter expressed concern that the proposed process does not include any process for how an appeal may be filed.

Several commenters expressed concerns that the process does not appear to provide to any opportunities for schools to conduct discovery or to cross-examine witnesses. Some of these commenters expressed the view that, in cases where the rebuttable presumption proposed in § 685.222(f)(3) applies, schools will need to be able to question borrowers in order to rebut the presumption.

One commenter stated that the group borrower defense process should allow for both students to present their own claims and institutions to have the same opportunity to present a defense, including any affirmative defenses, and to appeal adverse decisions. The commenter stated that both the school and the borrower should have such opportunities to present evidence and arguments in any proceeding or process to determine claims, not just proceedings where recovery against the school is determined. The commenter emphasized that permitting school participation would lead to correct results, since schools often have information as to any alleged wrongdoing.

Discussion: The Department understands commenters' concerns regarding the broad guidelines for the group fact-finding process established in § 685.222(f), (g), and (h). As noted throughout this section, the group borrower defense process involving an open school [35] in § 685.222(h) would be structured to provide the substantive and procedural due process protections both borrowers and schools are entitled to under applicable law, including those provided under the APA, 5 U.S.C. 554, and under the Department's other administrative proceedings. Such protections would include those regarding notice; the opportunity for an oral evidentiary hearing where the parties may confront and cross-examine adverse witnesses if warranted,); or those for the submission and exchange written material, as provided under enforcement procedures at 34 CFR part 668, subpart G. The Department is developing procedural rules to govern the fact-finding processes described in both § 685.222(e) and (f) to (h), which will establish these details more firmly and be informed by the procedures and protections established by the Department in its other administrative proceedings, such as 34 CFR part 668, subparts G and H.

We appreciate the concern that § 685.222(f)(2)(iii) is not clear as to the Department's intent that notice of a group proceeding will occur unless there is no party available to receive such notice—in other words, as would be the case under the closed school group borrower defense process described in § 685.222(g). We are revising § 685.222(f)(2)(iii) to clarify that no notice will be provided if notice is impossible or irrelevant due to a school's closure.

Changes: We have revised § 685.222(f)(2)(iii) to clarify that no notice will be provided if notice is impossible or irrelevant due to a school's closure.

Rebuttable Presumption of Reliance

Comments: A number of commenters objected to § 685.222(f)(3), which provides that a rebuttable presumption of reasonable reliance by members of the group applies if a group borrower defense claim involves a substantial misrepresentation that has been widely disseminated. One commenter stated that reliance cannot be presumed any more than the occurrence of a misrepresentation can be presumed, and that such an approach does not comply with general legal principles. Another commenter expressed concern that the rebuttable presumption of reasonable reliance would impermissibly preclude schools from presenting evidence as to the main fact of a group borrower defense case. These commenters expressed concern that the presumption

[35] As described in § 668.222(g), the ''closed school'' group borrower defense process would apply only when the school has both closed and provided no financial protection available to the Secretary from which to recover losses arising from borrower defenses, and for which there is no entity from which the Secretary may recover such losses. Or, in other words, when there is no entity from whom the Department may obtain a recovery.

would be difficult or impossible for schools to rebut. One commenter expressed concern that a school would be unable to rebut the presumption for borrowers who are unknown or not named as being part of the group for the group borrower defense process. One commenter expressed concern that the rebuttable presumption of reliance would be difficult for schools to disprove, particularly in situations where disproving a claim would require documentation that falls outside of the record retention requirements.

One commenter stated that the presumption would set up a system by which omissions by school employees or agents or misunderstandings by students may be considered substantial misrepresentations, without the Department needing to show reliance or that the misconduct caused the harm at issue. The commenter expressed general concern that the Department has proposed a negligence standard that is not contemplated by the HEA, and that this expansion in the standard has not been justified by the Department. The commenter argued that the presumption would allow claims based on accusations of omissions or misunderstandings on which the borrower did not rely.

One commenter stated that the presumption would threaten institutions with high liability and impose high costs on taxpayers. A couple commenters stated that the presumption is unfair, absent an intent or materiality requirement.

One commenter stated that it objected to the establishment of the rebuttable presumption generally, but requested clarification as to what the Department means by ''widely disseminated,'' specifically the size of the audience that would be required for a statement to be considered to have been widely disseminated and methods of dissemination that would trigger the presumption.

Several commenters supported the inclusion of a presumption of reasonable reliance on a widely disseminated misrepresentation is consistent with existing consumer protection law. One commenter stated that the presumption recognizes that it is unfair and inefficient to require cohorts of borrowers to individually assert claims against an actor engage in a well-documented pattern of misconduct.

Discussion: We disagree that the presumption established in § 685.222(f)(3) does not comport with general legal principles. It is a well-established principle that administrative agencies may establish evidentiary presumptions, as long as there is a rational nexus between the proven facts and the presumed facts. *Cole* v. *U.S. Dep't of Agric.,* 33 F.3d 1263, 1267 (11th Cir. 1994); *Chem. Mfrs. Ass'n* v. *Dep't of Transp.,* 105 F.3d 702, 705 (D.C. Cir. 1997). As explained in the NPRM, 81 FR 39348, we believe that if a representation that is reasonably likely to induce a recipient to act is made to a broad audience, it is logical to presume that those audience members did in fact rely on that representation. We believe that there is a rational nexus between the wide dissemination of the misrepresentation and the likelihood of reliance by the audience, which justifies the rebuttable presumption of reasonable reliance upon the misrepresentation established in § 685.222(f)(3). A similar presumption exists in Federal consumer law. *See, e.g., F.T.C.* v. *Freecom Commc'ns, Inc.,* 401 F.3d 1192, 1206 (10th Cir. 2005); *F.T.C.* v. *Sec. Rare Coin & Bullion Corp.,* 931 F.2d 1312, 1315–16 (8th Cir. 1991).

We disagree that the rebuttable presumption establishes a different standard than what is required under the current regulations. As explained under ''Substantial Misrepresentation,'' the Department's standard at part 668, subpart F, has never required intent or knowledge as an element of the substantial misrepresentation standard. Additionally, the current standard for borrower defense allows ''any act or omission of the school . . . that would give rise to a cause of action under applicable State law.'' 34 CFR 685.206(c)(1). As explained under ''Federal Standard'' and ''Substantial Misrepresentation,'' under many States' consumer protection laws, knowledge or intent is not a required element of proof for relief as to an unfair or deceptive trade practice or act. Moreover, we disagree with any characterization that the rebuttable presumption would remove the reliance requirement for substantial misrepresentation in group proceedings. The rebuttable presumption does not change the burden of persuasion, which would still be on the Department. As § 685.222(f)(3) states, the Department would initially have to demonstrate that the substantial misrepresentation had been ''widely disseminated.'' Only upon such a demonstration and finding would the rebuttable presumption act to shift the evidentiary burden to the school, requiring the school to demonstrate that individuals in the identified group did not in fact rely on the misrepresentation at issue. This echoes the operation of the similar presumption of reliance for widely disseminated misrepresentations under Federal consumer law described above. *See Freecom Commc'ns, Inc.,* 401 F.3d at 1206. A school would be entitled to introduce any relevant evidence to rebut the presumption and what may constitute relevant evidence may vary depending on the facts of each case. Similarly, what may be viewed as ''wide dissemination'' may also vary from case to case.

There appears to be confusion as to whether schools would be required to rebut the presumption of reliance as to ''unknown'' or ''unidentified'' members of the group. Under § 685.222(f)(1)(ii), the Department will identify all members of the group. Although the group may include borrowers who did not file an application through the process in § 685.222(e), the members of the group will be known in the group process.

We appreciate the support of commenters supporting the establishment of a rebuttable presumption. As discussed earlier, one of the reasons we are establishing a rebuttable presumption in cases of a widely disseminated substantial misrepresentation is that we believe that there is a rational nexus between a well-documented pattern of misconduct in the instance of a wide dissemination of the misrepresentation and the likelihood of reliance by the audience.

We also disagree that a materiality or intent element is necessary, as explained earlier under ''Claims Based on Substantial Misrepresentation.''

Changes: None.

Representation in the Group Process

Comments: Many commenters expressed concern that the Department would designate a Department official to present borrower claims in the group borrower defense fact-finding process, when schools would be permitted to obtain their own representation in the process. These commenters stated that they should be allowed to obtain their own outside representation. Some commenters stated that such outside representation should be either paid for by the Department, or that schools should not be allowed to participate in the group process until after the school's liability has been determined.

One commenter stated that borrowers should be allowed to have their own representatives in the group borrower defense process, either at their own expense or pro bono. This commenter stated that borrowers should at least be allowed to act as ''intervenors'' in a group borrower defense process, with separate representation, to protect their interests.

One commenter suggested that the Department establish procedures for individual borrowers and their legal representatives to petition the Department to initiate a group proceeding or, in the alternative, establish a point of contact for borrowers to notify the Department of potential candidates for group claims. The commenter also suggested that borrowers be allowed to file appeals to the Secretary in group proceedings, given borrowers' vested interest in obtaining favorable adjudications that will make obtaining relief easier for borrowers.

Discussion: We disagree that borrowers should be allowed to initiate group borrower defense claims or be able to retain their own counsel and present evidence and arguments before a hearing official in a group borrower defense process. As explained earlier in this section, we acknowledge that the designated Department official responsible for presenting the group borrower defense claim and initiating a group borrower defense process would not be the borrower's legal representative. However, as the holder of a claim to recovery that is contingent upon the relief awarded to a group's borrower defense claims, we believe that the Department is the appropriate party to present both the group's borrower defense claims and the Department's claim for recovery against the institution in question. As explained in the NPRM, 81 FR 39348, we also believe that the Department's fulfillment of this role will reduce the likelihood of predatory third parties seeking to take advantage of borrowers unfamiliar with the borrower defense process. Additionally, we note that, under § 685.222(f)(2)(ii), borrowers may also choose to opt-out of a group process and participate in the process established in § 685.222(e), if they are not satisfied with the Department's role in the group proceeding. Borrowers may also reach out to the designated Department official if they have questions about the process.

As discussed earlier in this section, in consideration of borrowers' desire for timely and efficient adjudications, we disagree that borrowers should be provided with a right of appeal to the Secretary. However, we note that borrowers may also seek judicial review in Federal court of the Department's final decisions or request a reconsideration of their claims by the Department upon the identification of new evidence under § 685.222(e)(5).

Changes: None.

Appeals

Comments: Several commenters expressed concern that, in the group borrower defense process, liability will be automatically assigned to a school, and that schools will have no opportunity to dispute the liability. One commenter stated this is unfair to school owners, and to principals and affiliates of schools, from whom the Department proposes to seek repayment in certain situations.

Discussion: The commenters are incorrect. Section 685.222(h)(2) provides both schools and the designated Department official in the open school group hearing process with the opportunity to file an appeal with the Secretary from a hearing official's decision. Further, § 685.222(g), which does not provide for such an appeal, applies only if a school has closed and has provided no financial protection available to the Secretary from which to recover losses arising from borrower defenses, and for which there is no other entity from which the Secretary can otherwise practicably recover such losses. If the Secretary seeks to recover borrower defense losses from the principal or affiliate of a ''closed school,'' the open school process in § 685.222(h) would apply.

Changes: None.

Open and Closed School Group Processes

Comments: Several commenters expressed concern about schools' participation in the closed school group process. One commenter expressed concern that in the group process for closed schools described in proposed § 685.222(g), that the hearing official deciding the claims at issue may consider additional information or responses from the school that the designated Department official considers to be necessary. This commenter stated that if there are persons affiliated with the school who are prepared to participate, then those persons should be given full rights of participation in the closed school group borrower defense process. One commenter stated that institutions should be provided with a right of appeal to the hearing official's decision in both the closed and open school group processes.

One commenter requested clarification as to claims filed by borrowers who have attended a school that has since closed, but where the school has posted a letter of credit or other surety with the Department.

Another commenter supported the distinction between the open school and closed school group processes.

Discussion: The commenters are incorrect about the nature of the closed school borrower defense group process described in § 685.222(g). As described, the standard provides that § 685.222(g) will apply only if a school is closed, there is no financial protection available to the Secretary from which to recover losses from borrower defense claims, and there is no other entity from which the Secretary may recover. If there is a letter of credit or some other surety that the school has posted to the Department and that is currently available to pay losses from borrower defense claims, the open school, borrower defense group process under § 685.222(h) will apply. If there is no ability for the Department to recover on any losses resulting from an award of relief in the closed school, group borrower defense process, then the Department will be unable to exercise its right to recovery against a school and the school will not face any possible deprivation of property. As a result, we believe it is appropriate that schools do not receive a right of administrative appeal in the closed school group process. If there are persons affiliated with the school who disagree with the final decision resulting from the process, however, such persons may still seek judicial review in Federal court under 5 U.S.C. 702 and § 704.

Changes: None.

Public Databases

Comments: A group of commenters suggested that decision makers be required to document decisions so that they may be appealed and reviewed in Federal court. These commenters and others also requested that the regulations require public reporting of borrower defense adjudications and that the Department maintain a public, online database of decisions resulting from any group process or individual application. The commenters stated that such public reporting would allow political representatives and advocates to review such decisions, suggest improvements, and ensure consistency in the Department's decision making.

One commenter also stated that the Department should develop a publicly available information infrastructure, such as a docketing system, to allow users to identify and track cases that may be candidates for group proceedings or informal aggregation and to allow users to learn from Departmental decisions.

Discussion: We appreciate the commenters' concerns regarding transparency and consistency in the borrower defense process, and will consider their suggestions as we move forward with the implementation of these regulations. All of the Department's administrative determinations are presumptively available for public disclosure, subject to privacy concerns. We will contemplate and evaluate appropriate methods for the release of information about borrower defense claims on an ongoing basis as the processes and procedures in the regulations take effect.

Changes: None.

Informal Aggregation

Comments: One commenter suggested that, in addition to the group borrower defense process, the Department allow hearing officials to informally aggregate, or to allow borrowers to petition for informal aggregation of, separate but related cases to be heard in front of the same trier of fact. The commenter stated that such informal aggregation would expedite the resolution of similar claims, enhance consistency, and conserve resources.

Discussion: We appreciate the suggestion by the commenter, but do not believe it is necessary to modify the regulations to provide for informal aggregation. Such aggregation would be within the discretion of the hearing officials presiding over the group processes as part of their routine caseload management responsibilities.

Changes: None.

FFEL Borrowers

Comments: Several commenters stated that FFEL borrowers should be included in any group discharges for borrower defense. One commenter suggested that the Department allow FFEL borrowers to participate in the group and individual borrower defense processes without having to consolidate FFEL Loans into Direct Consolidation Loans or by having to prove any relationship between the borrowers' schools and lenders. This commenter argued that not all FFEL borrowers are eligible for Direct Consolidation Loans, and that the proposed regulations do not address the needs of such FFEL borrowers.

Discussion: We disagree with the suggestion that FFEL borrowers be included in any group discharges for borrower defense. As explained under ''Expansion of Borrower Rights,'' FFEL Loans are governed by specific contractual rights and the process adopted here is not designed to address those rights. We can address potential relief under these procedures for only those FFEL borrowers who consolidate their FFEL Loans into Direct Consolidation Loans. As cases are received, the Department may consider whether to conduct outreach to FFEL borrowers who may be eligible for borrower defense relief by consolidating their loans into Direct Consolidation Loans under § 685.212(k) as appropriate.

Changes: None.

Abuse by Plaintiffs' Attorneys

Comments: Several commenters expressed concern that the group process would create opportunities for plaintiffs' attorneys. The commenters stated that the proposed regulations would encourage attorneys to have borrowers file suspect claims with the Department, while also bringing class actions in court. The commenters stated that this would result in the Department initiating a group process, identifying members of a putative class for the court proceeding, and obtaining determinations that class action attorneys would then be able to use in court to their advantage, while collecting attorneys' fees.

Discussion: We disagree that the regulations will create opportunities for plaintiffs' attorneys. Under the regulations, the Department has the discretion to decide whether a group borrower defense process will be initiated, and the filing of individual claims may not necessarily lead to the initiation of a group borrower defense process. Additionally, we recognize that borrowers may seek to utilize other avenues for relief outside of the borrower defense process and provide in § 685.222(k) that if the borrower has received relief through other means, the Department may reinstate the borrower's obligation to repay the loan to protect the Federal fiscal interest and avoid receipt by the borrower of multiple recoveries for the same harm.

Changes: None.

Borrower Relief

Process Arbitrary and Outside the Scope of Department Authority

Comments: Some commenters argued that the proposal for calculation of borrower relief is arbitrary and that the Department is neither qualified nor authorized to conduct this calculation. According to one commenter, implementation of the proposed framework for calculating relief would constitute arbitrary agency adjudication under relevant case law. One commenter cited 20 U.S.C. 3403(b) and section 485(h)(2)(B) of the HEA as imposing statutory limits on the Department's authority to direct or control academic content and programming, and argued that the Department would be exceeding its authority by attempting to assess the value of an education by including the quality of academic programming among the factors to be considered in carrying out an adjudication on any borrower defense claim.

Discussion: We disagree that the Department's proposal to adjudicate or calculate borrower relief is arbitrary. By directing the Secretary to designate acts and omissions that constitute borrower defenses to repayment in section 455(h) of the HEA, Congress has explicitly charged the Department, under the current and new regulations, to adjudicate the merits of claims brought alleging such acts and omissions. Such adjudications necessarily require the Department to determine the relief warranted by a proven claim against an institution. If a court adjudicating a borrower's cause of action against the institution would assess the value of the education provided in order to determine relief, section 455(h) requires and authorizes the Department to do so as well.

Further, we do not agree that the Department's adjudications on borrower defense claims will involve an ''exercise [of] any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system . . . or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.'' 20 U.S.C. 3403(b). As described above earlier, the Department's adjudications will determine whether a school's alleged misconduct constitutes an ''act[] or omission[] of an institution of higher education a borrower may assert as a defense to repayment of a loan . . .'', 20 U.S.C. 1087e(h), and provide relief to borrowers and a right of recovery to the Department from schools, in a manner that is explicitly authorized by statute. Notwithstanding, we believe that the provision of relief, as the result of and after any conduct by the school, through the borrower defense process is not the same as the active ''exercise [of] any direction, supervision, or control'' over any of the prohibited areas.

Changes: None.

Presume Full Relief

Comments: A number of commenters argued in favor of a presumption of full relief for borrowers. These commenters recommended that Appendix A be either deleted or modified to eliminate or alter the proposed partial relief calculations. The commenters contended that the proposed partial relief calculation process would be complex and subjective and potentially deny relief to deserving borrowers.

Multiple commenters argued that calculating partial relief would be excessively complicated, expensive, and time consuming. According to these commenters, the process of calculating relief would lead to the waste of Department resources and cause unnecessary delays in the provision of relief to borrowers. Additionally, commenters were concerned about the possibility that this process would be confusing and difficult for borrowers to navigate.

Some commenters argued that the proposed partial relief calculation process would unfairly subject borrowers who had already succeeded on the merits of their claims to a burdensome secondary review process. Commenters noted that, in the case of a claim based on a school's substantial misrepresentation, borrowers would have already demonstrated entitlement to relief by meeting the substantial misrepresentation standard. Consequently, these commenters suggested that the relief calculation process would create an unnecessary hurdle to the appropriate relief for these borrowers. The commenters argued that, after being defrauded by their schools, student borrowers should not be required to undergo an extensive process of calculating the value of their education. Further, these commenters argued that the partial relief system would be unfair because it affords a culpable school the presumption that its education was of some value to the borrower.

Other commenters suggested that it would be unfair for the borrower to bear the burden of demonstrating eligibility for full relief. Instead, these commenters proposed that the Secretary should bear the burden of demonstrating why full relief is not warranted. The commenters proposed that full relief be automatic for borrowers when there is evidence of wrongdoing by the school. These commenters suggested either eliminating partial relief or limiting it to cases in which compelling evidence exists that the borrower's harm was limited to some clearly delimited part of their education.

Commenters suggested that, in addition to being difficult to calculate, partial relief would be insufficient to make victimized borrowers whole. To support the argument in favor of a presumption of full relief, these commenters asserted that many Corinthian students never would have enrolled had the institution truthfully represented its job placement rates.

Some commenters raised concerns about the subjectivity of the process for calculating partial relief for borrowers. These commenters were concerned that the methods proposed in Appendix A for calculating relief are too vague, afford excessive discretion to officials, and could lead to potential inconsistencies in the treatment of borrowers. Some commenters suggested that Appendix A should prescribe one particular method for calculating relief, rather than providing multiple options in order to increase certainty and consistency.

Some commenters raised concerns about the potential impact of resource inequities between schools and borrowers on the partial relief calculation process. Specifically, these commenters argued that because schools will be able to afford expensive legal representation, schools would likely be able to find technicalities in the relief calculation process, potentially resulting in the denial of relief to deserving borrowers. These commenters were particularly concerned about disadvantages faced by borrowers who cannot afford legal representation. Commenters also noted that borrowers may feel pressure to retain legal counsel, which they contended would frustrate the Department's intent to design a process under which borrowers do not need legal representation, and are shielded from predatory third-party debt relief companies.

One commenter suggested that the provision of partial relief would lead to an excessive number of claims, particularly when implemented in conjunction with what was described as a low threshold for qualified claims.

Several commenters also supported the presumption of full relief by stating that this approach would be consistent with existing legal approaches to relief for fraudulent inducement or deceptive practices. Some commenters urged the Department to adopt the approach used for false certification and closed school discharges—providing full discharges for all meritorious claims, including cancellation of outstanding balances and refunds of amounts already paid.

As an alternative to fully eliminating partial relief, some commenters suggested limiting the availability of partial relief to claims based on breach of contract, based on the proposition that when a school breaches a contractual provision, it is possible that a borrower nevertheless received at least a partial benefit from his or her education.

Several commenters argued that Appendix A should be fully removed because it adds confusion to the process and it is not clear when or how it should be applied. Some commenters argued that we should remove Appendix A and revise proposed § 685.222(i) so that full relief is provided upon approval of a borrower defense, except where the Department explains its reasoning and affords the borrower the opportunity to respond.

Discussion: As noted in the NPRM, the Department has a responsibility to protect the interests of Federal taxpayers as well as borrowers. We discuss below that while the borrowers' cost of attendance (COA), as defined in section 472 of the HEA, 20 U.S.C. 1087ll, is the starting point in cases based on a substantial misrepresentation for determining relief, we do not believe, in proceedings other than those brought under § 685.222(h), that establishing a legal presumption of full relief is justified when losses from borrower defenses may be borne by the taxpayer. While the Department's other loan discharge processes for closed school discharges, 34 CFR 685.214; false certification, 34 CFR 685.215; and unpaid refunds, 34 CFR 685.216, do provide for full loan discharges and recovery of funds paid on subject loans, the factual premises for such discharges are clearly established in statute and are relatively straightforward. In contrast, we anticipate that determinations for borrower defense claims will involve more complicated issues of law and fact. Generally under civil law, determinations as to whether the elements of a cause of action have been met so as to state a claim for relief and then to establish liability are determinations separate from those for the amount or types of relief the plaintiff may receive. To balance the Department's interest in protecting the taxpayer with its interest in providing fair outcomes to borrowers, when a borrower defense based in misrepresentation has been established, the Department will determine the appropriate relief by factoring in the borrower's COA to attend the school and the value of the education provided to the borrower by the school. Importantly, the COA reflects the amount the borrower was willing to pay to attend the school based on the information provided by the school about the benefits or value of attendance. The Department may also consider any other relevant factors. In determining value, the Department may consider the value that the education provided to the borrower, or would have provided to a reasonable person in the position of the borrower. Moreover, in some circumstances, the Department will consider the actual value of the education in comparison to the borrower's reasonable expectation, or to what a reasonable person in the position of the borrower would have expected under the circumstances given the information provided by the institution. Accordingly, any expectations that are not reasonable will not be incorporated into the assessment of value.

We acknowledge commenters' concerns that references to ''calculations'' or ''methods'' in the regulations may be confusing. As a result, we are revising § 685.222(i) to remove such references. Additionally, to address concerns that the proposed relief determination requirements appear complicated, we are also revising § 685.222(i) to directly establish the factors to be considered by the trier-of-fact: The COA paid by the borrower to attend the school; and the value of the education. The Department will incorporate these factors in a reasonable and practicable manner. In addition, the Department may consider any other relevant factors. In response to concerns that the proposed methods in Appendix A are confusing, we have also replaced the methods with conceptual examples intended to serve as guidance to borrowers, schools, and Department employees as to what types of situations may lead to different types of relief determinations. As it receives and evaluates borrower defense cases under the Federal standard, the Department may issue further guidance as to relief as necessary.

The Department emphasizes that in some cases the value of the education may be sufficiently modest that full relief is warranted, while in other cases, partial relief will be appropriate. In certain instances of full or substantial value, no relief will be provided. Thus, it is possible a borrower may be subject to a substantial misrepresentation, but because the education provided full or substantial value, no relief may be appropriate. As revised, § 685.222(i) states that the starting point for any relief determination for a substantial misrepresentation claim is the full amount of the borrower's COA incurred to attend the institution. As explained later, the COA includes all expenses on which the loan amount was based under section 472 of the HEA, 20 U.S.C. 1087ll. Taken alone, these costs would lead to a full discharge and refund of amounts paid to the Secretary. Section 685.222(i) then provides that the Department will consider the value of the education in the determination of relief and how it compares to the value the borrower could have reasonably expected based on the information provided by the school. In some cases, the Department expects that this analysis will not result in reduction of the amount of relief awarded. This could be because the evidence shows that the school provided value that was sufficiently modest to warrant full relief or what the school provided was substantially different from what was promised such that the value would not be substantially related to the value the school represented it would provide. The presence of some modest value does not mean full relief is inappropriate.

We also note that the revised regulations require value to be factored in to determinations for relief, but do not prescribe any particular approach to that process. Because there will be cases where the determination of value will be fact-specific to an individual or group of individuals—and the determination of value may pose more significant difficulties in certain situations than in others—the Department believes that the official needs substantial flexibility and discretion in determining how to incorporate established factors into the assessment of value. The fact that the case has reached the phase of relief determination necessarily means that a borrower has experienced some detriment and that a school has engaged in substantial misrepresentation or breached a contract, or was found culpable in court of some legal wrong. At that point in the process, we intend that the Official be able to employ a practicable and efficient approach to assessing value and determining whether the borrower should be granted relief and if so how much. Relief will be determined in a reasonable and practicable manner to ensure harmed borrowers receive relief in a timely and efficient manner.

We have also revised § 685.222(i) to provide that in a group borrower defense proceeding based on a substantial misrepresentation brought against an open school under § 685.222(h), the school has the burden of proof as to showing any value or benefit of the education. The Department will promulgate a procedural rule that will explain how evidence will be presented and considered in such proceedings, taking full account of due process rights of any parties. We believe that these revisions address many of the concerns that borrower defense relief determinations may be confusing or complicated.

We also note that the process for determining relief in a borrower defense claim has no bearing on the Department's authority or processes in enforcing the prohibition against misrepresentation under 34 CFR 668.71. Schools may face an enforcement action by the Department for making a substantial misrepresentation under part 668, subpart F. As described under ''Substantial Misrepresentation,'' for the purposes of borrower defense, absent the presumption of reliance in a group claim, actual, reasonable, detrimental reliance is required to establish a substantial misrepresentation under § 685.222(d). However, for the purposes of the Department's enforcement authority under part 668, subpart F, the scope of substantial misrepresentation is broader in that it includes misrepresentations that could have reasonably been relied upon by any person, as opposed to misrepresentations that were actually reasonably relied upon by a borrower. It is also conceivable that there could be a case in which a borrower did experience detriment through reasonably relying on a misrepresentation—for example, by having been induced to attend a school he or she would not have otherwise—yet the school provided sufficient value to the borrower or would have provided sufficient value to a reasonable student in the position of the borrower so as to merit less than full, or no, relief. Nevertheless, the school in such a case may still face fines or other enforcement consequences by the Department under its enforcement authority in part 668, subpart F, because a borrower reasonably relied on the school's misrepresentation to his or her detriment.

We disagree that the relief determination process would be subjective. Agency tribunals and State and Federal courts commonly make determinations on relief. We do not believe the process proposed provides a presiding designated Department official or hearing official presiding, as applicable, with more discretion than afforded triers-of-fact in other adjudicative forums.

We also disagree with commenters who expressed concerns that borrowers may be disadvantaged due to resource inequities between students and schools. As discussed under ''Process for Individual Borrowers (§ 685.222(e)),'' under the individual application process, a borrower will not be involved in an adversarial process against a school. In the group processes described in § 685.222(f) to (h), the Department will designate a Department official to present borrower claims, including through any relief phase of the fact-finding process. If a borrower does not wish to have the Department official assert his or her claim in the group borrower defense process, the borrower may opt-out of the process and pursue his or her claim under the individual borrower defense process under § 685.222(e).

We note that, in determining relief for a borrower defense based on a judgment against the school, where the judgment awards specific financial relief, the relief will be the amount of the judgment that remains unsatisfied, subject to the limitation provided for in § 685.222(i)(8) and any other reasonable considerations. Where the judgment does not award specific financial relief, the Department will rely on the holding of the case and applicable law to monetize the judgment, subject to the limitation provided for in § 685.222(i)(8) and any other reasonable considerations. In determining relief for a borrower defense based on a breach of contract, relief in such a case will be determined according to the common law of contract subject to the limitation provided for in § 685.222(i)(8) and any other reasonable considerations.

Changes: We have revised § 685.222(i) to remove references to methods or calculations for relief. We have included factors that will be incorporated by a designated Department official or hearing official deciding the claim, including the COA paid by the borrower to attend the school, as well as the value of the education to the borrower. In addition, the Department official or hearing official deciding the claim may consider any other relevant factors.

We have revised § 685.222(i) to clarify how relief is determined for a borrower defense based upon a judgment against the school or a breach of contract by the school.

We include that for group borrower defense claims under § 685.222(h), the school has the burden of proof as to any value or benefit of the education.

We have also revised Appendix A to describe conceptual examples for relief.

Calculation of Relief

Comments: Some commenters raised concerns about the appropriateness of the specific factors for consideration, and methods to be applied, in calculating partial relief. Specifically, some commenters were concerned about relying on student employment outcomes to determine the value of a borrower's education. These commenters noted that graduates exercise substantial discretion in determining what type of employment to pursue after graduation, which would likely impact relevant calculations. These commenters also cited variations in median income throughout the country as another factor that could potentially complicate the calculation process. One commenter objected to consideration of the expected salary for the field, because expected salaries in certain professions are so low. These commenters recommended that earnings benchmarks not be considered in the calculation of relief because of the risk of discrepancies associated with those considerations.

Some commenters were concerned about the reliability of the proposed methods for calculating relief in Appendix A. Specifically, commenters raised concerns about the method for calculating relief in paragraph (A). Under this method, relief would be provided in an amount equivalent to the difference between what the borrower paid, and what a reasonable borrower would have paid absent the misrepresentation. These commenters suggested that this assessment would be unreliable because it would involve speculation by the official tasked with valuing a counterfactual.

In addition, some commenters disapproved of the method in paragraph (C), which would cap the amount of economic loss at the COA. These commenters suggested that legally cognizable losses often exceed the COA. Some commenters also disapproved of the proposal to discount relief when a borrower acquires transferrable credits or secures a job in a related field. According to these commenters, the discounted relief would not reflect the true harm experienced by the borrowers. These commenters stated that transferrable credits often lose their value because they are either not used, or used at another predatory or low-value school. These commenters also argued that discounting relief based on transferrable credits could penalize borrowers with otherwise meritorious defenses who opt to take a teach out. Some commenters also argued that discounting relief when a borrower obtains a job in the field with typical wages may penalize borrowers who succeed at finding work despite the failings of their programs. One commenter was concerned that the method in paragraph (C) may be read to place a burden on the borrower to produce evidence that the education he or she received lacks value.

One commenter suggested minimizing the potential for subjectivity by replacing the proposed methods of calculation with a system for scheduling relief based on the nature of the claim. This commenter recommended providing a table outlining the percentage of loan principal to be relieved for each of a series of specific enumerated claims. Another commenter suggested that the Department specify a single theory for calculating damages that would apply in each class of borrower defense cases.

Some commenters requested additional information about the circumstances that may impact partial relief determinations.

Discussion: We acknowledge commenters' concerns with the various methods in proposed Appendix A, some of which highlighted specific concerns about different methods' applicability to various fact-specific scenarios. As discussed earlier, we also appreciate that references to calculations or methods for relief may be confusing. As a result, we have revised Appendix A to reflect conceptual examples to provide guidance to borrowers, schools, and Department employees as to different scenarios that might lead to full, partial, or no relief. As stated in revised § 685.222(i), the examples are not binding on the Department or hearing official presiding over a borrower defense claim. Rather, they are meant to be simple, straight-forward examples demonstrating possible relief scenarios, and the outcomes of any borrower defense case may vary from the examples depending on the specific facts and circumstances of each case.

Changes: We have revised Appendix A to describe conceptual examples for relief.

Comments: Some commenters were concerned that the proposed regulations would grant Department officials the authority to make determinations for which they are not qualified. Specifically, commenters were concerned that the proposed regulations do not require the Department to rely on expert witnesses for certain calculations, despite the fact that they may be necessary in some cases.

Commenters also stressed the importance of ensuring the independence of the officials involved in making relief determinations. Similarly, some commenters requested more specificity and transparency regarding who will be calculating relief and how they will be conducting those calculations.

Discussion: We believe that Department officials designated to hear individual claims, and the Department hearing officials who preside over the group claim proceedings have the capability to evaluate borrower defense claims based upon the Federal standard, similar to how Department employees perform determinations in other agency adjudications.

As discussed under ''General'' and ''Group Process for Borrower Defense,'' the Department will structure the borrower defense proceedings in ways to ensure the independence and objectivity of the Department employees presiding over such processes. With regard to commenters' concerns about transparency and specificity, as established in § 685.222(e), (g) and (h), the decisions made in the proceedings will be made available to involved parties and will specify the basis of the official's determination. All of the Department's administrative determinations are presumptively available for public disclosure, subject to privacy concerns.

Changes: None.

Group Relief

Comments: Some commenters argued that group relief should be limited to situations in which a preponderance of the evidence shows that no member of the group received any identifiable benefit from his or her education. These commenters suggested that group relief would frustrate the Department's efforts to ensure that borrowers receive only the relief to which they are entitled. These commenters suggested that in the limited circumstances where group relief is provided, the amount should be determined based on a statistically valid sample of students. Some commenters also opposed the Department's proposal to consider potential cost to taxpayers in making group relief determinations.

Discussion: Section 685.222(a)(2), for loans first disbursed after July 1, 2017, explicitly states that borrower defenses must be established by a preponderance of evidence. This requirement applies regardless of whether the borrower defenses at issue are raised in the procedure for an individual borrower in § 685.222(e) or in the group processes under § 685.222(f) to (h). However, for group claims, § 685.222(f) establishes that the group process may be initiated upon the consideration of factors including the existence of common facts and claims among the members of the group. How the preponderance of evidence requirement may apply in group borrower defenses cases may vary from case to case. Additionally, as discussed earlier, for cases of substantial misrepresentation, the starting point for any relief determination is the full amount of the borrower's costs incurred to attend the institution. We have revised § 685.222(i) to provide that in such cases against an open school, the burden shifts to the school to prove the existence of any offsetting value to the borrowers provided by the education paid for with the proceeds of the loans at issue.

We disagree with commenters that the regulation should specify that relief should be based upon a statistically valid sample of students at this time. While a statistically valid sample may be appropriate for some cases, we believe the determination of what may be the criteria for an appropriate sample for group borrower defense cases should be developed on a case by case basis.

We discuss our reasons for including fiscal impact as a factor for consideration in the initiation of group processes under ''Group Process for Borrower Defense.'' Section 685.222(i), which pertains to the relief awarded for either a group or individual borrower defense claim, does not include a consideration of fiscal impact.

Changes: We have revised § 685.222(i) to provide that in group borrower defense cases against an open school, the burden shifts to the school to prove the existence of any offsetting value to the students provided by the education paid for with the proceeds of the loans at issue.

Expand the Scope of Available Relief

Comments: Some commenters argued that full relief must extend beyond loans, costs, and fees to account for other expenses associated with school attendance. These commenters cited expenses such as travel expenses, costs of not pursuing other opportunities, child care expenses, consequential losses, and nonfinancial harms including pain and suffering. Commenters also noted that borrowers who attend fraudulent schools often lose out on portions of their lifetime Federal loan and grant eligibility, effectively losing several thousands of dollars in Pell grants that could be used towards other educational opportunities. To support the expansion of relief, one commenter cited State unfair and deceptive practices laws, under which all types of harms—direct and consequential, pecuniary and emotional—may provide the basis for relief.

Some commenters argued that relief should include updates to consumer reporting agencies to remove adverse credit reports. Citing the impact of negative credit reports on borrowers' ability to find employment, own a home, etc., commenters urged the Department to adopt language clarifying that any adverse credit history pertaining to any loan discharged through a borrower defense will be deleted. Some commenters suggested that the language in proposed § 685.222(i)(4)(ii) conform to the language in proposed § 685.206(c)(2)(iii), which requires the Department to fix adverse credit reports when it grants discharges. Additionally, some commenters argued that relief should include a determination that the borrower is not in default on the loan and is eligible to receive assistance under title IV.

One commenter requested simplification of the language describing available relief, specifically, removal of the portion of § 685.222(i)(5) describing the unavailability of non-pecuniary relief on the basis that the provision would cause confusion.

Discussion: The Department's ability to provide relief for borrowers is predicated upon the existence of the borrower's Direct Loan, and the Department's ability to provide relief for a borrower on a Direct Loan is limited to the extent of the Department's authority to take action on such a loan. Section 455(h) of the HEA, 20 U.S.C. 1087e(h), gives the Department the authority to allow borrowers to assert ''a defense to repayment of a [Direct Loan],'' and discharge outstanding amounts to be repaid on the loan. However, section 455(h) also provides that ''in no event may a borrower recover from the Secretary . . . an amount in excess of the amount the borrower has repaid on such loan.'' As a result, the Department may not reimburse a borrower for amounts in excess of the payments that the borrower has made on the loan to the Secretary as the holder of the Direct Loan.

Additionally, § 685.222(i)(8) also clarifies that a borrower may not receive non-pecuniary damages such as damages for inconvenience, aggravation, emotional distress, or punitive damages. We recognize that, in certain civil lawsuits, plaintiffs may be awarded such damages by a court. However, such damages are not easily calculable and may be highly subjective. We believe that excluding non-pecuniary damages from relief under the regulations would help produce more consistent and fair results for borrowers.

The Department official or the hearing official deciding the claim would afford the borrower such further relief as the Department official or the hearing official determines is appropriate under the circumstances. As specifically noted in § 685.222(i)(7), that relief would include, but not be limited to, determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the HEA, and updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan. We do not believe a modification of this provision to conform with § 685.206(c)(2)(iii) is necessary.

Changes: None.

Comments: Some commenters suggested that the proposed regulations could result in excessive institutional liability. These commenters argued that institutions should be liable under a successful claim only for costs related to tuition and fees, rather than all amounts borrowed. Commenters supported limiting claims for relief to the payment of loans issued under title IV, and only the portion of loans directly related to the costs of the education. Some commenters proposed that relief be limited to funds actually received by the institution. One commenter cited the measure of student loan debt contained in the Department's Gainful Employment regulations to support this proposed cap on relief. In support of this position, several commenters argued that some students borrow excessively, and institutions play a limited role in determining the level or purpose of student borrowing. These commenters opposed holding institutions liable for loans borrowed to support a student's living expenses because of the attenuated nature of the nexus between any act or omission underlying a valid borrower defense claim and a student's living expenses while enrolled. These commenters were concerned that assigning responsibility to schools in excess of tuition and fees would constitute an unjustifiable, unprecedented expansion of potential institutional liability.

Discussion: Since their inception, the Federal student loan programs were designed to support both tuition and fees and living expenses in recognition of the fact that students need resources such as food and housing when they are pursuing their educations. Indeed, the HEA's definition of cost of attendance, 20 U.S.C. 1087ll, includes tuition, fees, books, supplies, transportation, miscellaneous personal expenses including a reasonable allowance for the documented rental or purchase of a personal computer, room and board, childcare, and expenses related to a student's disability if applicable. When a student makes the choice to attend an institution, he is also choosing to spend his time in a way that may require him to take out Federal loans for living expenses, and very likely to forgo the opportunity to work to defray those costs from earnings. If he had not chosen to attend the institution, he would not have taken out such loans for living expenses: His Federal aid eligibility depends on his attendance at the institution. Therefore we believe that an institution's liability is not limited to the loan amount that the institution received, since it does not represent the full Federal loan cost to students for the time they spent at the institution.[36] Regarding comments suggesting that some students borrow excessively and that institutions play a limited role in determining borrowing levels, it is important to note that institutions have the discretion to determine a reasonable COA based on information they have about their students' circumstances. Limiting gainful employment measurements to amounts borrowed for tuition and fees was reasonable for the context in which that approach was taken—measurement of eligibility of an entire program, based on borrowing decisions made by an entire cohort of completers. That context is not the paradigm for considering actual loss to individual borrowers. As discussed here, an institution may already face exposure in a private lawsuit for amounts greater than the amount the institution charged and received as tuition and fees, and the commenter offers no reason, and we see none, why a different rule should apply to determining the extent of the institution's liability for the same kinds of claims if successfully proven in the borrower defense context.

Changes: None.

Fiscal Impact Considerations Inappropriate

Comments: Commenters argued that full relief should be provided without consideration of fiscal concerns. Some commenters were concerned that consideration of fiscal impact would lead to groups of borrowers being denied relief to which they are entitled because of financial concerns. These commenters acknowledged taxpayer interests, but stated that taxpayers would benefit in the long term from a presumption of full relief because the presumption would deter fraud and increase institutional accountability. Some commenters also suggested that partial relief would negatively impact Department incentives and conduct by, for example, reducing the Department's incentive to monitor schools appropriately on the front end. One commenter opposed consideration of fiscal impact because of concerns about the Department's potential to profit off of the student loan program.

Discussion: We discuss our reasons for including fiscal impact as a factor for consideration in the initiation of group processes under ''Group Process for Borrower Defense.'' Section 685.222(i), which pertains to the relief awarded for either a group or individual borrower defense claim, does not include a consideration of fiscal impact.

Changes: None.

Institutional Accountability

Financial Responsibility

General Standards § 668.171

Scope of Rulemaking

Retroactivity and Authority

Comments: Commenters argued that the proposed financial protection triggers exceeded the Department's authority under the HEA to assess financial responsibility on the ground that the proposed regulations would be impermissibly retroactive. In particular, commenters objected to the proposed requirement in § 668.171(c)(3) that a school is not financially responsible if it has been required by its accreditor to submit a teach-out plan because of a Department action to limit, suspend, or terminate the school, or if its accreditor has taken certain actions due to failure to meet accreditor standards and not later notified the Department that the failure has been cured.

Others objected that proposed § 668.171(c)(1)(i)(A) is also impermissibly retroactive by providing that a school that, currently or during the three most recently completed award years, is or was required to pay a debt or liability arising from a Federal, State, or other oversight entity audit or investigation, based on claims related to the making of a Federal loan or the provision of educational services, or that settles or resolves such an amount that exceeds the stated threshold, is not financially responsible. Under proposed § 668.175(f)(1)(i), an institution affected by either § 668.171(c)(1)(i)(A) or (c)(3) could continue to participate in the title IV, HEA programs only under provisional certification and by providing financial protection in an amount not less than 10 percent of the amount of Direct Loan funds or title IV,

[36] Common law recognizes that a party who may rescind a transaction and obtain restitution from the defendant of amounts paid to the defendant may also assert a claim for related expenditures made in reliance on the rescinded transaction.

Compensation of such loss by an award of damages is a remedy different in kind from rescission and restitution, but the remedies are not necessarily inconsistent when the claimant's basic entitlement is to be restored to the status quo ante. Damages measured by the claimant's expenditure can be included in the accounting that accompanies rescission, in order to do complete justice in a single proceeding. Recovery of what are commonly called ''incidental damages'' may thus be allowed in connection with rescission, consistent with the remedial objective of restoring the claimant to the precontractual position.

Restatement (Third) of Restitution and Unjust Enrichment, § 54 note (i).

HEA funds, respectively, received in the most recently completed fiscal year.

Discussion: None of the litigation or other provisions of the regulation are impermissibly retroactive. They attach no new liability to an event or transaction that was permissible at the time it occurred and that occurred prior to the effective date of the regulations. They simply address the risk that certain events that occurred prior to the effective date of the regulations create risks that warrant protection now. The risks in these instances are that these suits, and the other events included in § 668.171(c), can cause the institution to close or so substantially reduce operations as to generate closed school discharge claims, borrower defense claims, or both, from the students who are directly affected by the action at issue. The school is liable for borrower defense claims and closed school discharge claims; the requirement that the school provide financial protection does not increase any liability that would otherwise attach, but merely provides a resource that the Department may access to meet liabilities that would already arise if borrowers were to seek discharges on either ground. In either case, the Department would establish any such liability in the same manner in which it would were there no protection provided, and would release or refund any portion of the financial protection that was not needed to satisfy any claims established under those procedures, in which the school would have the same opportunity to object to the claims and be heard on those objections as it would have if no protection had been provided.

Regulated parties have repeatedly challenged Department rules that attached particular new consequences to actions that have already occurred. Courts have regularly rejected claims that regulations that operate like the regulations adopted here are impermissibly retroactive. A regulation is unconstitutionally retroactive if it ''alter[s] the *past* legal consequences of past actions'' [37] or, put another way, if it ''would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'' [38] Thus, whether a regulation ''operates retroactively'' turns on ''whether the new provision attaches new legal consequences to events completed before its enactment.'' [39] It is, however, well settled that ''[a] statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment.'' [40] Nor is a statute impermissibly retroactive simply because it ''upsets expectations based in prior law.'' [41] Like each of the regulations challenged in these cases, the present regulations in some instances would attach prospectively consequences for certain actions that occurred prior to the effective date of the regulations, but would not attach any new liability to those actions or transactions that were permissible when the events occurred.

Moreover, we have clarified that the regulations apply to any triggering events that occur on or after July 1, 2017. We have also removed the two triggers highlighted by these commenters as looking to certain past events in a way that mitigates almost all of the commenters' concerns. First, we modified the accrediting agency actions trigger substantially, to assess as an automatic trigger [42] only the effect of a closure of a school or location pursuant to a teach-out requirement, and consider other accreditor actions occurring in the past three years only as a discretionary trigger. There is no three-year look-back in the automatic trigger. For this and other discretionary triggers, there is an opportunity for further review of the impact of those events. We have removed the three-year look-back in the lawsuits and other actions trigger. These changes are described in more detail in the sections specific to these triggers. Finally, as we have described, the final regulations permit an institution to demonstrate, either when it reports the occurrence of a triggering event or in an action for failure to provide a required letter of credit or other financial protection, that an event or condition no longer exists or has been resolved or that it has insurance that will cover the debts and liabilities that arise at any time from that triggering event.

Changes: We have revised §§ 668.90(a)(iii) and 668.171(h) to include consideration of insurance; we have removed the three-year period for review from § 668.171(c); we have revised the teach-out provisions in § 668.171(c)(1)(iii) to consider only the effect on the overall institutional financial capability of closures of locations or institutions as determined by recalculating the institution's composite score, as discussed more fully under the heading ''Teach-out Plan''; and we have revised § 668.171(b) to provide that the regulations address only those triggering events or conditions listed in § 668.171(c) through (g) that occur after July 1, 2017.

Comments: Several commenters contended that the proposed triggers in § 668.171(c) fail to take into account the provisions in section 498(c)(3) of the HEA that require the Secretary to determine that an institution is financially responsible if the school can show, based on an audited and certified financial statement, that it has sufficient resources to ensure against precipitous closure, including the ability to meet all of its financial obligations. To support this contention, the commenters stated that the proposed regulations do not provide a process or procedural mechanism for an institution to make this statutory showing before the Department would require the institution to submit a letter of credit in response to running afoul of an automatic trigger.

Similarly, some commenters stated that requiring financial protection by reason of the occurrence of a single triggering event was contrary to the requirement in section 498(c)(1) of the HEA that the Department assess the financial responsibility of the institution in light of the total financial circumstances of the institution.

Other commenters stated that section 498(c) of the HEA requires the Department to assess financial responsibility based solely on the audited financial statements provided by the institution under section 487(c) of the HEA.

[37] *Ass'n of Private Sector Colleges & Universities* v. *Duncan,* 110 F. Supp. 3d 176, 196 (D.D.C. 2015), *aff'd sub nom. Ass'n of Private Sector Colleges & Universities* v. *Duncan,* 640 F. App'x 5 (D.C. Cir. 2016) (internal citations removed)

[38] *Ass'n of Proprietary Colleges* v. *Duncan,* 107 F. Supp. 3d 332, 356 (S.D.N.Y. 2015) (gainful employment measured by using debt and earnings incurred prior to effective date of new rule); see also: *Ass'n of Accredited Cosmetology Sch.* v. *Alexander,* 774 F. Supp. 655, 659 (D.D.C. 1991), *aff'd,* 979 F.2d 859 (D.C. Cir. 1992), and *order vacated in part sub nom. Delta Jr. Coll., Inc.* v. *Riley,* 1 F.3d 45 (D.C. Cir. 1993) and *Ass'n of Accredited Cosmetology Sch.* v. *Alexander,* 979 F.2d 859, 864 (D.C. Cir. 1992) (application of cohort default rate to eligibility using pre-rule data).

[39] Id.

[40] *Ass'n of Proprietary Colleges* v. *Duncan,* 107 F. Supp. 3d at 356.

[41] Id.

[42] Under the proposed regulations, an institution would not be financially responsible for at least one year if it was subject to a triggering event that exceeded a materiality threshold or for a State or accrediting agency action, three years after that action. In these final regulations, an institution is not financially responsible if an automatic triggering event such as a lawsuit or loss of GE program eligibility produces a recalculated composite score of less than 1.0 or for a 90/10 or CDR violation or SEC action, the occurrence of that violation or action. In both the NPRM and these final regulations, discretionary triggers refer to actions, conditions, or events that are evaluated by the Department on a case-by-case basis to determine whether they have a material adverse impact on the financial condition or operations of the institution.

Discussion: Section 498(c) of the HEA directs the Secretary to determine whether the institution ''is able . . . to meet all of its financial obligations, including (but not limited to) refunds of institutional charges and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary.'' 20 U.S.C. 1099c(c)(1). The statute uses the present tense to direct the Secretary to assess the ability of the institution to meet current obligations. The statute then provides that the Secretary shall also develop criteria based on financial ratios, which are to be measured and reported in audited financial statements. 20 U.S.C. 1099c(c)(2), (5). Obligations that accrued in the past may be reflected in financial statements showing the institution's financial status as of the close of the most recent institutional fiscal year, which are to be submitted to the Department ''no later than six months after the last day of the institution's fiscal year.'' 34 CFR 668.23(a)(4). Obligations that accrue after the close of that fiscal year are not included in those statements, and those losses that are considered probable may receive limited recognition in those statements. Potential losses from pending litigation that are not yet considered probable are not included in those statements.

Thus, as the commenters state, the statute directs the Secretary to take into account ''an institution's total financial circumstances in making a determination of its ability to meet the standards herein required.'' 20 U.S.C. 1099c(c)(2). Far from precluding the Secretary from giving controlling weight to a single significant occurrence in making this determination, the statute recognizes that the Secretary may do so if certain enumerated single adverse events have occurred in the past two to five years (*e.g.,* audit liabilities exceeding five percent of the institution's prior year title IV, HEA funding, or a limitation, suspension or termination action or settlement of such an action). 20 U.S.C. 1099c(e). The Secretary has since, at least the 1994 regulations, consistently considered even one such ''past performance'' event as sufficient grounds to render an institution not financially responsible even if it met or exceeded the requisite composite financial score, and if the Secretary nevertheless permitted the institution to participate, the institution was required to do so under provisional certification with financial protection. 34 CFR 668.174(a), 668.175(f), (g). The current regulations have also considered an institution not financially responsible if the institution is currently delinquent by at least 120 days on trade debt, and at least one creditor has sued. 34 CFR 668.171(b)(3). Thus, in considering the institution's total financial circumstances, the Secretary has consistently regarded a single such occurrence as a sufficient threat to the institution's ability ''to meet . . . its financial obligations'' as to make the institution not financially responsible. In so doing, the current regulations do not delegate to the suing creditor, or to the guarantor that brought the limitation, suspension, or termination action, the determination of the financial responsibility of the institution. To the contrary, the current regulations already identify particular past or present events as raising significant threats to the institution's ability to meet current obligations to creditors, to students, and to the taxpayer. The changes to the financial responsibility regulations articulate a more comprehensive list of adverse events that similarly call into question the institution's ability to meet current and impending obligations.

Changes: None.

Comments: Some commenters argued that under the APA, the Department cannot enact regulations applicable to time periods prior to the enactment of those regulations and therefore should remove the proposed § 668.171(c)(3), which would impose penalties on an institution that is currently, or was any time during the three most recently completed award years, subject to an action by its accrediting agency.

Discussion: As discussed above, in response to the commenters' objection that the rules are impermissibly retroactive, they are not because they affect only future participation. In light of the adoption of the composite score methodology, in this section, we evaluate risks under that methodology as they affect the current financial responsibility of the institution. We evaluate on a three-year look-back period, as a discretionary triggering event, only certain accreditor actions.

Changes: We have revised § 668.171(c)(1)(i) so that it does not include events that occurred in the prior three years, we have revised § 668.171 to apply to events occurring on or after July 1, 2017, and we have relocated accreditor actions regarding probation and show cause to § 668.171(g)(5) as discretionary triggers.

Penalty-Financial Protection

Comments: A commenter stated that requiring the institution to provide financial protection constituted a penalty on the institution, and that requiring the institution to provide such protection from its own funds constituted a deprivation of the institution's property interest in those institutional funds. The commenter stated that the requirement would also deprive the institution of its liberty interest by stigmatizing it. The commenter stated that the proposed requirement offered the institution no opportunity to dispute the requirement prior to the deprivation of these interests, and thus the deprivation would be imposed without the due process required by applicable law. The commenter stated that Congress requires the Department to provide schools with meaningful procedures before the imposition of a significant penalty. Specifically, the commenter stated that section 487 of the HEA requires the Department to afford schools ''reasonable notice and opportunity for hearing'' before imposing a ''civil penalty.'' This requirement applies when the Department seeks to limit, suspend, or terminate the school's participation in any title IV, HEA program; determine that a school has made a substantial misrepresentation; or determine that a school has violated statutes or regulations concerning the title IV, HEA programs, each of which carry severe penalties. The commenter asserted that the required financial protection under this rule constitutes a civil penalty under the HEA, and is in fact far more onerous than the other examples in the HEA. Accordingly, the commenter contended that the Department must afford parties the same process that Congress contemplated in analogous circumstances.

Discussion: The requirement that the school provide financial protection is not a ''penalty'' under the HEA, which clearly labels as ''civil penalties'' what the regulations refer to as ''fines.'' 20 U.S.C. 1094(c)(3)(B); 34 CFR 668.84. In contrast, section 498(c) of the HEA refers to financial protections using completely different terms: ''third party guarantees,'' ''performance bonds,'' and ''letters of credit.'' The fact that the financial protections may inconvenience or burden the school in no way makes their requirement a ''penalty.'' However, current regulations already require the Department to provide the school with the procedural protections that the commenter seeks. 34 CFR 668.171(e) requires that the Department enforce financial responsibility standards and obligations using the procedures pertinent to the school's participation status; for fully certified schools, the regulations require the Department to use termination or limitation actions under subpart G of part 668 to enforce the requirement that the school's participation be terminated for lack of financial responsibility, or that the school's continued participation be reduced to provisional participation status and further conditioned on the provision of financial protection. Current regulations already assure that the school will receive all the procedural protections to which the HEA entitles it, not because the Department would deprive the school of its property right in its funds (which the financial standards would not do), but because the method of enforcing the financial responsibility obligation is through a termination or limitation action, subject to the procedural protections of an administrative hearing. 34 CFR part 668, subpart G. These requirements will not change under the new regulations.

Section 668.90(a) affords the school the opportunity to demonstrate, in the administrative proceeding, that a proposed limitation or termination is ''unwarranted.'' That same regulation, however, includes some 14 specific circumstances in which the hearing official has no discretion but to find that the proposed action is ''warranted'' if certain predicate facts are proven. Among these restrictions is a provision that, in a proposed enforcement action based on failure to provide ''surety'' in an amount demanded, the hearing official must find the action warranted unless the hearing official concludes that the amount demanded is ''unreasonable.'' In addition, § 668.174 provides explicit, detailed, curative or exculpatory conditions that must be met for a school subject to a past performance issue to participate. However, these substantive requirements are not incorporated in subpart G of part 668, the regulations regarding the conduct of limitation or termination proceedings. This may have created the impression that an institution subject to the requirements of § 668.174 could raise a challenge to those requirements in an administrative action to terminate or limit the institution that does not meet the requirements of § 668.174. This was never the intent of the Department. We therefore revise the regulations in § 668.90 governing hearing procedures to make clear that the requirements in current § 668.174 that limit the type and amount of permitted curative or exculpatory matters apply in any administrative proceeding brought to enforce those requirements. As for the restriction in the final regulations on challenges to a requirement that the school provide the ''surety'' or other protection, the Department is updating and expanding one of the existing 14 provisions in which an action must be found warranted if a predicate fact is proven—in this case, the occurrence of certain triggering events, established through notice-and-comment rulemaking, that pose significant risk warranting the provision of adequate financial protection, in a minimum amount also established as sufficient through this same notice-and-comment rulemaking, with any added amount demanded and justified on a case-by-case basis. The Department is significantly revising the triggers proposed in the NPRM to simplify and reduce the number of conditions or occurrences that qualify as automatic triggers. As we discuss in adopting the composite score methodology, we measure the effect of most of the triggering events not in isolation, but only as each may affect the overall financial strength of the institution, as that strength was most recently assessed under the financial ratio analysis adopted in current regulations. § 668.172. And, for all discretionary triggers, the Department undertakes to assert a demand for protection only on a case-by-case basis, with full articulation of the reasons for the requirement.[43] For these discretionary triggers, a school may contest not only whether the predicate facts have actually occurred, but also whether the demanded ''surety''—financial protection—is reasonable.

Changes: We have revised § 668.90(a)(3) to incorporate the limitations contained in current § 668.174, as well as the limits on challenges to demands for financial protection based on the automatic triggers in § 668.171(c)–(f) as modified in these final regulations.

Composite Score and Triggering Events

General

Comments: Some commenters believed that the Department should not promulgate new financial responsibility requirements, or have otherwise engaged in a rulemaking to do so, without reviewing and making changes to the composite score methodology used in the current financial responsibility standards in subpart L of part 668, particularly in view of changing accounting standards, and the manner in which the Department applies, calculates, and makes adjustments to the composite score.

Similarly, other commenters contrasted the process used to develop these financial responsibility amendments with the process used by the Department to develop the subpart L standards. The commenters noted that, in developing the subpart L standards, the Department engaged in systematic, sustained efforts to study the issue and develop its methodology through the formal engagement and aid of KPMG, an expert auditing firm, with significant community involvement. That process took approximately two years, and began with empirical studies by KPMG into the potential impact of the rule over a year before the issuance of any proposed language. The commenters stated that, in this case, the Department is rushing out these revisions without the necessary and appropriate analysis. Commenters noted that the Department produced draft language on the triggers and letter of credit requirements in the second negotiated rulemaking session, but with no significant accompanying analysis or basis for its proposal, and did not consult effectively or sufficiently with affected parties or prepare sufficient information and documentation to convey, or for the negotiated rulemaking panel to understand, the impact of this portion of the proposed regulations.

Some commenters were concerned that the Department did not harmonize the proposed financial responsibility provisions with the current composite score requirements and questioned whether it was reasonable for the Department to require an institution with the highest composite score of 3.0 to secure one or more letters of credit based on triggering events. The commenters further questioned why the Department proposed numerous and overlapping requirements, if the Department believes that the current composite score is a valid indicator of an institution's financial health.

Overlapping Triggers

Some commenters argued that it would be unnecessarily punitive to list as separate triggering events, and thereby impose stacking letter of credit requirements for, items that may be connected to the same underlying facts or allegations. For example, a lawsuit or

[43] As discussed with regard to determining the appropriate amount of financial protection, ordinarily the expected result of closure or a significant reduction in operations is closed school discharge claims. We recognize that in some instances financial protection may be warranted for an institution that does not participate in a title IV, HEA loan program, and its closure thus cannot generate closed school claims. Such an institution remains subject to a demand based on a discretionary assessment of other potential losses, and we have revised § 668.90(a)(3) to ensure that such an institution can object to a demand for financial protection if that demand was based *solely* on the 10 percent minimum requirement generally applicable.

administrative proceeding settled with a government oversight agency for an amount exceeding a set threshold could lead an institution's accrediting agency to place the institution on probation, or an institution that fails the 90/10 revenue requirement might thereby violate a loan covenant.

As another example, commenters noted that an institution could be subject to a lawsuit or multiple lawsuits about the same underlying allegations, an accrediting agency may take action against the institution in connection with the same allegations, and a State agency may cite the institution for failing State requirements that relate to those same allegations. The commenters stated that multiple triggering events did not necessarily warrant additional financial protection and believed that this ''stacking'' of triggers is especially punitive to publicly traded institutions, which may be required to or voluntarily elect to disclose certain triggering events, such as lawsuits in reports to the SEC where making such disclosures is then itself an independent trigger. In this case, the commenters believed it was unfair to penalize a publicly traded institution twice, while any other institution with fewer shareholders or one that opts to raise capital privately would be subject to only one letter of credit requirement.

Commenters objected that it would be theoretically possible that a school could be required to post letters of credit exceeding 100 percent of the title IV, HEA funds the school receives, effectively crippling the school. The commenters cautioned that the Department should not require multiple letters of credit stemming from the same underlying facts or allegations—rather, the rules should reflect a more refined approach for setting an appropriate level of financial protection for each unique set of facts or allegations. The commenters suggested that to ensure that an institution provides the amount of financial protection that relates specifically to its ability to satisfy its obligations, the Department should evaluate each triggering event that occurs to determine whether any additional financial protection is needed.

A few commenters suggested that, rather than applying the proposed triggering events in a one-size-fits-all manner, the Department should consider other institutional metrics that serve to mitigate concerns about institutional viability and title IV, HEA program risks. For example, the commenters suggested that the Department could presumptively exclude from many of the new triggers those institutions that have low and stable cohort default rates, consistently low 90/10 ratios, a general lack of accrediting or State agency actions, or any combination of these items. The commenters reasoned that, in the context of the NPRM, these attributes would generally indicate strong student outcomes and less likelihood of borrower defense claims arising from the institution. Or, the Department could provide that institutions with cohort default rates and 90/10 ratios below specified thresholds would not be required to post cumulative letters of credit under the new general standards of financial responsibility. Similarly, the commenters urged the Department to assess the circumstances of each triggering event to determine whether any additional protection is needed rather than requiring cumulative letters of credit for each of the triggering events. The commenters believed that by taking these alternate approaches, the financial responsibility regulations could be tailored to assess institutional risk profiles on a more holistic basis, rather than in the generally non-discerning manner reflected by the NPRM.

Other commenters requested that the Department specify in the final regulations the duration of each letter of credit for each triggering event, noting that in the preamble to the NPRM, the Department stated that schools subject to an automatic trigger would not be financially responsible for at least one year based on that trigger, and in some instances, for as long as three years after the event.

A commenter asserted that the institution should be provided the opportunity to demonstrate by audited financial statements that it had the resources to ensure against precipitous closure pursuant to section 498(c)(3)(C) of the HEA.

Discussion: After carefully considering the comments, the objective of the changes that we proposed, and the availability of other measures, we are changing the method of assessing the effect of many of the triggering events. We explain here briefly the composite methodology currently used to evaluate financial strength, and how we will use the composite score methodology to evaluate whether, and how much, those triggering events actually affect the financial capability of the particular institution. In addition, as discussed later in this preamble, we are revising and refining the triggers to consider as discretionary triggering events several of the events included as automatic triggers in the NPRM.

The composite score methodology in subpart L used under current regulations is the product of a comprehensive study of the issue and of numerous financial statements of affected institutions, as well as substantial industry involvement. The 1997 rulemaking that adopted this method established a basic model for evaluating financial responsibility that was intended to serve as the core of the Department's evaluation process for proprietary and private non-profit institutions, replacing a piecemeal approach still reflected in § 668.15(b)(7), (8), and (9). The regulations in subpart L were adopted to replace the prior structure, in which an institution was required to satisfy a minimum standard in each of three independent tests. The Department replaced that with ''a ratio methodology under which an institution need only satisfy a single standard—the composite score standard. This new approach is more informative and allows a relative strength in one measure to mitigate a relative weakness in another measure.'' 62 FR 62831 (Nov. 25, 1997).[44] However, we note that even the prior financial responsibility standards considered whether the school was subject to a pending administrative action or suit by a Federal agency or State entity. § 668.15(d)(2)(ii)(C). Section 668.15 contained, and still contains, provisions addressing matters that may well occur after the audited period—for example, delinquency on an existing debt obligation, and a suit by at least one creditor, § 668.15(b)(4)(ii), as well as the same familiar past performance standards regarding parties with substantial control over the institution or the institution itself. 34 CFR 668.15(c).[45]

Although the 1997 regulations replaced the three independent financial ratio tests with the new composite score methodology as the core measure of financial responsibility,

[44] The composite score methodology assesses three aspects of financial strength but, unlike the prior method, assigns relative weights to each of the three assessments to produce a single, ''composite'' score.

[45] The 1994 financial responsibility regulations implemented the provision of section 498(c)(3)(C) of the HEA that would have allowed an institution that failed other financial responsibility to demonstrate by audited financial statements that it would not pose a risk of ''precipitous closure.'' § 668.15(d)(2)(ii). The 1997 regulations supplanted the standards in § 668.15 with new subpart L, which centered the assessment of financial responsibility on the composite score methodology. The Department there adopted the ''zone'' assessment to assess ''precipitous closing'' rather than the separate audited financial statement showing previously permitted. 62 FR 62860–62862 (1997).

those regulations retained most of the accompanying provisions dealing with examples of financial risks that would not necessarily or even ordinarily be reflected in the audited financial statements on which the composite score rests. The Department made clear in the NPRM that, despite requests to revisit or modify the composite score component of the financial responsibility regulations, we were not doing so. 81 FR 31359. Thus, we retain here unchanged the methodology that the commenters laud as the product of careful, comprehensive, and engaged development.

In these final regulations the Department addresses the significance of new events that occur after the close of an audited period, or that are not recognized, or not fully recognized, and reflected in audited financial statements, to assess whether the school, regardless of its composite score, ''is able to provide the services described in its publications and statements, to provide the administrative resources necessary to comply with the requirements of this title [title IV of the HEA], and to meet all its financial obligations. . . .'' 20 U.S.C. 1099c(c)(1). In doing so, we are expanding the consideration of events that would make a school not financially responsible in the near term—from the single example in current regulations (commercial creditor lawsuits) to other major lawsuits and other events that pose a potential material adverse risk to the financial viability of the school. In the negotiated rulemaking meetings, and in the NPRM, we articulated the adverse events that recent history indicates pose a significant risk to the continued ability of an institution to meet these several obligations. We address elsewhere in this preamble comments directed at events that pose particular risks, but discuss here the manner in which these events will be evaluated.

The composite score methodology, as commenters stressed and as we acknowledge, is designed to measure the viability of an institution from three different aspects and develop a score that assigns relative weight to each aspect to produce a score showing the relative financial health and viability of the institution. In general, institutions with a composite score of 1.5 or more are financially responsible; those with a score between 1.0 and 1.5 are in the ''zone'' and subject to increased reporting and monitoring; those with a score below 1.0 are not financially responsible, and may participate only on conditions that include providing financial protection to the Department. However, the limitations of the existing composite score methodology are two-fold: The score is calculated based on the audited financial statements for the most recent fiscal year of the institution, and the audited financial statements recognize threatened risks only if accounting rules require the institution to recognize those events. If those events are recognized, however, the composite score can readily assess their effect on the viability of the institution, with due regard for the actual financial resources of the institution, including its ability to meet exigencies with internal resources and to borrow to meet them. The institution's composite score in each instance has already been calculated; to assess the effect of a threat or event identified in these regulations, the institution's financial statements on which that composite score was calculated will be adjusted to reflect the amount of loss attributed to, and other impacts of, that threat, and based on the adjusted statements, the Department will recalculate the institution's composite score. This recalculation will occur regularly as threats or events identified in these regulations are identified. By adopting this approach, the final regulations provide an individualized assessment rather than the one-size-fits-all method proposed in the NPRM that commenters found unrealistic. Unless other conditions apply, under the current regulations, an institution that undergoes a routine assessment of financial responsibility and achieves a composite score of 1.5 or greater may continue to participate without providing financial protection; an institution with a score between 1.0 and 1.5 may participate subject to heightened reporting and scrutiny; and an institution with a composite score below 1.0 is not financially responsible and may participate only with financial protection.[46] §§ 668.171(b)(1), 668.175(c), 668.175(f). Under the approach we adopt here, where the recognition of the triggering event produces a recalculated composite score of 1.0 or greater, we will regard the event as not posing a risk that makes or is likely to make the institution not financially responsible, and will therefore not require financial protection. If the recognition of the event or risk produces a failing composite score—less than 1.0—the institution is required to provide financial protection.[47]

For the purpose of recalculating an institution's composite score, as detailed in Appendix C to these regulations, the Department will make the following adjusting entries to the financial statements used to calculate an institution's most recent composite score. For clarity, the adjusting entries refer to the line items in the balance sheet and income statements illustrated in Appendix A for proprietary institutions and Appendix B for non-profit institutions.

For a proprietary institution, for events relating to borrower-defense lawsuits, other litigation, or debts incurred as a result of a judicial or administrative proceeding or determination, or for a withdrawal of owner's equity, the Department will debit Total Expenses, line item #32, and credit Total Assets, line item #13, for the amount of the loss—the amount of relief claimed, the debt incurred, the amount withdrawn, or other amount as determined under § 668.171(c)(2). Except for the withdrawal of owner's equity, the corresponding entries for a non-profit institution are a debit to Total Expenses, line item 38b (unrestricted), and a credit to Total Assets, line item #12, for the amount of the loss.

For a proprietary institution, for events relating to a closed location or institution or the potential loss of eligibility for GE programs, the Department will debit Total Income, line item #27, and credit Total Assets, line item #13, for the amount of the loss. The loss is the amount of title IV, HEA funds the institution received in the most recently completed fiscal year for the location or institution that is closing or for the GE programs that are in jeopardy of losing their eligibility for title IV, HEA funds in the next year. In addition, the Department will debit Total Assets, line #13, and credit Total Expenses, line #32, for an amount that approximates the educational costs that the institution would not have incurred if the programs at the closing location or the affected GE programs were not offered. We believe it is reasonable that this reduction in costs is proportional to the ratio of Cost of Goods Sold (line item #28) to Operating Income (line item #25)—that is, the amount it cost the institution to provide all of its

[46] As provided under § 668.175(f)(3), an institution that has a composite score of less than 1.0 is not financially responsible until it achieves a composite score of 1.5 or higher. In other words, if an institution with a composite score of less than 1.0 has in the following year a composite score between 1.0 and 1.5, the institution is still subject to the requirements under the provisional certification alternative, including the letter of credit provisions, even though it scores in the zone.

[47] As the Department stated in the 1997 rulemaking, ''However, an analysis of data of closed institutions indicates that institutions that fail the ratio test should not be allowed to continue to participate without some additional surety to protect the Federal interest.''

educational programs divided by the revenue derived from offering those programs.

The corresponding entries for a non-profit institution are, for the loss, a debit to Total Revenue, line item #31b, and a credit to Total Assets, line item #12. The reduction in costs is calculated by dividing Operating Expenses, line item #32, by Tuition and Fees, line item #27, and multiplying the result by the amount of the loss, the amount of title IV, HEA funds received by the location or affected GE programs. To account for the reduction in costs, the Department will debit Total Assets, line item #12, and credit Total Expenses, line item 38b.

Recognition of recent or threatened events can be appropriately measured under the composite score methodology if the event causes or is likely to cause a loss that can be quantified. All but two of the events that we retain as automatic triggers pose risks that we can quantify in order to assess their impact on the institution's composite score. Lawsuits, new debts of any kind, borrower defense discharge claims, closure of a location, loss of eligibility of gainful employment programs, and withdrawal of owner equity all have effects that may be quantified so that their effects can be assessed using the composite score methodology.

In at least two instances, there is no need to attempt to quantify the loss, because the loss is self-evident. An institution that fails the requirement to derive at least 10 percent of its revenues from non-title IV sources is so dependent on title IV, HEA funds as to make the loss of those funds almost certainly fatal, and we see no need to quantify that amount through the composite score methodology. That risk requires financial protection regardless of the most recent composite score achieved by the institution. Similarly, an institution whose cohort default rate exceeds 30 percent in two consecutive years is at risk of losing title IV, HEA eligibility the following year and requires no composite score calculation. These risks require financial protection regardless of the most recent composite score achieved by the institution.

An action taken by the SEC to suspend trading in, or delist, an institution's stock directly impairs an institution's ability to raise funds—creditors may call in loans or the institution's credit rating may by downgraded. However, unlike lawsuits and other threats, it is difficult to quantify readily the amount of risk caused by that action and assess that new risk using the prior year's financials and the composite score derived from those statements. Nevertheless, because the impaired ability to raise funds caused by these actions is potentially significant, that risk warrants financial protection without the reassessment of financial health that can be readily performed for more quantifiable risks. Nevertheless, because the impaired ability to raise funds caused by these actions is potentially significant, that risk warrants financial protection without the reassessment of financial health that can be readily performed for more quantifiable risks.

We recognize that the institution's current year financial strength may differ from that reported and analyzed for the prior fiscal year. That difference, however, can be favorable or unfavorable, and would be difficult to reliably determine in real time. Given that uncertainty, we consider it a reasonable path to use as the baseline the data in the most recent audited financials for which we have computed a composite score, and adjust that data to reflect the new debt or pending threat. Any disadvantage this may cause an institution will be temporary, because the baseline will be corrected with submission, evaluation, and scoring of the current year's audited financial statements. In assessing the composite score of the new financial statements for purposes of these standards, we will continue to recognize, for purposes of requiring financial protection, any threats from triggering events that would not yet be fully recognized under accounting standards. However, improvements in positions demonstrated in the new audited financials may offset the losses recognized under these regulations. If those improved positions produce a composite score of 1.0 or more, despite the loss recognized under these regulations, the institution may no longer be required to provide financial protection.

With regard to the suggestion by the commenters that the Department allow an institution to submit new month-end or partial-year audited financial statements from which the composite score would be recalculated, we believe that doing so would be costly and unworkable, because those financial statements do not reflect a full year's transactions, and would potentially recognize only new debts, or partially recognize new litigation or other claims for which the institution determines that a loss is probable. We note that the composite score methodology was designed to measure the financial performance of an institution over an entire 12-month operating cycle, the institution's fiscal year, and believe that attempting to calculate a composite score for a partial year would produce anomalous results. In addition, it is not clear how an institution could produce audited financial statements by the end of the month in which a triggering event occurred. Further, the suggestion does not appear to offer a realistic approach because separate actual or threatened losses may occur throughout the year, and for each event, this proposal would require a new set of financial statements.

This approach will affect only institutions that have a recalculated composite score of less than 1.0. If recognition of the event produces a recalculated composite score of between 1.0 and 1.5 for an institution that had a routine composite score of 1.5 or more, the recalculated score does not change the existing score to a zone score, so the institution is not required to comply with the zone requirements. § 668.175(d). For some institutions, a single event or threat may produce a failing composite score, while for others, a series of actions or events may together place the institution at substantial risk. Using the composite score methodology to assess new or threatened risks, instead of using a dollar- or percentage-based materiality threshold for individual triggering events, allows the Department to assess the cumulative effect on the institution of individual threats or events regardless. Thus, we will require financial protection only when the recalculated composite score is failing and the cumulative effect produces a failing score.

In response to the commenters who objected that the proposed triggering scheme would arbitrarily "stack" protection requirements, the composite score methodology distinguishes among levels of financial strength, and as we explain below, permits the Department to align the amount of protection required with the relative risk or weakness posed by successive triggering events or conditions. We agree with the commenters that an institution should not be required to provide financial protection for every automatic triggering event for which the underlying facts or circumstances are the same or where a direct causal relationship exists between two or more events, like the circumstance noted by the commenters where a 90/10 violation causes a loan agreement violation, or a settlement generates an accreditor sanction.

In response to the objection that these regulations could require financial protection equal to all of the title IV, HEA funds received in the prior year, we adopt here an approach that tailors the amount of protection required to a minimum amount we consider sufficient to cover the losses to the government reasonably likely to occur upon closure, plus any additional amount that we estimate is reasonable to expect based on the circumstances presented by the risks posed for the particular institution. Under current regulations, an institution that does not meet financial responsibility standards may participate under provisional certification requirements by providing a letter of credit equal to at least 10 percent of the prior fiscal year title IV, HEA program funds received. § 668.175(f)(2)(i). This restriction applies to any institution that no longer qualifies for continued participation in the zone, or, as particularly pertinent here, achieves anything less than a score of 1.0—for example, a score of .90. Because the composite score makes these kinds of distinctions among scores, current regulations give dispositive weight to its results in critical determinations regarding an institution's ability to participate. Thus current regulations have long attached controlling significance to what may be relatively slight differences in composite score outcomes. We adopt here a rule that an institution that receives an adjusted composite score of less than 1.0 must provide financial protection in an amount not less than 10 percent of the prior fiscal year's title IV, HEA funding, and, as the composite score decreases, the institution may be required to provide an added amount of protection where supported by the particular facts and circumstances—including the history of the institution, the nature of the risks posed, the presence of existing liabilities to the Department, the presence, amount, and rate at which borrower defense claims are being filed, and the likelihood that the risk will result in increases in borrower defense claims.

The requirement to provide at least a 10 percent letter of credit is rooted in the 1994 regulations regarding provisional certification of institutions that did not meet generally applicable financial responsibility standards. 34 CFR 668.13(d)(1)(ii)(1994). We adopt here this 10 percent as a minimum requirement because we consider financial protection in the amount of 10 percent of prior year title IV, HEA funding to be the minimum amount needed to protect the taxpayer from losses reasonably expected from an institution's closing. These losses include, at a minimum, costs of closed school discharges. Closed school discharges can affect all loans—including PLUS loans—obtained to finance attendance at the closing institution. This includes any loans obtained for enrollment in years before the year in which the institution closes, not merely those loans received by students for attendance at the institution in the year in which it closes. Thus, a closure could, in some instances, generate closed school discharge losses in amounts exceeding the total amount of Direct Loan funds that the institution received in the year preceding the year of that closure.

Liabilities of an institution could also include liabilities for funds unaccounted for by audit, because the institution as a fiduciary is liable for the costs of title IV, HEA funds it received unless it affirmatively demonstrates by the required compliance audit that it spent those funds properly. An institution that closes may have neither the resources nor the incentive to secure an audit of its expenditures of these funds. The liability of an institution that fails to account for those funds includes the full amount of Pell Grant funds received, and, for loans that are received for that period and are not discharged, the subsidy costs for those loans, which varies from year to year among loan types.[48] An institution that closes may also owe liabilities to the Department for debts arising from audits, program reviews, or fine actions, or from borrower defense claims. Closure of the institution would also jeopardize recovery of all these liabilities, and the risk to the taxpayer in those instances is considerably greater than the costs of closed school discharges.

We have already experienced closed school discharge claim losses in one of the most recent and significant school closures, that of Corinthian, that permits development of estimates of liabilities. Corinthian was composed of three chains of some 37 separate institutions, operating at 107 campuses, with 65,000 students enrolled in 2014. It received $1.439 billion in title IV, HEA funding in FY 2013, the last full fiscal year preceding its closure. During the year preceding its closure, Corinthian sold 50 campuses, with some 30,000 students enrolled, to a new entity, a transaction that allowed a major portion of Corinthian students to complete their training. In addition, under agreement with the Department, Corinthian continued training at the campuses it retained until its closure in April 2015.

The Department has to date granted closed school discharges of some $103.1 million for some 7,858 Corinthian borrowers, with the average discharge some $13,114.[49] Additionally, the Department has thus far approved 3,787 borrower defense discharges, totaling $73.1 million. Together, Corinthian's liabilities through both closed school and borrower defense total more than $176 million, with additional claims expected to be approved later. A letter of credit at the level of 10 percent of prior year title IV, HEA funding would have been $143 million—enough to cover the estimated total closed school discharges and far too little to cover the school's total liabilities on individual student loan losses.[50]

From this history, we estimate that an institution that closes in an orderly wind down, under which the majority of the students are able to continue their education by transfer or otherwise, will generate closed school discharge claims of at least 10 percent of the amount of all title IV, HEA funding received in the last complete fiscal year prior to the year in which the institution finally closes. Therefore, we adopt 10 percent of prior year title IV, HEA funding as the minimum amount of financial protection required of an institution that achieves a recalculated composite score of less than 1, or otherwise faces the risks (90/10, cohort default rates, SEC action) for which we do not recalculate a composite score. This is consistent with many years of Department practice.

Obviously, not all closures will arise in such fortuitous situations. It is realistic to expect that for other closures, including those that are more precipitous, a far greater percentage of borrowers will qualify for closed school discharges. Moreover, these regulations are expected to increase the number of instances in which we will give a closed school discharge by providing relief without an application where we have sufficient information to determine eligibility. In addition, based on the Corinthian experience, we expect that

[48] Because every institution must affirmatively account for the title IV, HEA funds it has caused to be awarded during an entire fiscal year as properly spent, an institution receiving funds on the cash monitoring or reimbursement method does not meet this obligation simply by having payments approved under the requirements applicable to funding under those methods, which do not necessarily involve the comprehensive examination conducted in an audit. Similarly, because the institution must make this accounting on a fiscal year basis, the fact that an institution may offer short programs several of which may be completed within a fiscal year does not limit the potential loss in the case of a precipitous closure to the amount of funds received for a program that may be curtailed by such a closure, rather than all the funds for which it was responsible for the entire fiscal year.

[49] As of October 2016.

[50] The Department also fined Corinthian $30 million.

the law enforcement agency actions that can constitute triggering events will generate borrower defense claims as well.[51] Other liabilities to the Department may already exist or are expected to arise. Under these regulations, therefore, the Department demands greater financial protection in cases in which these risks are identified, in addition to the minimum 10 percent. We include other conditions as discretionary triggering events, but in particular circumstances, those conditions can separately indicate that the potential losses that may arise warrant levels of financial protection greater than 10 percent. If the Department demands greater financial protection than the 10 percent level, the Department articulates the bases on which that added protection is needed, which can include any of the considerations discussed here. If an institution has already arranged financial protection, the Department credits the amount of protection already provided toward the amount demanded, if the protection already provided has the same terms and extends for the duration of the period for which protection is required pursuant to these regulations. In determining the proper amount of financial protection, then, we intend to look closely at any evidence that these kinds of liabilities may ensue from the risk posed by adverse events to a particular institution. We note, in particular, that section 498(e)(4) of the HEA, by indicating which specific histories of compliant behavior are enough to bar the Department from requiring personal guarantees from owners or institutions, has identified those histories that indicate future risk. 20 U.S.C. 1099c(e). Since 1994, the Department has implemented the statute in precisely this way, by adopting these histories as per se financial responsibility failures, warranting surety and provisional certification. §§ 668.174(a), 668.175(f)(1)(ii).

Similarly, section 498(c)(1)(C) of the HEA specifically directs the Secretary to consider whether the institution is able to meet its refund obligations to students and the Department. 20 U.S.C. 1099c(c)(1)(C). The Department has implemented this provision by requiring an institution that has a performance rate of less than 95 percent in either of the two most recently completed fiscal years to provide surety in an amount of 25 percent of the amount of refunds owed during the most recently completed fiscal year. § 668.173(d). We intend to apply these long-standing and statutorily sanctioned predictors of potential liabilities in determining the amount of financial protection that we may require over and above that minimum amount to cover the costs of closed school discharges. Thus, we may determine that the potential loss to the taxpayer of the closure or substantial reduction in operations of an institution that has failed the 95 percent refund performance standard to be 25 percent of refund obligations in the prior year, in addition to the 10 percent of prior year title IV, HEA funding needed to cover closed school discharges. We may determine that the potential loss to the taxpayer of the closure or substantial reduction in operations of an institution that has had audit or program liabilities in either of the two preceding fiscal years of five percent or more of its title IV, HEA funds to present a potential loss of that same percent of its most recent title IV, HEA funding, in addition to the 10 percent of funding needed to defray closed school discharge losses. We may determine that the closure or substantial reduction in operations of an institution that has been cited in any of the preceding five years for failure to submit in a timely fashion required acceptable compliance and financial statement audits presents a potential loss of the full amount of title IV, HEA funds for which an audit is required but not provided, in addition to any other potential loss identified using these predictors.

Relying on the composite score methodology also helps clarify how long financial protection for risks or conditions should be maintained, because some events have already occurred, and will necessarily be assessed in the next audited financial statements and the composite score, which is routinely calculated. Others, such as pending suits or borrower defense claims, will not be reflected in the new financial statements, and those risks may still warrant continuing the financial protection already in place. Along these lines, we will maintain the full amount of the financial protection provided by the institution until the Department determines that the institution has (1) a composite score of 1.0 or greater based on the review of the audited financial statements for the fiscal year in which all losses from any triggering event on which the financial protection was required have been fully recognized, or (2) a recalculated composite score of 1.0 or greater, and that any triggering event or condition that gave rise to the financial protection no longer applies.

We believe it is reasonable to require an institution to maintain its financial protection to the Department as noted above until the consequences of those events are reflected in the institution's audited financial statements or until the institution is no longer subject to those events or conditions. If the institution is not financially responsible based on those audited statements, or the triggering events continue to apply, then the financial protection on hand can be used to cover all or part of the amount of protection that would otherwise be required. Doing so minimizes the risks to the Federal interests by having financial protection in place in the event that an institution does not sufficiently recover from the impact of a triggering event—any cash or letter of credit on hand would be retained and any funds under a set-aside arrangement would reduce or eliminate the need to offset current draws of the title IV, HEA funds.

With regard to the comment that a letter of credit could exceed 100 percent of the title IV, HEA funds received by an institution, we note that the regulations adopted here set 10 percent of prior year title IV, HEA funding as the minimum financial protection required for an institution that achieves a recalculated score below a 1, or fails the 90/10, cohort default rate, or SEC triggers, and permit the Department to demand greater protection when the Department demonstrates that the risk to the Department is greater.

Changes: We have revised § 668.171(c)(1) to provide that losses from events or risks listed as triggering events are generally evaluated by determining whether the amount of loss recognized for this purpose, if included in the financial statements for which a composite score was most recently calculated under § 668.172, would produce a composite score less than 1.0. In § 668.171(c)(2) we have specified that the actual or potential losses from the actions or events in § 668.171(c)(1) are accounted for by revising an institution's most recent audited financial statements and that the Secretary recalculates the institution's composite score based on the revised statements regularly. If the recalculated

[51] These losses can be very substantial. The Department has already granted $73 million in borrower defense discharge relief to some 3800 Corinthian Direct Loan borrowers under § 685.206, and thousands of Corinthian borrower claims are pending. The average amount of loan indebtedness discharged for these 3800 was $19,300; many thousands of other Corinthian borrowers may have valid claims for relief, and the Department has been reaching out to some 335,000 of these individuals. See: United States Department of Education Fourth Report of the Special Master for Borrower Defense to the Under Secretary, June 29, 2016. If even 20 percent of these other borrowers qualify for relief, the loss to the Federal taxpayer would add another billion dollars to the $73 million in losses already experienced.

composite score is less than 1.0, the institution is not financially responsible and must provide financial protection.

Triggering Events

Comment: Some commenters objected that the Department had produced no data to support the assertion that the triggering events in fact pose the risks that would warrant their use. Other commenters stated that the requirement to provide financial protection based on the mere filing of a lawsuit seeking the proposed recoveries was speculative, not based on actual data showing that an adverse result was reasonably expected to result from that suit and was thus arbitrary and lacked a reasonable basis. Another commenter asserted that the Department's reference to the Corinthian situation does not support adopting the rule proposed here, and that current regulations were sufficient to enable the Department to obtain from Corinthian the protections needed to mitigate or eliminate the risks now cited to justify the new rules. The commenter asserted that Corinthian failed financial responsibility tests in FY 2011, could have been required to post a letter of credit, but was not required to do so, nor was it required to post a letter of credit for FY 2014, when Corinthian again failed the tests.

Discussion: As discussed for each of the triggers, each reflects a new financial obligation already incurred and not yet reflected in the composite score for the institution, or a new financial risk that is realistically imminent, whether or not yet recognized in the audited financial statements. Current regulations permit the Department to demand 10 percent or more financial protection, but provide no structured scheme to assess whether a particular event actually jeopardizes the institution, and if so, by how much, and what amount of protection is needed beyond that 10 percent minimum described in the regulations. We described in the NPRM the history of Corinthian's evaluation under the existing financial responsibility scheme.[52] Even if Corinthian's financial statements had been accurate when presented, they would not have accounted for the risk posed by the pending California attorney general action, that ended in a judgment for $1.1 billion, and the LOC that would likely have been demanded—a small fraction of the title IV, HEA funding for the prior year—would barely have covered the liabilities already established by the Department against Corinthian. The Corinthian experience highlighted the need to identify events that posed realistic jeopardy in the short term, and to secure financial protection before the loss was incurred and the institution on account that that loss no longer had the ability to provide that protection. Similarly, current standards would not require protection where an institution was on the very cusp of loss of title IV, HEA eligibility, as with cohort default rate and 90/10 sanctions.

Changes: None.

Automatic Triggering Events

Lawsuits and Other Actions § 668.171(c)(1)(i)

Lawsuits Settlements/Resolutions

Comments: Under proposed § 668.171(c)(1)(i)(B), (ii), and (iii), a school may not be financially responsible if it is currently being sued by a State, Federal, or other oversight entity, or by private litigants in actions, including qui tam suits under the False Claims Act, that have survived a motion for summary judgment.

Some commenters objected that requiring financial protection based on suits by private parties was unreasonable because the commenters considered those suits to have no bearing on the financial responsibility and administrative capability of the institution. Others considered reliance on the filing of suits that had not yet resulted in judgments against the institution to constitute an unreasonable standard that deprived the institution of its due process rights to contest the lawsuits. A commenter objected to the inclusion of government suits because the commenter considered proprietary institutions to often be the target of ill-planned and discriminatory suits by State and Federal agencies. A commenter stated that suits filed by State AGs have been shown in some cases to be politically motivated and argued that such suits should not be the basis for a letter of credit as they may unfairly target unpopular members of the higher education industry, depending on the party affiliation of the AG. The commenter stated that the suits are not required to be based in fact and rarely lead to a finding, that the judicial process should be allowed to follow its usual course, and that requiring schools to post letters of credit prior to a judicial ruling in the case amounts to finding a school guilty and requiring the school to prove innocence. The commenter stated that the risk posed by the filing of a suit cannot be determined simply from the complaint filed in the suit, and the actual risk posed by such suits, some commenters urged, could be reasonably determined only after determining the merits of the suit.

Commenters objected that these triggering events would require a school to submit a letter of credit before there was any determination of merit or wrongdoing by an independent arbiter, and stated that such suits should not be taken into account until judgment. The commenters stated that they believed that, contrary to the Department's statement in the preamble that suits by State and Federal agencies are likely to be successful, most cases settle due to the outsized leverage of the government, despite their merits. In addition, the commenters believed that suits filed by State AGs should not be the basis for a letter of credit because these suits have been shown in some cases to be politically motivated and to unfairly target institutions.

Another commenter urged the Department to remove the lawsuit triggers, arguing that the mere filing of an enforcement action by a State, Federal, or other oversight entity based on the provision of educational services should not be considered a trigger. The commenter stated that lawsuits are easy to file, allegations are not facts, and, even assuming good faith on the part of State and Federal regulatory agencies, sometimes mistakes are made. The commenter contended that the litigation process creates the incentive for sweeping allegations that may or may not be verifiable, or there may be cases filed by an agency in the hope of making new law or establishing a new standard for liability or mode of recovery beyond that applied by courts in ruling on such claims. A commenter was concerned that an ''other oversight agency'' could refer to a town or county zoning board or land use agency that could threaten to file a multi-million dollar suit for pollution, or a nuisance suit like a violation of a local sign ordinance, or failure to recycle soda cans, as a way to leverage concession from the institution for other reasons. These suits would be covered under proposed § 668.171(c)(1)(ii) even though they have nothing to do with the educational mission of the school. The commenter contended that giving such unbridled power to non-State, non-Federal, non-education-related oversight entities would effectively place the ''sword of Damocles'' over the head of every college president who needs to negotiate a dorm or a new parking facility.

[52] Applying the routine tests under current regulations did not result in financial protection, because Corinthian appeared at the time it provided the Department with its audited financial statements to pass those tests. Only later—too late to secure financial protection—did further investigation reveal that Corinthian in fact had failed the financial tests in current regulations. 81 FR 39361.

Many commenters objected to consideration of settlements with government agencies under proposed § 668.171(c)(1). As proposed, the regulation might make a school not financially responsible if during the current or three most recently completed award years it was required to pay a debt to a government agency, including a debt incurred under a settlement. Commenters viewed this provision as overly broad and punitive, and suggested that settlements be excluded from this provision. A commenter believed that an institution under investigation will have a strong incentive to avoid a settlement that would precipitate the triggering event in proposed § 668.171(c)(1)(i)(A), which would require it to provide the Department a potentially expensive or unobtainable letter of credit. A commenter noted that bringing suit can be an important tool in facilitating settlement, and cited a case where a State AG filed a consumer fraud suit against an institution. The parties were able to negotiate a settlement that provided $2.1 million in loan forgiveness and $500,000 in refunds for students. Imposing a letter of credit in such situations would deter such favorable settlements. Commenters asserted that many businesses settle claims with the government due to the cost of litigation and the outsized leverage of the government, regardless of the merits of the underlying claims.

Commenters objected to consideration of debts already paid, asserting that if a school pays a liability as a result of an agency action, the school has already paid an amount that was deemed appropriate by the agency and should not be subject to the additional punitive requirement of posting a letter of credit. The commenters argued that this is especially true if the school's payment resulted in repayments to students such that a letter of credit is no longer necessary to provide for possible student claims.

Similarly, other commenters claimed that lawsuit triggers would create every incentive for borrowers who get behind in their loan payments to file claims or suits against an institution, regardless of how frivolous those suits or claims may be, and therefore these triggers should not be part of the borrower defense rulemaking.

Evaluation

A commenter urged the Department to make the lawsuit and investigation triggers in § 668.171(c)(1) evaluative instead of automatic, so that the Department would evaluate the type of suit, the merit of the claims, the amount of money at stake, and the likelihood of success. With this system in place, only institutions with a serious financial risk would be required to obtain a letter of credit, leaving other institutions room to negotiate with State AGs or other enforcement entities.

Other commenters objected to assessing the value of the lawsuits (in proposed § 668.171(c)(v)) by using ''the tuition and fees the institution received from every student who was enrolled at the institution during the period for which the relief is sought'' as wrongly presuming that every student in the period (or three years if none is stated) would receive a full refund, and may have no relation to the event on which suit was brought. While the commenters do not suggest using the damages proposed in any complaint, which they claim are often speculative and designed to grab media attention rather than reflect a true damage calculation, a better way to assess value would be an analysis of the merits of the specific litigation at issue, guided by past recoveries and settlements for similar actions. Some commenters objected that State AGs and private litigants will likely include demands for relief in pleadings that equal or exceed the thresholds set by the Department in order to gain additional leverage over an institution. Other commenters objected that State AG suits will also exceed the thresholds because they will state no dollar amount of relief, and thus be deemed to seek restitution in the amount of all tuition received for a period.

Some commenters believed that an institution should be afforded the opportunity to demonstrate, by an independent analysis, that the actual amount at issue is below the thresholds set for the applicable action and therefore the action is not material. Some commenters suggested that the Department allow an institution to seek an independent appraisal from a law firm, accounting firm, or economist that would state the actual amount at issue in the lawsuit. Others stated that this analysis could be accomplished as part of an appeal process with a hearing official deciding the amount based on evidence from the institution and the Department.

Threshold

Some commenters stated that it is common for plaintiffs suing colleges and universities to allege damages far exceeding any amount that could feasibly be obtained in either a settlement or final judgment, as a tactic to maximize any final settlement amount and contingency fees to the attorney. For this reason, the commenters argued that requiring a letter of credit based solely on a claim exceeding 10 percent of an institution's assets is arbitrary and unwarranted, as the claimed amounts often have little factual basis or legal support. Further, the commenters were concerned that enacting this new standard would lead to plaintiffs' attorneys stating claims in excess of the 10 percent threshold to create negotiating leverage.

Other commenters believed that the $750,000 and 10 percent of current assets thresholds were arbitrary because they do not take into account that the size of schools varies significantly and, as such, their exposure may vary significantly. The commenters reasoned that a larger school that serves a greater number of students may be subject to a larger liability, but may also be able to adequately withstand that liability. For these reasons, the commenters suggested that the triggering events in § 668.171(c)(1) should be removed entirely, but if they are not removed, the commenters urged the Department to exclude the settlement provisions and the $750,000 threshold because debts of that size are not indicative of the financial stability of the school.

Some commenters noted that Federal and State settlements are often very small, and therefore believed those settlement amounts would not likely reach or exceed the proposed threshold of 10 percent of current assets. The commenters urged the Department to eliminate the 10 percent threshold in the final regulations, arguing that a settlement, in and of itself, should be sufficient to trigger a letter of credit. Other commenters believed that the threshold of $750,000 for the lawsuit triggers was so low that an auditor would not consider that amount to be material and therefore would not include the lawsuit in the footnotes of an institution's financial statements. They suggested that the Department set the materiality threshold as the higher, rather than the lesser, of $750,000 or 10 percent of current assets. The commenters reasoned that the lesser amount would almost always be the audit threshold ($750,000) which, in the case of any large school, will not be material. Alternatively, the commenters suggested that the Department remove the audit-based threshold and simply rely on the 10 percent of current assets threshold.

No Amount Claimed

Objecting to the method of calculating a claim in a suit in which the plaintiff does not state a dollar amount of relief, a commenter noted that in a number of

State courts—in New York, Maryland, and Maine, for example—a specific dollar-amount demand is not permitted in many civil actions. In such cases, proposed § 688.171(c)(1)(v)(A) would require that the amount be calculated ''by totaling the tuition and fees the institution received from every student who was enrolled at the institution during the period for which relief was sought, or if no period is stated, the three award years preceding. . . .'' The commenter feared that applying this principle would result in a ''deemed'' ad damnum of at least three years' total revenue—and it would be a fortunate institution that maintained sufficient current assets to keep the made-up ''deemed'' ad damnum below 10 percent of current assets. In addition, the commenter notes that other States, like Virginia, do not permit recovery in excess of the written ad damnum, regardless of what a jury may award—for example, if the demand is $10,000 and the jury awards ten million dollars, only the demanded amount is awarded. The commenter opined that in those States, the incentive is to massively over-plead the value of the case, so that an attorney's client is not forced to accept less money after encountering a generous jury. The underlying point is the same: Neither a stated ad damnum in any lawsuit nor the ''deemed'' ad damnum of proposed § 688.171(c)(1)(v)(A) bears any necessary relationship to the actual value of the suit, to the likely range of recovery, or to the effect of the suit on the financial responsibility of the educational institution.

Second, the commenter argued that a pending private lawsuit seeking large damages should not be considered a trigger event, as proposed in § 688.171(c)(1)(iii). The commenter cautioned that considering filed-but-not-decided litigation to impair the financial responsibility of an institution would overly empower opportunistic or idealistic members of the plaintiff's bar. The commenter asserted that the proposed position would give every lawyer with a draft lawsuit containing enormous damage claims a chokehold on any school. The commenter noted that although proposed § 688.171(c)(1)(iii)(A) is intended to restrict this triggering event to only those claims that survive summary judgment, the commenter asserted that in some States, this restriction would be ineffective. The commenter asserted that, for example, in New York State courts, a plaintiff can file a ''Motion For Summary Judgment in Lieu of Complaint,'' under CPLR Section 3213, to initiate the case. A plaintiff can demand a response on the date an answer would otherwise be due; if the defendant were to file a cross-motion for summary judgment as a response, the court ostensibly would deny both and treat the cross-motions as an answer and complaint, and the case would go forward. But the case would have ''survived a motion for summary judgment by the institution,'' and would then constitute a trigger event at its outset.

The commenter further asserted that California State courts permit not only summary judgment, but also a separate procedure for resolution of entire claims by ''summary disposition.'' Cal. Code of Civ. Pro. Section 437c. The grant of judgment to the institution on any relevant claim by summary disposition would not seem to affect whether a trigger event has occurred, even if the only relevant claim was disposed of. The commenter asserted as well that in Virginia, summary judgment is technically available, but, as a practical matter, the commenter states that it is never granted because a motion for summary judgment cannot procedurally be supported by documents, affidavits, depositions, or other similar evidence. Moreover, the real effect of this provision would be to deter institutions from ever moving for summary judgment, fearing that the motion would be denied therefore generating a triggering event.

For these reasons, the commenter concluded that institutions would have to bring every covered private case to trial, at much greater financial and emotional expense not only to the school but also to the opposing parties. The commenter expressed concern that the proprietary school sector was a target for enterprising trial lawyers, and that because of the heightened scrutiny faced by financial institutions making lending decisions, it would be impossible for many institutions facing one of these triggering events to obtain a sufficient letter of credit to comply with the regulations. The commenter cautioned that an institution in such a circumstance would have little choice but to cease operations, even if its financial basis remained fundamentally sound—and even if the claims represented by the proposed triggering events were insubstantial or frivolous.

Similarly, another commenter stated that in litigation, plaintiffs are able to survive a motion for summary judgment due to a variety of factors. The commenter said that judges may decline to dispose of a case on summary judgment because there remains an issue of material fact that may have little to do with the underlying false claim or provision of educational services. The commenter offered that a final judgment requires a higher level of proof than a motion for summary judgment and would therefore be a fairer threshold. In addition, the commenter noted that private rights of action are fundamentally different than agency or government actions that are subject to well-established policies and procedures. Further, the commenter anticipated that private parties will likely request relief in excess of the proposed thresholds of $750,000 or 10 percent of current assets to gain additional leverage in seeking a settlement.

With regard to proposed § 668.171(c)(1)(iii), some commenters asked the Department to clarify whether the mere filing of a False Claims Act case is a triggering event or if paragraphs (A) and (B) apply to that case (as well as private litigation). The commenters offered that the mere filing of a False Claims Act case should not subject an institution to a letter of credit. While the commenters recognized the seriousness of a False Claims Act case, they stated that these cases do not garner intervention from the Federal government and are typically settled for amounts that are dramatically less than the stated damages in the complaint. Further, while the commenters appreciated the Department's attempt to ensure it was only capturing meritorious private litigation under § 668.171(c)(1), they believed that the provision would penalize an institution for settling a case for nuisance value or harming a school for filing a motion for summary judgment which it ultimately loses.

Discussion: Proposed § 668.171(c)(1) included a range of governmental actions and certain actions by private parties, and proposed § 668.171(c)(6)(ii) included any other litigation that the institution was required to report in a filing with the SEC. Regardless of the substantive basis or motivation of the party suing, each of these suits could pose a serious potential threat to the continued existence and operation of the school, and as such, they affect the assessment of the school's ability to meet its financial obligations. We see no basis for ignoring that risk simply because some suits in each of these types may in fact be frivolous, assert exaggerated demands, rest on attempts to make new law, or attempt to extract concessions from the school in what the commenter calls areas unrelated to the school's educational mission. We consider pending suits under these regulations for two reasons. First, a judgment entered in any of these suits may significantly jeopardize the existence or continued operations of the institution, and that threat bears directly on the statutory requirement that the Secretary determine whether the institution for the present and near future, the period for which the assessment is made, ''is able to meet . . . all its financial obligations.'' 20 U.S.C. 1098c(c)(1)(C). Second, that consideration looks not merely at obligations already incurred, but looks as well to the ability of the institution to meet ''potential liabilities''—whether the institution has the resources to ''ensure against precipitous closure''— and thus demands that we assess threats posed by suits not yet reduced to judgments that would be recognized in the financial statements submitted annually and evaluated under the current composite score methodology. In response to the comment regarding treatment of qui tam suits under the False Claims Act, we confirm that those actions are evaluated like any other litigation not brought by a Federal or State agency enforcing claims that may relate to borrower defenses. They are evaluated under the summary judgment test.

Responding to the objection that we should consider only claims reduced to judgment, we stress that ignoring the threat until judgment is entered would produce a seriously deficient assessment of ability to meet financial obligations, and worse, would delay any attempt by the Department to secure financial protection against losses until a point at which the institution, by reason of the judgment debt, may be far less able to supply or borrow the funds needed to provide that protection. We reject this suggestion as contrary to the discharge of the duty imposed on the Department by section 498 of the HEA. Similarly, we see no basis for the contention that taking into account risk posed by pending suits somehow deprives an institution of its due process right to contest the suit. If the risk posed is within the statutory mandate to assess, as we show above, taking that risk into account in determining whether an institution qualifies to participate in the title IV, HEA programs cannot deprive the institution of any constitutionally protected right. The institution remains free to respond to the suit in any way it chooses; it is frivolous to contend that we are barred from considering whether that risk warrants financial protection for the taxpayer as a condition for the continued participation by that institution in this Federal program.

Besides these general objections to the consideration of pending suits, the comments we received addressed several distinct aspects of the proposed consideration. These included comments addressed to the inclusion of suits by an oversight entity, which may include a local government component, in the category of government suits; the proposal that suits be evaluated on their merits by a third party, by Department officials, or by a Department hearing official; objections to inclusion of debts arising from settlements; objections that the thresholds in the proposed rule were unrealistic or arbitrary; objections to the proposed method of calculating the amount claimed where the institution contends that the amount claimed exceeds the amount that applicable law would support; objections to the proposed calculation of the amount in actions that did not seek a stated amount of relief; objections to the proposed use of summary judgment as a test of the potential risk posed by the suit; and objections to consideration of debts already incurred and paid in prior years. We discuss each in turn and, as discussed earlier explaining the use of an adapted composite score methodology, we are modifying the proposed regulations in several regards that we intend and expect to assess the risk posed by pending suits in a manner that alleviates several of major concerns raised by commenters.

We address first the changes to the proposed thresholds, because adoption of the composite score methodology of assessing risk affects the response to those objections and other concerns as well. Each institution is well aware of its most recent composite score, and as explained above, the amount of risk posed by each suit considered under the regulations will be assessed by recognizing that loss in the financial statements on which that composite score was based, and determining whether that recognition will produce a failing composite score. Any institution can readily evaluate that effect and take that result into account in responding to the suit. A pending suit that produces a failing score will be recognized as a threat until the suit is resolved and that result produces a score of 1.0 or more, whether by favorable judgment or settlement. Second, we include an opportunity for an institution to demonstrate that loss from any pending suit is covered by insurance. Commenters advised that we should not treat lawsuits as potential triggering events because the risks posed by these suits are commonly covered by insurance. If the institution demonstrates that insurance fully covers the risk, the suit is simply not considered under these financial responsibility standards. The institution can demonstrate that insurance fully or partially covers risk by presenting the Department with a statement from the insurer that the institution is covered for the full or partial amount of the liability in question.

In response to the proposal that the regulations should provide for an evaluation of the merit of a suit by a third party, by a Department official, or by a Department hearing official, we see no practical way to implement such a procedure. Litigants already have the ability to engage in court-sponsored or independent mediation, in which both parties can adequately present their positions; if both parties are amenable to such a two-party assessment, the parties can readily pursue that course through mediation, and we see no need for the Department to undertake that role. We see little or no value in entertaining and evaluating a presentation solely from a defendant institution, whether that evaluation were to be performed by a Department official or an administrative hearing official in a Department proceeding. As noted, a party whose defense is financed by insurance may find the insurer conducting precisely such an evaluation in conducting the litigation, and that assessment will influence the conduct of the litigation.

In addition, the proposal that the Department or a third party assess the merit of an action by a government agency would require the Department or a third party to interpret the statutes and regulations on which that agency based its actions as well as assess whether the action was a reasonable exercise of the agency's authority. We have no authority to second guess the actions of another agency in the exercise of its authority, and we would neither presume to do so nor adopt a procedure in which we would credit such second-guessing by a third party.

The proposed regulation would treat ''oversight authority'' actions like actions of Federal or State agencies. By this term, we include local government entities with power to assert and recover on financial claims. This consideration applies only to affirmative government financial claims against the institution, not to government actions that deny approvals or suits that seek only injunctive or other curative relief but make no demand for payment. Local authorities can take enforcement actions that can pose a serious financial risk to the institution, and we see no basis for disregarding that risk or undertaking any internal or third-party assessment of the merit of the claim. Given the wide range of such government actions, we agree that those that do not directly seek relief that affects or relates to borrower defenses under this regulation might warrant a different assessment of risk than those closely related to borrower defenses. Generally the risks posed by the events deemed automatic triggers are events that threaten the viability of the institution, and the risks to the taxpayer posed by those threats include risks posed by closed school discharges and unaccounted-for Federal grant and loan funds. Federal or State agency suits asserting claims related to the making of a Direct Loan or the provision of educational services, as the latter term is considered under Department regulations, pose an additional risk and warrant a different assessment of risk, because these Federal or State actions not only pose a threat to the viability of the institution but are also reasonably expected to give rise to, and support, borrower defense claims. For those suits, we continue to consider it reasonable to treat the amount claimed in the suit or discernable from the scope of the allegations to quantify the potential loss from these suits.[53] However, we acknowledge the value of having the obligation to require financial protection depend on something more than the mere filing of a lawsuit if delaying surety does not jeopardize our ability to obtain appropriate financial protection. The summary judgment scheme we adopt for all other litigation may result in significant delay before protection is required for borrower defense-related suits, which may impair our ability to obtain adequate surety. Rather than delaying protection requirements until summary judgment or even a point close to trial, or creating some third-party evaluation of the merit of government agency suits involving borrower defense-related claims, we will rely on the outcome of the initial opportunity available in the litigation process itself for an institution to challenge the viability of the suit—the motion to dismiss. Thus, under these regulations, a government suit related to potential borrower defenses is a potential triggering event only if the suit remains pending 120 days after the institution is served with the complaint. This change provides the institution with ample time to move to dismiss the suit on any ground, including failure to state a claim on which relief can be granted.[54]

For suits by a Federal or State agency not directly implicating borrower defenses, and suits by other government agencies, we consider the summary judgment test applicable to private party lawsuits—not a motion to dismiss test—to provide a reasonable basis for testing the degree of risk posed.[55] Moreover, the threat posed by any of these suits may have no substantial effect on the composite score of the institution; as explained above, threats evaluated here require financial protection only if the threats together produce a failing composite score under these regulations.

We recognize that settlements may well achieve highly desirable outcomes, and that regulations should not create a disincentive to settlements. Regardless of the position taken in these regulations, a debt actually incurred under a settlement entered into in the current fiscal year will be recognized in the financial statements of the institution eventually submitted for the current year, and will be part of the financial information on which the institution's composite score will be calculated for the current year. The concerns raised about treatment of settlement obligations are therefore concerns only about how the regulations treat during the current fiscal year those settlement debts incurred during the current year, not their subsequent treatment. A settlement debt that the institution can meet will likely not jeopardize its financial score when actually evaluated, and we approach such debts from the same perspective by assessing their effect when incurred using the composite score method as adopted here. We do not expect that an institution will enter into a settlement that jeopardizes its viability, and by removing the thresholds and assessing that debt in a holistic manner, we believe that the regulation will remove any disincentive to enter into settlement. If an adjusted composite score includes a potential liability from a suit or oversight action that eventually results in a settlement, the previously recorded risk will be accordingly adjusted downward to the settlement amount.

We are retaining the summary judgment test for all non-governmental suits, because awaiting a final judgment that may cripple the institution would substantially frustrate our objective to acquire financial protection at a time when a significant threat is posed and while the institution is far more likely to be able to afford to provide that coverage. That alternative is unacceptable for those reasons, and those who object to use of a summary judgment standard pose no alternative judicial test that avoids these problems. We recognize that a complaint that lacks substantive merit may avoid dismissal if sufficiently well pled, but that such a suit survives summary judgment only with a showing of some evidence sufficient to support recovery.[56] The

[53] The most prominent recent example of such government actions that have resulted in judgments—those against Corinthian—does not suggest that assigning this level of risk to a government borrower defense-related suit is unreasonable, and, for that reason, as well, we decline the proposal to consider claims that such suits should be discounted.

[54] The Federal Rules of Civil Procedure require an answer or motion to dismiss to be filed within 20 days of service of the complaint, and also allow a defendant to move at any time for summary judgment. Fed. R. Civ. Proc. 12(a), (b); 56(b).

[55] The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ''to secure the just, speedy and inexpensive determination of every action.'' . . . Before the shift to ''notice pleading'' accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of ''notice pleading,'' the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.

Celotex Corp. v. *Catrett,* 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986).

[56] As one writer has observed, ''summary judgment stands as the only viable postpleading protector against unnecessary trials.'' Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix* (2005), 57 Stan. L. Rev. 1329. The comments that some States adopt summary judgment or summary adjudication procedures that differ either in labels (*e.g.,* California) or in some detail from the Federal standard do not show that the test is not available or sufficient to meet this objective. Where a plaintiff asserts several causes of action, a summary adjudication under Cal.C.C.P. § 437c(f) or similar law, or partial summary judgment that disposes of some but not all causes of action, those claims not disposed of remain pending and proceeding to trial, and therefore continue to pose risk. Furthermore, the regulations treat a failure to file for summary disposition by a defendant as a concession that the plaintiff has sufficient evidence to withstand a motion, and therefore that the claim has sufficient support to merit presentation to a jury. The fact that a State permits a plaintiff to seek summary judgment immediately upon commencement of the action (*e.g.,* N.Y. C.P.L.R., rule 3213, 28 U.S.C.A. (McKinney) does not frustrate use of this summary judgment test by a defendant institution; the institution is required merely to answer the plaintiff's motion. N.Y. Uniform Dist. Ct. Act § 1004 (McKinney). The institution is not required to make a cross motion for summary judgment, and may move later for summary judgment. N.Y. C.P.L.R., rule 3212, 28 U.S.C.A. (McKinney). The comment cites Virginia law as restricting the defendant's use of declarations and affidavits as making summary judgment less effective a test there. Even if this support is disfavored, the defendant is free to support the motion with ''admissions, interrogatories, and documents produced'' in discovery. *Nicoll* v. *City of Norfolk Wetlands Bd.,* 90 Va. Cir. 169 (Va. Cir. Ct. 2015). The tool,

Continued

obvious inference from a choice not to file for summary judgment is that a defendant fears that such a motion would not be well-founded, an assessment that implies a concession that the suit does pose a risk. Such a suit is at that point hardly frivolous, and constitutes a significant threat to the viability of the institution. Summary judgment is available in Federal court litigation, in which we expect a significant amount of even private party litigation to be brought, such as qui tam actions under the False Claims Act. As to the shortcomings of the summary judgment test under particular State law as asserted by the commenter, we note that the commenter pointed to only a few States in which the commenter asserted that summary judgment (or summary disposition) is less effectively available than in Federal courts. Institutions are already subject to those limitations, and face scrutiny by any party from whom the institution seeks investment or loans for the risks posed by such suits. The consideration we undertake here is no different in kind.

In response to the commenters who raised concerns about assessing the potential recovery sought in an action that articulates no specific financial recovery, we cannot ignore the threats posed by such suits. The fact that a particular suit may avoid stating a dollar amount of damages in the complaint in no way affects whether the suit poses a significant risk to the school. The potential recovery in such suits may not be obvious from a complaint, but will ordinarily be articulated in a number of different ways, at least one of which would be routinely available. For example, the plaintiff may have articulated a specific financial demand in a written demand made prior to suit. Second, a plaintiff may have offered to settle the claim for a specific amount.[57] Third, defendants engage in discovery, the amount of financial relief claimed is highly relevant to the handling of the suit, and we expect that a defendant would invariably seek such information in discovery. We recognize that suits brought by Federal and State authorities may and commonly do seek ''rescission,'' ''restitution,'' and ''disgorgement'' in unspecified amounts from the school, with civil penalties, for patterns and practices affecting students enrolled for years up to the filing.[58] The institution may be able to demonstrate that the complaint seeks unstated financial relief that as pled, pertains only to students enrolled in a particular program, location, or period of enrollment, and not all students enrolled at the institution, and may calculate the maximum recovery sought using data for that cohort.

Together, these changes are expected and designed to enable a school faced with the kinds of suits the commenters describe to either vigorously contest the suits as the school sees fit or to settle them. In either case, even a suit or settlement that might warrant financial protection in one year, that protection would be required only until the institution later may achieve a passing composite score despite recognition of the settlement obligation.

Changes: We have revised § 668.171(c)(1) to remove both the $750,000 and 10 percent of current asset threshold amounts for events that constitute an automatic trigger. Section 668.171(c) is revised to consider government actions unrelated to borrower defense claim subjects, and any private party lawsuits, to constitute a triggering event only if the suit has survived a motion for summary judgment or disposition, or the institution has not attempted to move for summary judgment and the suit progresses to a pretrial conference or trial. Section 668.171(c)(2) is revised to identify the sources from which an institution may discern the amount of financial recovery sought if that amount is not stated in the complaint.

Accrediting Agency Actions

Teach-Out Plan § 668.171(c)(1)(iii)

Comments: Under proposed § 668.171(c)(3)(i), an institution is not financially responsible if it is currently or was at any time during the three most recently completed award years required by its accrediting agency to submit a teach-out plan, for a reason described in § 602.24(c)(1), that covers the institution or any of its branches or additional locations.

Some commenters suggested making the submission of a teach-out plan under 34 CFR 602.24(c) a separate, automatic trigger. The commenters argued that, unlike accreditor sanctions, the teach-out provisions are clearer circumstances that suggest the institution may imminently close.

Commenters argued that a letter of credit for institutions that trigger the teach-out provision is unnecessary and duplicative of existing protections in the regulations. The commenters stated that in the scenario of a closing institution, it is highly unlikely that the school will be able to obtain a letter of credit, and argued that, as a result, requiring the closing school to submit a letter of credit could convert a planned, orderly closing into a sudden shut down, thus leaving students stranded and harming taxpayers.

Some commenters warned that including the voluntary closure as a trigger would have unwanted effects. The commenters argued that this trigger would incent schools to keep locations open, despite the fact that the locations may no longer be serving its purpose and its continued presence may constitute a drain on institutional resources. Forced to choose between a location that is running slightly in the red and a letter of credit calculated against the entire institution's title IV expenditures, the commenters believed institutions may have no choice but to keep the doors open.

Moreover, the commenters argued that requiring a letter of credit makes little sense in the circumstance in which a school closes one or more locations, but the institution remains open. The commenters offered that in any scenario involving the closure of a location but not the main campus, the Department may pursue derivative student claims against an institution when those students receive a loan discharge pursuant to proposed § 685.214.

Some commenters also contended that the closure of locations is typically designed to increase the financial soundness of an institution and believed that the Department's records would show that most individual locations are closed only after an orderly teach-out and without triggering many (or any) closed school discharges. They argued that the closing of one or more locations of a school does not necessarily signal financial instability of a school; it may signal prudent fiscal controls. Closing locations that are not profitable or that cannot effectively serve students makes the institution as a whole more financially responsible and better able

therefore, remains substantially available to test meritless cases.

[57] We recognize the settlement negotiations are privileged, and this option does not in any way diminish that privileged status. Private parties commonly disclose voluntarily to government agencies material that is privileged without risk of losing that privilege, and parties that share a settlement proposal with the Department under this option would not lose that protection, Thus, the Department would not disclose, in response to a Freedom of Information Act request, material regarding settlements if that material fell within exemption 4 of that Act, 5 U.S.C. 552(b)(4). 34 CFR 5.11. Such information includes commercial or financial information provided voluntarily and not customarily disclosed by the party to the public.

[58] We derive the default recovery amount of three years of tuition and fees from actions such as *Consumer Fin. Prot. Bureau* v. *Corinthian Colleges, Inc.,* No. 1:14–CV–07194, 2015 WL 10854380 (N.D. Ill. Oct. 27, 2015) (claims for actions over three year period); see also *California* v. *Heald College,* No. CGC–13–534793, Sup. Ct. Cty of San Francisco (March 23, 2016). (claims based on actions of varying duration). An institution may demonstrate that lesser amounts are applicable.

to serve its remaining students. Consequently, the commenters cautioned that schools should not be punished for making reasonable business decisions to conduct an orderly wind down of an additional location. The commenters recommended that no letter of credit be imposed in the circumstance of the proposed closure of individual locations, and that the Department address on a case-by-case basis the appropriateness of requiring a letter of credit from a school that announces a teach out of the entire school. Alternatively, if the Department maintains the letter of credit requirement based on a school's intention to close a location, the commenters suggested that the letter of credit should only apply to locations that service 25 percent or more of the institution's students.

Similarly, other commenters suggested that the Department adopt a materiality threshold, such as the number of students enrolled or affected or the title IV dollar amount associated with those students, because the closure of an additional location may have no adverse effect on an institution.

In response to the Department's request for comment on whether a threshold should be established below which the closure of a branch or additional location would not trigger the letter of credit requirement, as noted previously, commenters urged the Department to eliminate the closure of a branch or additional location as a triggering event, or at minimum, make the trigger discretionary rather than mandatory. If the Department does not do so, the commenters asserted that a threshold is then both necessary and appropriate, but the commenters believed that a letter of credit should be required only if the closure of a branch or additional location would have a material financial impact on the school as a whole. The commenters offered that the Department could request a letter of credit if the closure of a branch or additional location:

• Would reduce total school enrollment by 30 percent or more;
• Would reduce total school title IV receipts by 30 percent or more; or
• Would reduce total school tuition revenues by 30 percent.

Other commenters suggested that the Department extend the 10 percent materiality concept to this situation and apply the letter of credit requirement only if the closure of a location involves more than 10 percent of the school's population.

Some commenters noted that locations are often part of campus models that, among other things, bring postsecondary education to areas that might otherwise have none, and believed that institutions may elect to forgo these innovative efforts if they are unable to close a location without incurring a significant financial penalty.

Other commenters suggested that the Department clarify whether the letter of credit provisions would be applied based on the title IV, HEA funds received by the main or branch campus, and how the letter of credit provisions would apply to teach-out plans that might be submitted for a branch campus instead of the entire main campus.

Discussion: Under the teach-out provisions in 34 CFR 602.24(c)(1), an accrediting agency must require an institution to submit a teach-out plan whenever (1) the Department initiates an emergency action or an action to limit, suspend, or terminate the institution's participation in the title IV, HEA programs, (2) the accrediting agency acts to withdraw, terminate, or suspend the institution's accreditation, (3) the institution notifies the accrediting agency that it intends to cease operations entirely or close a location that provides 100 percent of a program, or (4) a State licensing or authorizing agency notifies the accrediting agency that the institution's license or authority to provide an educational program has been or will be revoked. The occurrence of any of these actions may call into question an institution's ability to continue, placing at risk the welfare of students attending the institution. However, in keeping with our treatment for other automatic triggering events, instead of using a materiality threshold, the Department will recalculate the institution's composite score (1) based on the loss of title IV, HEA funds received by students attending the closed location during the most recently completed fiscal year, and (2) by reducing the expenses associated with providing programs to those students, as specified in Appendix C to these regulations. We believe that this approach will corroborate the position of some of the commenters that closing an unprofitable location was a good business decision in cases where the recalculated composite score is higher but not less than the original score. Otherwise, a failing recalculated composite score shows that closing the location had an adverse impact on the institution's financial condition.

Changes: We have added a new § 668.171(c)(1)(iii) to provide that an institution is not financially responsible if it is required by its accrediting agency to submit a teach-out plan under § 602.24(c) that covers the institution or any of its branches or additional locations if, as a result of closing that institution or location, the institution's recalculated composite score is less than 1.0. In addition, we provide in Appendix C to subpart L, the adjustments to the financial statements that are needed to recalculate the composite score.

Show Cause or Probation § 668.171(g)(5)

Comments: Under proposed § 668.171(c)(3)(ii), an institution is not financially responsible if it is currently, or was at any time during the three most recently completed award years, placed on probation or issued a show-cause order, or placed on an accreditation status that poses an equivalent or greater risk to its accreditation by its accrediting agency for failing to meet one or more of the agency's standards, and the accrediting agency does not notify the Secretary within six months of taking that action that it has withdrawn that action because the institution has come into compliance with the agency's standards.

Some commenters were concerned that the scope of the proposed accrediting agency triggering events is too broad because it includes matters that do not necessarily pose any existential threat to the viability of an institution. The commenters stated that an institution placed on probation or show-cause status does not, in all cases, signal an imminent threat to the continued viability of the institution that should automatically require a letter of credit; in the tradition of accreditation, while these designations are meant to identify and make public areas of concern at an institution, the goal remains that of self-improvement and correction.

Other commenters agreed that an institution placed on show cause by most accrediting agencies is typically at substantial risk of losing its accreditation, and loss of accreditation would likely have some impact on its finances and operations. However, the commenters noted that, in many cases, the agency placed the institution on show cause because it had demonstrated significant financial and operational deficiencies that were already having an impact on its business and educational outcomes. Therefore, the commenters cautioned that in many cases, it is the reason behind the show cause order (*i.e.,* concerns about the financial and operational capacity of the institution), and not the show-cause status itself, that suggests an institution is not financially responsible.

Some commenters stated that in many cases, an accrediting agency places an institution on probation for issues of academic quality or dysfunction at the governance level even while the institution's operations and finances remain strong. The commenters stated that, while the issues that lead to the probation are certainly not minimal, it would take an institution longer than six months to correct them. In addition, the agency will need time to evaluate the changes and determine that the institution is now in compliance. Moreover, the commenters maintain that there is no clear evidence that institutions on probation routinely or uniformly experience operational or financial outcomes as a result of being on probation, particularly when the issues leading to the probation are unrelated to finance or operations. Again, the commenters cautioned that uniformly concluding that all institutions on probation that cannot correct non-compliance issues in six months are not financially responsible is overly broad. In addition, the commenters noted that it effectively punishes an institution that is on probation for issues not related to financial and operational deficiencies by requiring the institution to provide a letter of credit and participate in the title IV, HEA programs under a provisional certification.

The commenters believed that if the Department intends to rely on accrediting actions to determine financial responsibility, then the Department must review the content of the accrediting actions and act based on the reasons for those actions. As a matter of due process, each accrediting agency action imposing probation makes highly individualized findings of non-compliance that provide clear indicators regarding the institution's risk, as determined by the agency. For these reasons, the commenters suggested that the Department revise the show cause and probation provisions to refer specifically to agency standards related to finances, operations, or institutional ethics or integrity or related areas.

Other commenters supported tying accrediting agency actions to financial or operational issues but, in the alternative, would also support the Department's suggestion during the negotiated rulemaking process that there be a way for an accrediting agency to inform the Department as to why its probation or show-cause action will not have an adverse effect on the institution's financial or operating condition (see 81 FR 39364). Along somewhat similar lines, other commenters believed that, if an accrediting agency takes an action against a school based on financial responsibility concerns, that action should not supplant the Department's own analysis under subpart L of the regulations.

Other commenters stated that accreditors do not consider a show-cause order a negative action—to the contrary, accreditors routinely use it as a mechanism to promote institutional change and compliance. The commenters argued the Department itself has not previously taken the view that a show-cause order or probation was a significant threat to an institution's financial health by noting that a recent report listing the institutions the Department required to submit letters of credit did not identify an accrediting agency action as the basis for requiring any of those letters of credit. The commenters also noted that the Department's recent spreadsheet listing the institutions on heightened cash monitoring indicates that 13 of the 513 institutions were placed there for Accreditation Problems, which the Department defined as ''accreditation actions such as the school's accreditation has been revoked and is under appeal, or the school has been placed on probation.'' The commenters asserted the spreadsheet establishes (1) that the Department already has a mechanism for seeking financial protection from institutions experiencing accreditation problems, and (2) that a mere show cause order historically has not been viewed as posing the same risk as revocation or probation. In addition, the regulations governing recognized accreditors permit an accreditor to afford an institution up to two years to remedy a show-cause before it must take action, and the commenters believe that this allowable timeframe effectively codifies the notion that a show-cause order is neither a sign of impending financial failure, nor a matter than an institution would expect to resolve in six months' time. See 34 CFR 602.20.

Other commenters agreed with the Department that actions taken by an accreditor could be a sign that the institution may imminently lose access to Federal financial aid. In those cases, the commenters believed that asking for additional funds upfront would be a sensible step as an advance protection for taxpayers. However, the commenters point to recent review of accreditor actions over the last five years showing that the current sanctions system is highly inconsistent. The commenters stated this inconsistency was true with respect to terminology, the frequency with which actions happen, and how long an institution stays on a negative status. (Antoinette Flores's ''Watching the Watchdogs,'' published in June 2016). Given this inconsistency, the commenters recommend making the following changes to the proposed accrediting triggering events.

Commenters suggested that the Department make accreditor actions a discretionary trigger because, given the inconsistency among accreditors, establishing an automatic trigger tied to negative sanctions may be difficult. They stated that accreditors do not interpret what it means to be on probation or show cause in the same way. In addition, the commenters stated that making sanctions by accreditors an automatic trigger also risks making them unlikely to take action when they should.

The commenters note that a clear finding from the research, ''Watching the Watchdogs,'' is that many accreditors put institutions on a negative status for a very short period of time, while other accreditors required institutions facing a sanction to stay in that status for at least a year. The commenters were concerned that setting a clear threshold of six months would give an institution too much leverage to argue that its accreditor should withdraw the sanctions sooner than the accreditor otherwise would.

Discussion: In view of the significant number of comments that a probation or show cause action taken by an accrediting agency may not be tied to a financial reason or have financial repercussions, and could have serious unintended consequences as an automatic trigger, we are revising this trigger to make it discretionary. As such, we will work with accrediting agencies to determine the nature and gravity of the reasons that a probation or show cause action was taken and assess whether that action is material or would otherwise have an adverse impact on an institution's financial condition or operations. Moreover, under this approach, the proposed six-month waiting period for an institution to come into compliance with accrediting agency standards is no longer necessary.

Changes: We have reclassified and relocated the automatic probation and show-cause trigger in proposed § 668.171(c)(3)(ii) as a discretionary trigger under § 668.171(g)(5) and revised the trigger by removing the six-month compliance provision.

Gainful Employment § 668.171(c)(1)(iv)

Comments: Under proposed § 668.171(c)(7), an institution would not be financially responsible if, as determined annually by the Secretary, the number of title IV recipients enrolled in gainful employment (GE) programs that are failing or in the zone under the D/E rates measure in § 668.403(c) is more than 50 percent of the total number of title IV recipients who are enrolled in all the GE programs at the institution. An institution is exempt from this provision if fewer than 50 percent of its title IV recipients are enrolled in GE programs.

Some commenters noted that many institutions subject to the GE regulations have limited program offerings, and in some cases offer only one program. For those institutions, a single program scoring in the zone will result in more than 50 percent of its students being enrolled in zone-scoring programs. The commenters further noted that the GE regulations provide for a runway for institutions to bring programs into compliance, and institutions do so through cost reductions that are passed along to students. The commenters reasoned that imposing a letter of credit requirement on such an institution would deprive it of curative resources and ultimately lead to a closure of the program, rather than its remediation.

In response to the Department's request for comment on whether the majority of students who enroll in zone or failing GE programs is an appropriate threshold, commenters offered several observations and recommendations.

First, the commenters believed that a simple tally of the number of GE programs that may be failing or in the zone at a given point in time will not produce a consistently accurate assessment of an institution's current or future financial stability. The first set of debt-to-earnings rates, for example, are based on debt and earnings information for students who graduated between the 2008–09 and 2011–12 award years (assuming an expanded cohort). See generally 34 CFR 668.404. By the time the associated debt-to-earnings ratio for these programs are released (likely early 2017), many institutions will be offering new or different programs that are designed to perform favorably under the GE framework. Though, as of 2017, a significant number of the students may still be enrolled in the institution's older GE programs, these programs will no longer be integral to the institution's business model, and indeed, may be in a stage of phase-out. For this reason, the commenters suggested that any reasonable assessment of an institution's financial health would need to account for the phase-out of older GE programs and the strength of the newer ones.

Second, the commenters recommended that the Department exclude from this determination any GE programs that are in the zone, or at a minimum, GE programs that have only been in the zone for two or fewer years. The commenters argued that, because a GE program must be in the zone for four consecutive years for which rates are calculated before it loses eligibility, the inclusion of a zone program prior to this point does not justify the presumption that the program may lose eligibility.

Finally, the commenters suggested that, rather than exempting institutions where fewer than 50 percent of the title IV recipients are enrolled in GE programs, the regulations should simply compare the number of students who receive title IV, HEA funds and are enrolled in failing GE programs to the total number of students. The commenters believed this approach would be a better and more straightforward measure of the risk of financial failure posed to the entire institution.

Discussion: We appreciate the concerns and suggestions made by the commenters regarding the GE trigger and are persuaded that the trigger should be revised to (1) account for the time that an institution has to improve a GE program in the zone, and (2) focus more on the financial impact of failing programs instead of the percentage of students enrolled in GE programs.

We proposed including zone programs in the GE trigger because there are no assurances that an institution will attempt to improve or succeed in improving those programs. However, we agree that the proposed trigger could influence an institution to discontinue an improving program prematurely or hold an institution accountable for poorly performing programs that it voluntarily discontinues. In proposing the 50 percent threshold, we were attempting to limit this trigger to those situations where the potential loss of program eligibility would have a material financial impact on an institution. But, as alluded to by the commenters, the percentage threshold based on title IV recipients may not apply to situations where an institution discontinues a zone program, or cases where 50 percent of the title IV recipients enrolled at an institution account for a small fraction of (1) the total number of students enrolled, or (2) institutional revenue.

To address these concerns, we are revising the GE trigger by considering only those programs that are one year away from losing their eligibility for title IV, HEA program funds and assessing the impact of that program's closure and any potential loss under the recalculated composite score approach. Specifically, the Department will use the amount of title IV, HEA program funds the institution received for those programs during its most recently completed fiscal year as the potential loss and recalculate the composite score based on that amount and an allowance for reductions in expenses that would occur if those programs were discontinued.

Changes: We have revised the GE trigger as described above. We have also revised the GE trigger in § 668.171(c)(1)(iv) to provide that the loss used in recalculating the institution's composite score under § 668.171(c)(2) is the amount of title IV, HEA program funds the institution received for affected programs during the most recently completed fiscal year. Lastly, we specify in Appendix C to subpart L, the changes needed to reflect that loss of funding and the reduction in educational expenses associated with discontinuing those programs.

Withdrawal of Owner's Equity § 668.171(c)(1)(v)

Comments: Under proposed § 668.171(c)(8), an institution whose composite score is less than 1.5 is not financially responsible if there is any withdrawal of owner's equity from the institution by any means, including by declaring a dividend.

Some commenters appreciated the provision in § 668.171(d)(2) that would allow an institution whose composite score is based on the consolidated financial statements of a group of institutions, to report that an amount withdrawn from one institution was transferred to another entity within that group. However, the commenters argued that, since the Department is aware of the institutions whose composite scores are calculated based on consolidated financial statements, requiring those institutions to report every intercompany funds transfer imposes an unnecessary burden because the reporting provides little if any benefit to the Department. Therefore, the commenters recommend amending proposed § 668.171(c)(8) to expressly exclude any withdrawal of equity that falls within the circumstances described in § 668.171(d)(2).

Other commenters assumed that this provision is intended to apply only to proprietary institutions because nonprofits do not have owners. However, because in financial reporting, the term "equity" is often used conceptually to refer both to owner's equity for businesses or net assets for nonprofits, the commenters recommended that the Department clarify in the final regulations that this provision applies only to proprietary institutions.

Discussion: We agree that, where a composite score is calculated based on the consolidated financial statements of a group of institutions, funds transfers between institutions in the group should not be reported as withdrawals of owner's equity. The trigger for the withdrawal of owner's equity was based on the reporting requirement under the zone alternative in current § 668.175(d)(2)(ii)(E), which applies only to proprietary institutions. We agree to clarify in the regulations that as a triggering event under § 668.171(c), the withdrawal of owner's equity applies only to proprietary institutions.

In addition, by recalculating the composite score we capture the impact of withdrawals of owner's equity in cases where the withdrawals were not made solely to meet tax liabilities.

Changes: We have revised the withdrawal of owner's equity trigger now in § 668.171(c)(1)(v) to specify that it applies only to a proprietary institution and that it does not include transfers to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated. In addition, we specify in § 668.171(c)(2)(iv)(B) that except for a withdrawal used solely to meet tax liabilities, as provided under § 668.171(h)(3)(ii), the Secretary will recalculate the institution's composite score to account for that withdrawal.

Cohort Default Rates § 668.171(f)

Comments: Under proposed § 668.171(c)(9), an institution is not financially responsible if its two most recent official cohort default rates are 30 percent or greater, unless the institution files a challenge, request for adjustment, or appeal with respect to its rates for one or both of those fiscal years and that action remains pending, results in reducing below 30 percent the official cohort default rate for either or both years, or precludes the rates from either or both years from resulting in a loss of eligibility or provisional certification.

Some commenters urged the Department to remove the cohort default rate trigger, citing concerns that this trigger would have unintended consequences. The commenters believed that, because of the corresponding letter of credit requirements, it is likely that banks would curtail their lending to affected institutions making it more difficult for those institutions to initiate, or continue with, innovative educational efforts that are often capital-intensive.

In response to the Department's request for comment on whether a cohort default rate of 30 percent or more for a single year should be a triggering event, some commenters believed that the proposed two-year trigger should not be changed. One commenter suggested that this trigger should apply to any institution whose most recent cohort default rate is 30 percent or higher, arguing that keeping default rates below 30 percent is a very low standard for an institution to meet—only 3.2 percent of institutions have a default rate of 30 percent or higher. The commenter noted that, among all students attending institutions of higher education where the default rate is 30 percent or higher, 85 percent attend public institutions and just 11 percent attend proprietary institutions. The commenter urged the Department not to exempt public institutions from this trigger if the Department's goal is to protect as many students as possible.

Discussion: We wish to make clear that the Department will not apply the cohort default rate trigger until any challenge, request for adjustment, or appeal that an institution qualifies to file, under subpart N of the General Provisions regulations, is resolved. If that action is resolved in favor of the institution, the Department will take no further action and make no further requests of the institution with regard to this trigger. Otherwise, after the challenge, request, or appeal is resolved, the Department will apply the cohort default rate trigger and request the corresponding financial protection from the institution.

We disagree with the notion that a bank will curtail its lending to an institution solely because the Department requests financial protection under this trigger. Like other creditors, a bank would assess the risks inherent in making a lending decision, including regulatory risks. In this case, under the statutory provisions in section 435(a)(2) of the HEA, pending any appeal for, or adjustment to, its cohort default rates the institution is one year away from losing its eligibility for title IV, HEA funds. Although an institution's intention to initiate or continue innovative educational efforts are laudable, we believe it is questionable that a bank would jeopardize funds requested by the institution after having assessed the risks of whether the institution could repay those funds in the event that the institution's eligibility under the title IV, HEA programs is terminated in the near term.

With regard to the Department's request for comment, we are persuaded to maintain the proposed two-year threshold.

With respect to the comment that, to protect as many students as possible, the Department should not exempt a public institution from the cohort default rate trigger, we note that while cohort default rates for all institutions are publicly available and can be used by students and parents in making enrollment decisions for particular institutions, the purpose of this trigger is to protect the Federal interest in the event an institution loses its eligibility for title IV, HEA funds in the coming year. In that circumstance for a public institution, we already have financial protection in the form of full faith and credit of the State to cover any liabilities that may arise (see the discussion under the heading ''Public Domestic and Foreign Institutions'').

Changes: None.

Non-Title IV Revenue (90/10) § 668.171(d)

Comments: Under proposed § 668.171(c)(5), a proprietary institution is not financially responsible if it does not derive at least 10 percent of its revenue from sources other than title IV, HEA program funds during its most recently completed fiscal year.

Some commenters believed this trigger was unjustified, arguing that an institution's eligibility to participate in the title IV, HEA programs is not at risk after a one-year failure. The commenters stated that section 487(d)(2) of the HEA provides that no penalties are imposed on an institution until it loses title IV eligibility by failing the 90/10 revenue test for two consecutive years, and that the sanctions that are specified do not include the financial responsibility consequences proposed under this trigger. For these reasons, the commenters concluded that, lacking specific statutory authority, the Department should remove this trigger from the final regulations.

Other commenters were concerned that institutions actively game the 90/10 requirements by (1) delaying title IV disbursements until the next fiscal year; (2) combining locations that exceed the 90 percent revenue limit with those that do not, and (3) raising tuition, which forces students to take out private loans that increase revenue from non-title IV sources. The commenters believed that these gaming strategies are the reason that only a few institutions fail the 90/10 revenue test each year (14 institutions for the 2013–14 reporting period) and urged the Department to limit the use of these strategies, recommending for example, that Department track for three years the 90/10 compliance for each location included at the institution's request under a single PPA or that the Department should not grant those requests when institutional 90/10 compliance is in question.

Discussion: As we noted in the preamble to the NPRM, an institution that fails the 90/10 revenue test for one year, is one year away from losing its title IV eligibility. Under § 668.28(c)(3), an institution that fails the revenue test must notify the Department of that failure no later 45 days after the end of its fiscal year. If the institution fails again in the subsequent fiscal year, it loses its eligibility for title IV, HEA funds on the day following the end of its fiscal year, not at the end of the 45-day reporting period. After the end of its fiscal year, the institution's ability to continue to make disbursements to enrolled students is severely limited under the provisions in § 668.26. Consequently, in view of the institution's dependence on revenues from title IV, HEA funds that it is no longer eligible to receive, it is likely that the institution would close, possibly precipitously, leading to closed school discharges and program liabilities owed to the Department. These are the same outcomes that would result from an existential threat, such as a crippling lawsuit or loss of accreditation, for which financial protection is authorized under the financial responsibility provisions in section 498(c) of the HEA.

Contrary to the commenters' assertion that there is no risk to an institution's eligibility after a one-year failure, the HEA contemplates that risk under section 487(d)(2)(B) by providing that after a one year failure, the institution automatically becomes provisionally certified and remains on that status for the following two years, unless it fails the 90/10 revenue test in the subsequent year and loses eligibility. Moreover, the Department's authority to establish 90/10 as a basis for determining whether an institution is financially responsible is anchored under the provisions in section 498(c)(1) of the HEA, not the provisions governing the institution's eligibility under the 90/10 revenue provisions.

With regard to the comments about institutions evading the 90/10 requirements, we note that changes to these requirements are beyond the scope of this rulemaking. Administratively however, the Department will continue to diligently enforce the 90/10 requirements and work closely with the Office of the Inspector General to help ensure that institutions properly calculate their 90/10 rates.

Changes: None.

Publicly Traded Institutions § 668.171(e)

General

Comments: Under proposed § 668.171(c)(6), a publicly traded institution is not financially responsible if the SEC warns the institution that it may suspend trading on the institution's stock, the institution's stock is delisted involuntarily from the exchange on which it was traded, the institution disclosed in a report to the SEC that it is subject to a judicial or administrative proceeding, the institution failed to file timely a required report with the SEC, or the exchange on which the institution's stock is traded notifies the institution that it is not in compliance with exchange requirements.

Commenters believed that the NPRM did not provide meaningful rationale for some of the provisions that the Department asserts require financial protection, pointing for example to an institution's failure to file a timely report with the SEC, or noncompliance with exchange requirements, and noting that the Department only suggested that such events could lead to institutional failure. In response to the Department's request for comment regarding how these triggers could be more narrowly tailored to capture only those circumstances that could pose a risk to an institution's financial health, the commenters offered that the final regulations should provide that in every instance where an SEC action occurs, the Department will only take action after it affords the institution a notice and hearing and thereafter makes a reasoned determination that the event is likely to result in a material adverse effect. The commenters further stated that, to be a triggering event, any SEC action should be a final, non-appealable judgment or suspension and not merely a warning or notification. The commenters also stated that because many companies inadvertently and regularly miss a periodic filing deadline, the final regulations should require a finding of materiality, as applied to the delinquency of the filing, and the Department should consider whether the filing failure is an isolated incident or part of a pattern of conduct, and whether the missed filing was the fault of the institution.

Similarly, in response to the Department's request for comment, other commenters identified the following situations that they believed would provide for a more appropriate set of triggers for publicly traded institutions:

(1) The institution is in default on an obligation to make payments under a credit facility, or other debt instrument, and the default involves an amount in excess of 10 percent of the institution's current assets, and the default is not cured within 30 days;

(2) An event of default has been declared by the relevant lender or trustee under any outstanding credit facility or debt instrument of the institution or its parent, including any bond indenture, and the default is not cured within 30 days; or

(3) The institution or its parent declares itself insolvent, files a petition for reorganization or bankruptcy under any Federal bankruptcy statute, or makes an assignment for the benefit of creditors.

The commenters believed that adopting the recommended triggers would enable the Department to efficiently identify those cases in which a publicly traded institution is in financial trouble, and would avoid conflating investor-facing disclosures or nonmaterial administrative matters (*e.g.,* failure to timely file a required report, notification of non-compliance with exchange requirements) with reliable indicators of financial distress.

Discussion: With regard to the suggestion that the Department apply these triggering events only when an SEC action is what the commenter describes as a final, non-appealable judgment or suspension, and not a warning or notification, doing so would further distance these events as early but significant indicators of serious financial distress. We understand that the warning is issued by the SEC only after repeated efforts have already been made to alert the delinquent party of the need to file, and despite these attempts, the registrant continues to fail to respond. We understand that the consequences of failure to file timely required reports after this warning include significant burdens should the institution wish to raise capital, and that not uncommonly, the reason a registrant becomes so delinquent as to be issued this warning is that the registrant has ceased operations. We are not capturing, or requiring contemporaneous reporting of, the actions and circumstances that give rise to an SEC or exchange action—information that may at an early stage forecast operational or financial difficulties—because that would be unmanageable and could lead to erroneous conclusions. Instead, we are relying on the conclusions reached by the SEC and the stock exchange that the actions taken by the institution warrant a significant and corresponding reaction.

With regard to the proposal that the Department take action to impose financial protection based on an SEC or exchange action only after providing the institution an opportunity for a hearing and a case-by-case evaluation of the significance of the particular event on which the SEC or exchange acted, we note that § 668.171(h)(3)(iv) provides the institution with an opportunity at the time it reports the event to demonstrate that the condition no longer exists, has been cured or, that it has insurance that will cover any and all debts and liabilities that arise at any time from that triggering event. The liabilities referred to here are those that arise from a precipitous closure of an institution, including, but not limited to losses from closed school discharges, and liabilities for grant and loan funds not accounted for as properly spent by the statutorily required compliance audit. If the Department takes an enforcement action based on this trigger, or any other automatic triggering events, to condition the continuing participation of the institution on providing the required financial protection, § 668.90(a)(3)(iii)(A) provides the institution a more formal opportunity to demonstrate these defenses. The event itself is of such significance that the Department considers only these defenses, and not contentions that the event itself is not grounds for requiring protection.

While we appreciate the suggestions made by the commenters to streamline the triggers for publicly traded institutions, particularly with regard to making payments under a credit facility, as discussed more thoroughly under the heading ''Violation of Loan Agreement,'' we have made these provisions discretionary and they apply to all institutions. While we agree that some of the situations described would signal serious distress, under these regulations we will make those determinations on a case-by-case basis. As previously noted, if the lender files suit as a result of the delinquency, that suit would be considered under the private litigation assessment in § 668.171(c)(1)(ii).

Changes: None.

Delisting

Comments: With regard to the triggers pertaining to a warning from the SEC that it may suspend trading and the involuntary delisting of an institution's stock, some commenters found the correlation the Department was attempting to make between an institution's failure to comply with exchange requirements and its ability to meet its financial obligations troublesome.

The commenters argued that, while a delisting is significant, correlating an institution's financial health to its delisting incorrectly assumes that the delisting is generated as a result of financial problems and the delisting will materially impact the institution's financial health. Even where the delisting is itself related to something that is measured in dollars, like a minimum bid price, that measure is not necessarily indicative of the health of an institution, as opposed to the market value of a share of the institution.

Discussion: While the commenters are technically correct that an involuntary delisting does not necessarily mean that an institution has financial problems, it could equally or more likely mean that it does. Even worse, the delisting may be a prelude to bankruptcy. Generally speaking, financially healthy institutions are not involuntarily delisted. As discussed in the preceding comment, the regulations provide the institution ample informal and formal opportunities to show that the risks that the triggering event may cause have been removed by curing the event itself. These liabilities are those that ensue from a precipitous closure, as described above. An institution's financial viability under the Department's composite score methodology assesses, as explained earlier, the ability of the institution to borrow and access capital as needed. Delisting and SEC actions directly affect the ability of a publicly-traded institution to access capital. An institution may contend that the event on which the action was premised does not portend closure, but the action by the exchange or SEC unquestionably affects the ability of the institution to obtain financing, a critical aspect of financial viability. While the negative effect of that impairment may be difficult to quantify, and cannot immediately be assessed under the composite score methodology, that impairment warrants requiring financial protection.

Changes: None.

SEC Filings Regarding Judicial or Administrative Proceeding

Comments: With regard to judicial or administrative proceedings, some commenters noted that the SEC's requirements are designed to encourage disclosure of information to potential investors and cautioned that the proposed regulations may discourage those disclosures. The commenters believed that although the proposed reporting requirements under § 668.171(d)(i) would permit an institution to explain why a particular litigation or suit does not constitute a material adverse event that would pose an actual risk to its financial health, a publicly traded institution that elects to make broad disclosures to the SEC and potential investors would be dependent on the Department agreeing with the institution's position. If the Department disagrees, the commenters opined that the institution would face a financial penalty (*i.e.,* be required to submit a letter of credit) for a situation where the disclosure may not have been required by the SEC in the first place. Along similar lines, other commenters noted that the reporting provisions do not require the Department to act on any evidence provided by the institution, and do not specify what opportunity, if any, the institution would have to discuss these events with the Department. For these reasons, the commenters suggested that the Department should not implement regulations that would interfere with the primary purpose of SEC disclosures—to permit potential investors to make their own decisions about whether to invest in the institution.

Similarly, other commenters believed this triggering event would run counter to the long-standing practice of publicly traded institutions generally erring on the side of disclosing legal and regulatory events to the public and their shareholders. More specifically, the commenters asserted that publicly traded institutions tend to over-disclose these events, particularly since the materiality of those events often cannot be reasonably determined at their onset.

Discussion: We acknowledge that a judicial or administrative proceeding reported by an institution to the SEC may or may not be material. We believe that proceedings reported in SEC filings that seek substantial recovery but may not be meritorious pose a risk similar to the risk posed by non-governmental actions. The institution may succeed in dismissing such a suit, or at least testing its merit by moving for summary judgment or disposition. The institution may also have insurance that fully protects the institution from loss from the suit.

Changes: We have added a new § 668.171(c)(1)(ii) to treat all private party litigation as a triggering event only if the action survives a motion for summary judgment or disposition, or the institution has chosen not to file for summary judgment, and have amended § 668.171(h) to enable the institution to demonstrate that all actual and potential losses stemming from that litigation are covered by insurance.

SEC Reports Filed Timely

Comments: With respect to the trigger for filing timely SEC reports under proposed § 668.171(c)(6)(iii), some commenters warned that the

Department should not assume that an institution is unable to meet its financial or administrative obligations and impose punitive actions based on a failure to meet SEC filing requirements. As an initial matter, the commenters argued that the proposed trigger is more stringent than the SEC's rules, which allow an institution to file a notification of late filing, that enables the institution to file the report by an extended deadline, and once filed the institution would be deemed to have timely filed the report. In addition, the commenters stated that an institution's failure to file a report may not necessarily reflect that the institution is unable to meet its financial or administrative obligations, because the report could be late for many reasons outside of financial problems at an institution, including the unavailability of an individual required to sign the report, an unforeseen circumstance with an institution's auditors, or the need to address a financial restatement done for technical reasons. Similarly, other commenters urged the Department to apply this trigger only where the filing would be considered late under SEC rules. The commenters explained that pursuant to SEC rules, an institution that fails to timely file a report must file a Form 12b–25, reporting the failure to file no later than one business day after the report was due. If the Form 12b–25 is properly filed, the institution will have 15 additional calendar days to file an annual report or five additional calendar days to file a quarterly report. If the institution files the late report within the extended deadline, the SEC considers that the report was timely filed.

Discussion: A late SEC filing, or failure to file, may precipitate an adverse action against an institution by the SEC or a stock exchange. For example, an AMEX or Nasdaq-listed institution that files a late SEC report is cited for failing to meet exchange requirements and will be required by the exchange to submit a plan for regaining compliance with listing requirements. The exchange may suspend trading on the institution's stock if it does not come into compliance with those requirements. Or, a late filing may limit the institution's ability to conduct certain types of registered securities offerings. In addition, capital markets tend to react negatively in response to late filings. All told, the consequences of late SEC filing may impact the institution's capital position or its ability to raise capital, and we believe that it remains a significant event to include as an automatic trigger.

Changes: None.

Discretionary Triggering Events § 668.171(g)

Comments: Under proposed § 668.171(c)(10), an institution is not financially responsible if the Secretary determines that there is an event or condition that is reasonably likely to have a material adverse effect on the financial condition, business, or results of operations of the institution, including but not limited to whether (1) there is a significant fluctuation in the amount of Direct Loan or Pell Grant funds received by the institution that cannot be accounted for by changes in those programs, (2) the institution is cited by a State licensing or authorizing agency for failing State or agency requirements, (3) the institution fails a financial stress test developed or adopted by the Secretary to evaluate whether the institution has sufficient capital to absorb losses that may be incurred as a result of adverse conditions, or (4) the institution or its corporate parent has a non-investment grade bond or credit rating.

Commenters believed that the proposed discretionary triggers were unreasonable for several reasons. First, the commenters noted that the discretionary provisions do not afford institutions any opportunity to communicate with the Department regarding a possible materiality determination. Instead, it appeared to the commenters that the Department may determine unilaterally, and without engaging the school, that there is an event or condition that is reasonably likely to have a material adverse effect and proceed to demand financial protection, violating the school's due process. Moreover, the commenters argued that any standard of financial responsibility that does not permit the receipt and review of information from the school cannot produce consistent and accurate results and, as such, fails to satisfy the reasonability standard put into place by Congress.

Second, the commenters noted that the Department did not define the term ''material adverse effect'' and made no mention of the concept in the preamble to the proposed regulations. The commenters asserted that the Department must define this term to ensure that the regulations are consistently applied, particularly where an institution could be significantly penalized (required to submit a letter of credit) pending the result of the determination.

Third, the commenters argued that by requiring under proposed § 668.171(d) that an institution must report any automatic or discretionary trigger within 10 days, the proposed regulations are unworkable—because the discretionary triggers are not exhaustive, an institution would have an obligation to speculate as to the types of events the Department might determine would have a material adverse effect and report those events. Conversely, the commenters were concerned that the Department could argue that an institution's failure to report an event, that the Department might deem likely to have material adverse effect, is a failure to provide timely notice under § 668.171(d), and grounds to initiate a proceeding.

Fourth, the commenters argued that the six examples of events that the Department might consider ''reasonably likely'' to have a material adverse effect on an institution are vague, and asserted that the Department offered no factual support in the preamble for the notion that these events regularly, or even more often than not, lead to financial instability at an institution. The commenters stated that the only rationale the Department offers for including these six events is that each could, in theory, signal financial stress. For example, they noted that a citation from a State-authorizing agency for failing a State requirement could concern almost any aspect of an institution's operations. The commenters contended that routine citations occur with great frequency in annual visit reports and routine audits. Therefore, under the proposed regulations, an institution would be required to report every citation, without regard to materiality, frequency, or the relationship to the institution's financial health. According to the commenters, events such as ''high annual dropout rates,'' a ''significant fluctuation'' in the amount of Federal financial aid funds received by an institution, an undisclosed stress test, and an adverse event reported on a Form 8–K with the SEC are equally problematic and vague. Commenters stated that it was unclear what these thresholds or events represent, how they would be evaluated, or how an institution would know that one has occurred and report it to the Department.

Other commenters believed that the Secretary should not have open-ended discretion to determine which categories of events or conditions would be financial responsibility triggers. Like other commenters, these commenters argued that as a practical matter it would likely be impossible for an institution to comply with the reporting requirements in proposed § 668.171(d) for any event or condition that is not specifically identified by the Secretary because the institution would have to guess which additional events or conditions might be of interest. Similarly, some commenters believed the discretionary triggers should be exhaustive with established parameters so that institutions know the events they must comply with and report to the Department.

Some commenters believed that the discretionary triggers constitute an open invitation for litigation by anyone with an ''axe to grind'' with any school. The commenters were concerned that the Secretary could use the expanded authority under the discretionary triggers to take actions against institutions for any reason.

Discussion: As a general matter, the discretionary triggers are intended to identify factors or events that are reasonably likely to, but would not in every case, have an adverse financial impact on an institution. Compared to the automatic triggers, where the impact of an action or event can be reasonably and readily assessed (*e.g.,* claims, liabilities, and potential losses are reflected in the recalculated composite score), the materiality or impact of the discretionary triggers is not as apparent. The Department will have to conduct a case-by-case review and analysis of the factors or events applicable to an institution to determine whether one or more of those factors or events has an adverse financial impact. In so doing, the Department may request additional information or clarification from the institution about the circumstances surrounding the factors or events under review. If the Department determines that the factors or events have a material adverse effect on the institution's financial condition or operations, the Department notifies the institution of the reasons for, and consequences of, that determination. As for the comment that we should define ''material adverse effect,'' we do not intend to adopt a specific measure here, because identification of those events that cause such an effect is a particularized judgment.[59] We disagree with the notion that it is inappropriate for the Department to determine which factors or events may be used as discretionary triggers, or that the list of factors and events in the regulations should be exhaustive. Each discretionary trigger rests on a particularized judgment that a factor or event has or demonstrates such a substantial negative condition or impact on the institution as to place continued operations in jeopardy.[60] In this regard, as explained more fully under the heading ''Reporting Requirements,'' an institution is responsible for reporting only the actions and events specified in these regulations.

We address specific concerns and suggestions about the discretionary triggers in the following discussion for each factor or event. In addition, we have added pending borrower defense claims as a discretionary trigger because it is possible that an administrative action could cause an influx of borrower defense claims that we can expect to be successful, though that will vary on a case-by-case basis.

Changes: None.

Discretionary Triggering Events

Bond or Credit Rating, Proposed § 668.171(c)(11)

Comments: Commenters argued that a non-investment grade bond or credit rating is not a reliable indicator of financial problems. The commenters stated that, because the rating assigned by a rating agency is a measure designed for the benefit of creditors concerned solely with pricing the institution's debt, a rating below investment grade does not necessarily mean that an institution cannot meet its financial obligations. Moreover, the commenters questioned how the Department would determine that an institution or its corporate parent had a non-investment grade rating, since there are multiple rating agencies and the agencies may not necessarily assign the same rating to a particular institution or in the case where the institution or its corporate parent have multiple ratings, some of which are investment grade. The commenters stated that this financial structuring is not unusual and has no impact on the ability of the institution to meet its obligations. For these reasons, the commenters suggested that, if the Department retains bond or credit ratings as a triggering event, it should specify how those ratings are determined. In addition, the commenters were concerned that applying this trigger could potentially increase costs to institutions because, in an effort to avoid this risk of a non-investment grade rating, an institution may seek not to have a credit rating in the first place, so obtaining alternate financing could increase its costs of capital.

Other commenters argued that assuming that schools with noninvestment grade bond ratings are somehow deficient is unwarranted. The commenters noted that the majority of nonprofit colleges and universities do not have a bond rating at all, since they have not issued public debt, citing the data provided by the Department in the

---

[59] Accounting rules do not set a specific figure for such effects. However, SEC regulations require the registrant to disclose resources the loss of which would have a material adverse effect on the registrant, and in that rule explicitly require the registrant to disclose an investment of 10 percent or more of company resources in an entity, 17 CFR 210.1–02(w), and identify any customer or revenue source that accounts for 10 percent or more of the registrant's consolidated revenues, if the loss of that revenue would constitute a material adverse effect. 17 CFR 229.101(c)(1)(i), (vii). While not defining material adverse effect, the selection of this threshold supports an inference that loss of this magnitude can be expected to constitute a material adverse effect. A popular characterization of the significance of such a loss states that material adverse effect is a term that commonly denotes an effect that

. . . usually signals a severe decline in profitability and/or the possibility that the company's operations and/or financial position may be seriously compromised. This is a clear signal to investors that there is something wrong . . . Material adverse effect is not an early warning signal, but rather a sign that a situation has already deteriorated to a very bad stage. Investopedia *www.investopedia.com/articles/analyst/112702.asp#ixzz4JKIpsbwk.*

[60] The assessment would look to the factors identified in recent revisions to Financial Accounting Standards Board rules regarding the expectations regarding whether the entity's ability to continue as a going concern. FASB Standards Update, No. 2014–15, Presentation of Financial Statements—Going Concern (Subtopic 205–40):

205–40–55–2 The following are examples of adverse conditions and events that may raise substantial doubt about an entity's ability to continue as a going concern. The examples are not all-inclusive. The existence of one or more of these conditions or events does not determine that there is substantial doubt about an entity's ability to continue as a going concern. Similarly, the absence of those conditions or events does not determine that there is no substantial doubt about an entity's ability to continue as a going concern. Determining whether there is substantial doubt depends on an assessment of relevant conditions and events, in the aggregate, that are known and reasonably knowable at the date that the financial statements are issued (or at the date the financial statements are available to be issued when applicable). An entity should weigh the likelihood and magnitude of the potential effects of the relevant conditions and events, and consider their anticipated timing. a. Negative financial trends, for example, recurring operating losses, working capital deficiencies, negative cash flows from operating activities, and other adverse key financial ratios. b. Other indications of possible financial difficulties, for example, default on loans or similar agreements, arrearages in dividends, denial of usual trade credit from suppliers, a need to restructure debt to avoid default, noncompliance with statutory capital requirements, and a need to seek new sources or methods of financing or to dispose of substantial assets. c. Internal matters, for example, work stoppages or other labor difficulties, substantial dependence on the success of a particular project, uneconomic long-term commitments, and a need to significantly revise operations. d. External matters, for example, legal proceedings, legislation, or similar matters that might jeopardize the entity's ability to operate; loss of a key franchise, license, or patent; loss of a principal customer or supplier; and an uninsured or underinsured catastrophe such as a hurricane, tornado, earthquake, or flood.

NPRM that shows that only 275 private institutions have been rated by Moody's (some others likely have used other rating agencies like Fitch or Standards & Poor). The commenters contended that institutions that have a rating are arguably in better financial condition than those that do not, so rather than being a trigger for additional scrutiny, the existence of a credit rating and outstanding public debt would, in itself, be an indication of financial responsibility. Further, the commenters noted that a bond rating seeks to assess the creditworthiness and risk of nonpayment over an extended time period—typically 20 to 30 years—that is well beyond the much shorter timeframe contemplated by the financial responsibility regulations.

Discussion: In considering the complexities and difficulties noted by the commenters in using and relying on bond or credit ratings, we are removing this triggering event.

Changes: We have removed bond or credit ratings as a discretionary trigger.

Adverse Events Reported on Form 8–K, Proposed § 668.171(c)(11)

Comments: Commenters believed that the trigger regarding the reporting of adverse events on the SEC's Form 8–K is too narrow since it is not used to identify adverse events at non-publicly traded institutions and too broad since it would capture events reported on Form 8–K that are not indicative of an institution's financial health. Although the commenters acknowledged that it may be efficient to use existing disclosure channels to identify potential issues of concern, they nevertheless believed that it was unfair for the Department to impose burdens on publicly traded institutions, but not on other institutions that may be experiencing adverse events. In addition, the commenters stated that many events listed on Form 8–K have no bearing on an institution's ability to meet its financial obligations, so the Department should identify the events it considers to be adverse. Once identified, the commenters suggested that the Department could develop a broader list of adverse events that would be applicable to all institutions.

Also, the commenters believed that, because of the proposed trigger, publicly traded institutions would have an incentive not to report events on Form 8–K that could potentially be adverse events, but in the ordinary course would have provided useful information to investors. In conclusion, the commenters feared that, without clear guidelines from the Department about what constitutes an adverse event, publicly traded institutions would have to make their own decisions as to whether to treat something as an adverse event. Commenters were concerned that, even where institutions make that decision in good faith, they could potentially be exposing themselves later to an action by the Department if the Department exercises its own judgment in hindsight.

Similarly, other commenters believed that a number of events on Form 8–K have little or no relationship to the institution's continued capacity to operate or to administer the title IV, HEA programs. Instead of using a trigger based on Form 8–K reporting, the commenters suggested that the financial responsibility regulations should be focused on potential risks to the title IV, HEA programs and, as a related matter, institutional outcomes that are indicative of that risk.

Discussion: While we are not convinced that some of the reportable items on Form 8–K will not have an adverse financial impact on an institution, we will not require an institution to report any Form–8K event because that information is otherwise publicly available to the Department. We may, however, evaluate the effect of an event reported in a Form 8–K as if it were a discretionary triggering event, on a case by case basis, or in light of the effect on an institution's composite score as applied under these regulations.

Changes: We have removed the discretionary trigger regarding an adverse event reported by an institution on a Form 8–K under proposed § 668.171(c)(10)(vii).

High Drop-Out Rates and Fluctuations in Title IV, HEA Funding

Drop-Out Rates § 668.171(g)(4)

Comments: Some commenters urged the Department to define how it will calculate high annual dropout rates and provide an opportunity for the pubic to comment on the methodology employed. The commenters noted that in the preamble to the NPRM, the Department stated that it uses high dropout rates to select institutions for program reviews, as described in 20 U.S.C. 1099c–1(a), and that ''high dropout rates may signal that an institution is employing high-pressure sales tactics or is not providing adequate educational services, either of which may indicate financial difficulties and result in enrolling students who will not benefit from the training offered and will drop out, leading to financial hardship and borrower defense claims'' (81 FR 39366 (emphasis added)). Although the commenters agreed that those statements may be true, they argued that when the Department conducts a program review, it investigates whether high dropout rates are in fact signs of financial difficulties. Under the NPRM, the commenters surmised that the Department would have the discretion to impose a requirement to provide a letter of credit or other financial protection without any review of institutional practice or other investigation to find a causal connection between high dropout rates and financial difficulties, thus depriving the institution of fair process.

Other commenters were concerned that this trigger is arbitrary because it is unlikely that a high dropout rate is related to a school's financial stability. The commenters pointed to a study published in December 2009 by Public Agenda showing that the most common reason students dropped out of school is because they needed to work. Other reasons cited in the study include: Needing a break from school, inability to afford the tuition and fees, and finding the classes boring or not useful. Based on this study and survey results from the Pew Research Center, the commenters concluded that the reasons students drop out of school typically have very little to do with school itself, and therefore suggested that the Department remove this triggering event.

Some commenters argued that the use of the dropout rate as a trigger fails to account for the various missions that title IV institutions represent, or the extended time to graduation that many contemporary students face as they balance career, family and higher education. The commenters believed that establishing a dropout rate as a trigger for a letter of credit creates a perverse incentive for institutions to enroll and educate only those students who are most likely to succeed, instead of continuing to extend access to higher education to the broader population. In addition, the commenters believed that measures of academic quality are best left to accreditors, but if the Department chooses to take on this role, it should consider instead triggering a letter of credit if an institution's persistence rate decreases significantly between consecutive award years, or over a period of award years. The commenters believed this approach would account for the significant variances in mission and student body across higher education without potentially limiting access.

Fluctuations in Funding § 668.171(g)(1)

Commenters believed the proposed trigger for a significant fluctuation between consecutive award years, or a period of award years, in the amount of Pell Grant and Direct Loan funds received by an institution, is overly vague. The commenters noted that year-over-year fluctuations can occur when an institution decides to discontinue individual programs or close campus locations, often because those campuses or programs are under-performing financially even where the overall institution is financially strong and argued that because these are sound business decisions made in the long-term interests of the institution, they should not give rise to a letter of credit requirement.

Some commenters believed that a decrease in total title IV expenditures should not trigger a letter of credit requirement because the decreases in the amount of title IV, HEA funds disbursed puts the Department at less risk of financial loss. In addition, the commenters stated that a decrease in title IV, HEA funding to a school is largely out of the school's control—it is usually a result of decreased enrollments or the Department's rulemaking actions.

Other commenters agreed that big changes in the amount of financial aid received by an institution could be a sign that growth that is too fast, or an enrollment decline may signal a school is in serious trouble. The commenters argued, however, that at small schools, big percentage changes could simply be the result of small changes in the number of students. While the commenters were confident that the actual implementation of this rule would not result in the Department holding a small school accountable for what is a minor change, they believed the Department should clarify that the change in Federal aid would need to be large both in percentage and dollar terms as a way of proactively assuaging this concern.

One commenter noted that the phrase ''significant fluctuation'' was not defined, but that the Department implied on page 39393 of its NPRM that it believes a reasonable standard would be a 25 percent or greater change in the amount of title IV, HEA funds a school receives from year to year, after accounting for changes in the title IV, HEA programs. The commenter urged the Department to clarify in the final regulations precisely what this phrase means so that institutions would know how to comply. Moreover, the commenter argued that the Department may be evaluating institutions by the wrong metric, stating that the for-profit sector has seen six-fold enrollment growth over the past 25 years where significant fluctuations in title IV, HEA program volume may be a reflection of that expansion. Said another way, a significant fluctuation in title IV, HEA program volume, without looking at important contextual clues, is insufficient to determine whether there is questionable conduct at the institution. In addition, the commenter warned that including significant fluctuation as a trigger may serve to deter institutional growth, since a large increase in enrollment would trigger the financial protection requirement even if that increase was perfectly legitimate.

In addition, the commenter believed that, while the Department has a compelling interest in ensuring that institutions do not raise tuition unnecessarily to take advantage of title IV, HEA aid, the Department should try to address this problem in a way that does not discourage institutions from expanding their enrollment.

For these reasons, the commenter suggested revising the trigger so it refers to a significant fluctuation in title IV, HEA program volume per aid recipient, not program volume overall. The commenters believed this approach would guard against increases in tuition designed to take advantage of the title IV, HEA programs while not penalizing institutions with rapid enrollment growth.

Discussion: We intend to use the high drop-out rate and fluctuations in funding triggers only when we make a careful, reasoned analysis of the effect of any of these events or conditions on a particular institution, and conclude that the condition or event is likely to have a material adverse effect on the institution. An institution that challenges this determination may present an argument disputing this determination. If we are not persuaded, we will take enforcement action under 34 CFR part 668, subpart G to limit the institution's participation to condition further participation on supplying the financial protection demanded. The institution may obtain an administrative hearing to dispute the determination, and unlike with the automatic triggers, the institution may present and have considered both evidence and argument in opposition to the determination that the condition may constitute a material adverse effect, but also whether the amount of financial protection demanded is warranted.

As noted in the introductory discussion of this section and noted by some commenters, the materiality or relevance of factors like dropout rates and fluctuations in funding must be evaluated on a case-by-case basis in view of the circumstances surrounding or causes giving rise to what may appear to be excessive or alarming outcomes. In other words, what may be a high dropout rate or significant fluctuation in funding at one institution may not be relevant at another institution. In this regard, we appreciate the suggestions made by the commenters for how the Department could view or determine whether or the extent to which these factors are significant.

While a case-by-case approach argues against setting bright-line thresholds, to mitigate some of the anxiety expressed by the commenters as to what may be a high dropout rate or fluctuation in funding, we may consider issuing guidance or providing examples of actual cases where the Department made an affirmative determination.

Changes: None.

State or Agency Citations § 668.171(g)(2)

Comments: With respect to the discretionary trigger under proposed § 668.171(c)(10)(ii), some commenters noted that because State agencies may issue citations for minor violations of State requirements and not subject an institution to any penalties, the Department should remove this triggering event. The commenters believed this triggering event would unnecessarily capture citations for minor violations, such as failure to update the institution's contact information. It would also capture violations for which the State agency has decided no penalty is necessary. The commenters questioned why the Department should substitute its judgment for that of the State agency and determine that an otherwise non-punitive citation is indicative of financial problems. In the alternative, the commenters suggested that the final regulations should provide that this trigger would only be invoked if an institution's failure to comply with State or agency requirements was material. In addition, the commenters suggested that the final regulations should define ''State licensing or authorizing'' agency in this context to mean only the primary State agency responsible for State authorization, not specialized State agencies, such as boards of nursing, that have responsibility for professional licensure and other matters that would not have a material impact on the overall financial condition of the institution.

Other commenters recommend that the Department apply the State agency-based trigger only if the citation by the State authorizing agency is final and relates to the same bases that can support a borrower defense claim. Or, because State agencies frequently cite institutions for findings of noncompliance that are remedied appropriately and timely, the commenters supported applying the trigger only if the State agency has initiated an action to suspend or terminate its authorization of the institution.

Some commenters were concerned that the Department did not provide any evidence that would support that an institution that chooses to discontinue State approval for a single program at a single location would implicate the financial stability of an entire institution, much less a large institution with a wide range of programming and multi-million dollar endowment.

Discussion: The State agency-based trigger and other discretionary triggers are intentionally broad to capture events that may have an adverse financial impact on an institution. With regard to the comments that the Department should not require an institution to report State agency actions for events or violations (1) that the institution considers minor, (2) for which the agency did not penalize the institution, or (3) that are remedied timely, we believe that doing so under any of these circumstances defeats the purpose of the trigger. There is little or no reporting burden on an institution that is sporadically cited for a violation by a State agency, but where the institution is cited repeatedly the reporting burden is warranted because even if individual violations are minor, collectively those violations may signal a serious issue at the institution.

A State licensing or authorizing agency, for the purpose of this trigger, includes any agency or entity in the State that regulates or governs (1) whether an institution may operate or offer postsecondary educational programs in the State, (2) the nature or delivery of those educational programs, or (3) the certification or licensure of students who complete those programs. In this regard, we disagree with the assertion that actions by a State agency responsible for professional licensure would never have a material impact on the financial condition of the institution. To the contrary, because the State agency enforces standards that restrict professional practice to individuals who, in part, satisfy rigorous educational qualifications, a citation or finding by the agency could impact how an institution offers or delivers an educational program.

Finally, with regard to the comment about an institution voluntarily discontinuing State approval for a program at a particular location, we note that, unless the State cited the institution for discontinuing the program, this is not a reportable event.

Changes: None.

Comments: Some commenters believed that considering ''claims of any kind'' against an institution, in proposed § 668.171(c)(1)(ii), would invite a broad set of claims that may not cause financial damages. Others objected to the apparent ability under proposed § 668.171(c)(10) to add other events or conditions as it wished without public comment. Commenters believed that proposed triggers do not focus just on fiscal solvency; rather, they assert, the proposed triggers include events not related to financial solvency: Accrediting agency actions, cohort default rates, and dropout rates. The commenters opined that the Department was inappropriately attempting to shift the emphasis of these regulations from financial oversight into much broader accountability measures and to insert the Federal government into institutional decision-making.

Discussion: To the extent that the proposed regulations would have included events other than explicit claims, we are revising the regulations to include only events that pose an imminent risk of very serious financial impact. An institution that could lose institutional eligibility in the next year is indeed at serious risk of severe financial distress. Other events cited here we agree pose a risk only under particular circumstances, and should not be viewed as per se risks.

Changes: Section 668.171 has been revised to make clear that accreditor sanctions and government citations, are considered, like high dropout rates, as triggering events only on a reasoned, case-by-case basis under § 668.171(g)(2) and (5).

Stress Test § 668.171(g)(3)

Comments: Commenters believed that a trigger based on the proposed stress test is redundant because the Department uses the existing composite score methodology as the primary means of evaluating the financial health of an institution. In addition, the commenters were concerned that the Department did not provide schools with enough information regarding what the financial stress test will be and if it will be developed through negotiated rulemaking. The commenters suggested removing the stress test as a trigger, but if the Department does implement a stress test, it should first be developed through negotiated rulemaking.

Other commenters echoed the suggestion to develop the stress test through negotiated rulemaking, arguing that developing a test would not only be time consuming and complex, but have serious implications for institutions—all the reasons why institutions and other stakeholders should have an opportunity to provide their views and analyses.

Some commenters argued that it was premature and unreasonable to include reference to a stress test, which has yet to be developed, and which schools have not had a chance to review and offer comment on.

Discussion: We do not intend to replace the composite score methodology with a financial stress test. The stress test could be used to assess an institution's ability to deal with an economic crisis or adverse event under a scenario-based model, whereas the composite score methodology focuses primarily on actual financial performance over a fiscal year operating cycle.

We certainly understand the community's desire to participate in any process the Department undertakes to develop a stress test, or evaluate adopting an existing stress test, but cannot at this time commit to a particular process. However, we wish to assure institutions and other affected parties that we will seek their input in whatever process is used.

Changes: None.

Violation of Loan Agreement § 668.171(g)(6)

Comments: Under proposed § 668.171(c)(4), an institution is not financially responsible if it violated a provision or requirement in a loan agreement with the creditor with the largest secured extension of credit to the institution, failed to make a payment for more than 120 days with that creditor, or that creditor imposes more stringent loan terms or sanctions as a result of a default or delinquency event.

Some commenters noted that because the largest secured extension of credit may be for a very small dollar amount, the Department should specify a minimum threshold below which a violation of a loan agreement is not a triggering event.

Other commenters believed that a school that satisfies the composite score requirements should not be required to post a letter of credit relating to violations of loan agreements. The commenters cautioned that this provision could have the unintended impact of altering the relationship between schools and their creditors because creditors would have additional leverage in negotiations regarding violations of loan agreements. The commenters believed that, because this additional leverage could potentially place a school's financial stability at risk where it otherwise was not, this triggering event should be deleted.

Along the same lines, other commenters warned that the proposed loan agreement triggers would create significant leverage for banks that does not presently exist. The commenters opined that a bank potentially could threaten to trigger a violation of a loan agreement or obligation, thereby exercising inappropriate leverage over the institution and its operations to the detriment of its educational mission, students, and employees. The commenters believed this outcome would be a significant threat that the Department must consider this ''countervailing evidence'' in rationalizing the reasonableness of this proposed trigger. *See Am. Fed'n of Labor & Cong. of Indus. Organizations* v. *Occupational Safety & Health Admin., U.S. Dep't of Labor,* 965 F.2d 962, 970 (11th Cir. 1992) (*quoting AFL–CIO* v. *Marshall,* 617 F.2d 636, 649 n. 44 (D.C. Cir. 1979)).

Other commenters agreed that, in certain circumstances, the violation of a loan agreement or other financial obligation may signal the need for financial protection. However, the commenters believed the proposed triggering events were overly broad and could result in financially sound institutions being regularly penalized. The commenters recommended that the Department revise the triggering events in two ways.

First, the Department should include a materiality threshold in proposed § 668.171(c)(4)(i) so that this provision is only triggered when a default is material and adverse to the institution. In addition, the commenters suggested that this provision should apply only to any undisputed amounts and issues that are determined by a final order after all applicable cure periods and remedies have expired. With regard to proposed § 668.171(c)(4)(ii), because cross-defaults are prevalent in most material loan agreements, commenters suggested that the Department should focus on defaults that are material and adverse to the institution as a going concern, as opposed to narrowing the trigger to the institution's largest secured creditor.

Second, commenters suggested that the language in proposed § 668.171(c)(4)(iii) should be revised to exclude events where the institution it permitted to cure the violation in a timely manner in accordance with the loan agreement. They noted that this type of ''curing'' is a common occurrence and specifically contemplated in the agreements between the parties.

Other commenters believed that the Department should include allowances for instances in which the creditor waives any action regarding a violation of a provision in a loan agreement, or the creditor does not consider the violation to be material. The commenters note that although the reporting requirements under proposed § 668.171(d)(3) permit an institution to notify the Department that a loan violation was waived by the creditor, it does not explicitly state that such a waiver would make the institution financially responsible. The commenters urged the Department to revise this provision to clearly state that a waiver of a term or condition granted by a creditor cures the triggering event so that financial protection is not required. According to the commenters, certified public accountants use this standard when assessing a school's ability to continue as a going concern—if a waiver is issued or granted by the creditor the certified public accountant does not mention this event in the school's audited financial statements because it is no longer an issue for the debtor.

Some commenters believed that the proposed loan agreement provisions were too broad and would unnecessarily impact institutions that pose no risk. The commenters stated that loan agreements may include a number of events that are not related to the failure of the institution to make payments that trigger changes to the terms of the agreement, and in that case the proposed provisions would seem to capture the change in terms as a reportable event. The commenters noted that nonprofit institutions have access to and use variable rate loans, and that some nonprofit institutions have synthetically converted their variable rate interest borrowings into fixed rate debt by entering into an interest rate swap agreement. The commenters believed that, under these circumstances, it would be incorrect to assume that changes to the interest rates negatively impact the institution. Further, while the loan provision in the proposed regulations is narrower than the current one since it only applies to an institution's largest secured creditor, rather than all creditors, the commenters believed the Department should establish a materiality threshold and/or make a determination that any changes to the interest rate or other terms would have a material impact on the institution. In addition, the commenters noted that the exception provided under § 668.171(d)(3), allowing the institution to show that penalties or constraints imposed by a creditor will not impact the institution's ability to meet its financial obligations, only applies if the creditor waived a violation and questioned whether the end result would be the same if the creditor did not waive the violation, but the penalties or changes to the loan nevertheless would not have an adverse impact.

Discussion: In considering the comments regarding the materiality of loan violations, and whether the sanctions or terms imposed by a creditor as a result of a default or delinquency event are relevant or adverse, we are making the provisions in proposed § 668.171(c)(4) discretionary triggers under § 668.171(g)(6). We believe that evaluating a delinquency or default on a loan obligation under the discretionary triggers addresses the commenters' concerns that the Department should review or assess a loan violation on a case-by-case basis to determine whether that violation is material and sufficiently adverse to warrant financial protection. This case-by-case review eliminates the need to qualify or limit the scope of loan violations to the largest secured creditor. Moreover, making these discretionary triggers maintains the Department's objective of identifying and acting on early warning signs of financial distress. We expect that making the proposed provisions discretionary will abate the concerns raised by the commenters that an automatic action by the Department in response to a loan violation would prompt or create an unfair advantage for creditors, because that action is no longer certain. In addition, we note that if a creditor files suit in response to a loan violation, that suit is covered under the provisions in § 668.171(c)(1)(ii) as an automatic triggering event.

Changes: We have relocated the proposed loan agreement provision to § 668.171(g)(6), reclassified those provisions as discretionary events, and removed the qualifier that the loan violation is for the largest secured creditor.

Borrower Defense Claims § 668.171(g)(7)

Comments: None.

Discussion: After further consideration, the Department concluded that, in instances in which the Department can expect an influx of successful borrower defense claims as a result of a lawsuit, settlement, judgment, or finding from a State or Federal administrative proceeding, we may wish to require additional protection. However, since such instances are fact-specific, we have decided to make such a trigger discretionary.

Changes: We have added a new discretionary trigger in § 668.171(g)(8) relating to claims for borrower relief as a result of a lawsuit, settlement, judgment, or finding from a State or Federal administrative proceeding.

Reporting Requirements § 668.171(h)

Comments: Some commenters believed that the proposed mandatory reporting requirements under § 668.171(d) are outside the scope of the Department's authority. The commenters argued that statutory provisions cited by the Department, that the Secretary has authority ''to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department,'' and that the Secretary is authorized ''to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department'' (20 U.S.C. 1221e–3), are ''implementary rather than substantive,'' meaning that they ''can only be implemented consistently with the provisions and purposes of the legislation.'' *New England Power Co.* v. *Fed. Power Comm'n.,* 467 F.2d 425, 430 (D.C. Cir. 1972), aff'd, 415 U.S. 345 (1974) (citation omitted).

Discussion: The Secretary cited 20 U.S.C. 1221e–3 as authority for revisions to 34 CFR 30.70, 81 FR 39407, and the repayment rate disclosures proposed as new § 668.41(h). 81 FR 39371. As pertinent here, the Department cited as authority for the proposed changes to § 668.171, which includes the new reporting requirements under § 668.171(h), sections 487 and 498(c) of the HEA, 20 U.S.C. 1094 and 1099c. Section 487 states that the Secretary ''notwithstanding any other provision of this title (title IV of the HEA), shall prescribe such regulations as may be necessary to provide . . . in matters not governed by specific program regulations, the establishment of reasonable standards of financial responsibility . . . including any matter the Secretary deems necessary to the sound administration of the financial aid programs, such as the pertinent actions of any owner, shareholder, or person exercising control over an eligible institution.'' 20 U.S.C. 1094(c)(1)(B). Section 498 states that the Secretary is to determine whether an institution is able to meet its financial obligations to all parties, including students and the Secretary, including adopting financial criteria ratios. 20 U.S.C. 1099c(c). These provisions give the Secretary ample substantive authority to adopt regulations that require the institution to provide audited financial statements and other records needed to evaluate the financial capability of the institution. This authority is direct and specifically authorizes the required reporting by participating institutions, unlike the charge imposed by the Federal Power Commission in *New England Power Co.* v. *Fed. Power Comm'n,* cited by the commenter to support its view. The court there concluded that the Commission lacked authority to impose that charge on the industry member for costs incurred not for the benefit of the member but for the general public. *New England Power Co.* v. *Fed. Power Comm'n,* 467 F.2d 425, 427 (D.C. Cir. 1972), *aff'd,* 415 U.S. 345 (1974). Here, the HEA expressly authorizes the Secretary to adopt regulations governing the conditions for participation in the title IV, HEA programs, and in particular, the assessment of the institution's financial capability.

Changes: None.

Comments: Under the reporting requirements in proposed § 668.171(d), an institution must report any action or event identified as a trigger under § 668.171(c) no later than 10 days after the action or event occurs. For three of the reportable actions or events—disclosure of a judicial or administrative proceeding, withdrawal of owner's equity, and violations of loan agreements—the institution may show that those actions or events are not material or relevant.

Commenters were concerned that the Department would not be bound to act or consider any evidence an institution would provide under proposed § 668.171(d)(2) regarding the waiver of a violation of a loan agreement, or provide any opportunity to the institution to discuss the waiver. Moreover, the commenters were concerned that the waiver reporting provisions would permit the Department to disregard any such evidence if the creditor imposes additional constraints or requirements as a condition of waiving the violation, or imposes penalties or requirements. Absent a materiality modifier, the commenters believed that the waiver ''carve out'' would become meaningless. Ostensibly, the commenters feared that the Department could proceed to demand financial protection even if a creditor waived the underlying violation and the institution effectively demonstrated that the additional requirements imposed would only have a negligible impact on the institution's ability to meet current and future financial obligations. The commenters recommended that at a minimum, proposed § 668.171(d)(2) should be modified to require a material adverse effect on the institution's financial condition.

Other commenters believed that requiring institutions to report the widely disparate events reflected in the proposed triggering events within 10 days is unreasonable, particularly for large, decentralized organizations. The commenters believed that it was one thing to demand that type of prompt reporting on a limited number of items from institutions that already have been placed on heightened monitoring but quite different to require hyper-vigilance from all institutions. The commenters argued that various offices across the institution might be involved and have contemporaneous knowledge of the triggering events, but the individuals dealing with an unrelated agency action, a lawsuit, or a renegotiation of debt are unlikely to have a Department reporting deadline on the top of minds. Moreover, the commenters believed that individuals at an institution who are charged with maintaining compliance with Department regulations are unlikely to learn about some of these events within such a short period of time.

Discussion: In view of these comments and other comments discussing the triggering events, we clarify in these final regulations the reporting requirement that applies to each triggering event. As shown below, an institution must notify the Department no later than:

1. For the lawsuits and other actions or events in § 668.171(c)(1)(i), 10 days after a payment was required, a liability was incurred, or a suit was filed, and for suits, 10 days after the suit has been pending for 120 days;
2. For lawsuits in § 668.171(c)(1)(ii), 10 days after the suit was filed and the deadlines for filing summary judgment motions established, and 10 days after the earliest of the events for the summary judgments described in that paragraph;
3. For accrediting agency actions under § 668.171(c)(1)(iii), 10 days after the institution is notified by its accrediting agency that it must submit a teach-out plan.
4. For the withdrawal of owner's equity in § 668.171(c)(1)(v), 10 days

after the withdrawal is made. 5. For the non-title IV revenue provision in § 668.171(d), 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(3).

6. For the SEC and exchange provisions for publicly traded institutions under § 668.171(e), 10 days after the SEC or stock exchange notifies or takes action against the institution, or 10 days after any extension granted by SEC.

7. For State or agency actions in paragraph (g)(2), 10 days after the institution is cited for violating a State or agency requirement;

8. For probation or show cause actions under paragraph (g)(5), 10 days after the institution's accrediting agency places the institution on that status; or

9. For the loan agreement provisions in paragraph (g)(6), 10 days after a loan violation occurs, the creditor waives the violation, or imposes sanctions or penalties in exchange or as a result of the waiver. We note that the proposed loan agreement provisions are discretionary triggers in these final regulations, and as such facilitate a more thorough dialogue with the institution about waivers of loan violations and creditor actions tied to those waivers.

We also are providing that an institution may show that a reportable event no longer applies or is resolved or that it has insurance that will cover the debts and liabilities that arise at any time from that triggering event.

In addition, we are providing that an institution may demonstrate at the time it reports a State or Federal lawsuit under § 668.171(c)(1)(i)(B) that the amount claimed under that lawsuit exceeds the potential recovery. We stress that this option does not include any consideration of the merit of the government suit. It addresses only the situation in which the government agency asserts a claim that the facts alleged, if accepted as true, and the legal claims asserted, if fully accepted, could still not produce a recovery of the deemed or claimed amount for reasons totally distinct from the merit of the government suit. Thus, the regulations in some instances deem a suit to seek recovery of all tuition received by an institution, but the allegations of the complaint describe only a limited period, or a given location, or specific programs, and the institution can prove that the total amount of tuition received for that identified program, location, or period is smaller than the amount claimed or the amount of recover deemed to be sought.

Changes: We have revised § 668.171(h)(1) to specify the reporting requirements that apply to a triggering event, as described above. We have also provided in revised paragraph (g)(3) that an institution may show (1) that a reportable event no longer exists, has been resolved, or that it has insurance that will cover debts and liabilities that arise at any time from that triggering event; or (2) that the amount claimed in a lawsuit under § 668.171(c)(1)(i)(B) exceeds the potential recovery the claimant may receive.

Public Domestic and Foreign Institutions § 668.171(i)

Domestic Public Institutions

Comments: Commenters were concerned that the proposed regulations would unfairly target private institutions, noting that public institutions would be exempt from the triggering events requiring letters of credit, even as recent events have shown that public institutions are not necessarily more financially stable than other institutions.

Other commenters believed that the Department intended to exempt public institutions, as it currently does, from the financial responsibility standards, including the proposed triggering events, but the Department did not explicitly do so in the NPRM.

Discussion: We rely, and have for nearly 20 years relied, on the full-faith and credit of the State to cover any debts and liabilities that a public institution may incur in participating in the title IV, HEA programs. Under the current regulations in §§ 668.171(b) and (c), a public institution is not subject to the general standards of financial responsibility and is considered financially responsible as long as it does not violate any past performance provision in § 668.174. The Department has on occasion placed public institutions on heightened cash monitoring for failing to file required audits in a timely manner, but even then has never required a public institution to provide financial protection of any type because we already have it in the form of full-faith and credit. We would like to clarify that we are not changing long-standing policy for public institutions with these final regulations. In other words, the triggering events in § 668.171(c) through (g) of these regulations do not apply to public institutions.

Changes: None.

Foreign Institutions

Comments: Commenters believed that the actions and events that could trigger a letter of credit under § 668.171(c) are not applicable to foreign institutions, and requested that foreign institutions be exempted from these regulations, at least until the composite score methodology is revised. In addition, the commenters reasoned that a foreign institution with thousands of students from the institution's home country and perhaps a few dozen U.S. students should not be required to post warnings for all of its students based on this U.S. regulatory compliance issue.

Discussion: While we agree that some triggering events in §§ 668.171(c) through (g) may not apply to foreign institutions, that circumstance does not justify exempting those institutions from the triggering events that do apply. In addition, we see no reason to grant a temporary exemption until the composite score methodology is revised because it is unlikely that accounting-based revisions to a financial statement-centered methodology will affect triggering events like lawsuits that are applied contemporaneously, or title IV, HEA program compliance requirements like cohort default rate and gainful employment. We note that foreign public institutions, like U.S.-based public institutions, are currently exempt, and continue to be exempt in these final regulations, from most of the general standards of financial responsibility, including the composite score.

Changes: None.

Alternative Standards and Requirements § 668.175

Provisional Certification Alternative § 668.175(f)

Amount of Financial Protection § 668.175(f)(4)

Cost of Letter of Credit

Comments: One commenter stated that, years ago, letters of credit were both widely available and very inexpensive; it was not unusual for a bank to issue a small letter of credit on behalf of a client for no charge and without any collateral. However, the commenter stated that the bursting of the stock bubble in the late 1990s and the new rules regulating banks after the financial crisis has had a tremendous effect on the ability of banks to issue letters of credit, the price charged for them, and the amount of collateral required to issue one.

According to the commenter, a $1,000,000 letter of credit that might have cost $5,000 to issue with no collateral 30 years ago now costs $10,000–$20,000 and requires $500,000 to $1,000,000 of cash to collateralize it. The commenter opined that while this is still relatively easy for the wealthiest schools with the largest endowments to meet, it would place a tremendous burden on smaller schools, vocational schools, and schools that serve the poorest students in the poorest areas because it will tie up a significant portion of their cash as collateral. For these reasons the commenter urged the Department to accept alternatives to bank-issued letters of credit, noting that performance bonds are used widely in business to guarantee satisfactory performance of construction, services, and delivery of goods. The commenter stated that most States that have regulations to protect students from poorly run schools allow performance bonds already.

According to the commenter, a performance bond guarantees the performance of a task on behalf of the client. In the case of a borrower defense, the Department is using the letter of credit to guarantee to successful completion of the education for which the Department issued title IV loans. By allowing performance bonds, according to the commenter, the Department could protect itself from poorly run schools that harm students without harming thinly capitalized schools by forcing them to purchase more expensive products. The commenter stated that a typical surety bond for $1,000,000 might cost $5,000–$15,000 and only require 25 percent collateral or less. This means that the schools get to keep more of their cash to better deliver education to students and the Department is still adequately protected against a claim from a closed school.

Some commenters noted that the Department has the statutory authority under section 498(c)(3)(A) of the HEA to accept performance bonds and should use that authority because surety bonds cost far less than letters of credit and are equally secure.

Other commenters were concerned that the cost of securing required letters of credit could be prohibitive and cause some schools to close. These and other commenters believed that schools are finding that it is increasingly more difficult to secure letters of credit because of high cost and the regulatory uncertainties facing the higher education sector. The commenters noted that these costs include fees to the lenders and attorneys each time the underlying credit facility is negotiated to expand the letters of credit (schools are required to pay their attorney's fees as well as lender attorney fees for these transactions). Moreover, the commenters stated that because of the Department's compliance actions against proprietary schools, many lenders will no longer lend to proprietary institutions. Therefore, if schools are forced to obtain large letters of credit they will need to turn to second or third tier lenders, or lenders who offer crisis loans, who will charge significant fees for these letters of credit.

In view of the cost and financial resources needed to secure a letter of credit, some commenters believed that the Department should apply a cap of 25 percent on the amount of the cumulative letters of credit that a provisionally certified institution could be required to post under the revised regulations.

Other commenters suggested that if a letter of credit is imposed for an accrediting agency trigger relating to closing a location, the letter of credit should be based on a percentage of the amount of title IV, HEA funds the closing location received, not a percentage of title IV, HEA funds received by the entire institution. The commenters reasoned that if the financial impact of the closing of the branch or additional location will have a material negative impact on the school, then the Department should set the letter of credit amount based on 10 percent of the branch or additional location's title IV, HEA funds, arguing that this approach is straight-forward: Any liabilities that the school may incur resulting from the closure of a branch or additional location would relate only to the students attending the closing location. In contrast, the commenter believed that imposing the letter of credit based on the total title IV, HEA funds received by the school would be disproportionate to the financial impact of the potential student issues to which a letter of credit may relate. The commenters noted that the NPRM expressly recognized the cost of securing letters of credit and the difficulties a school may have in obtaining a letter of credit within 30 days. 81 FR 39368. If a school cannot secure a letter of credit within that timeframe, the Department would set aside title IV, HEA funds, which according to the commenters would almost assuredly have a catastrophic financial impact on the institution. Therefore, the commenters concluded that imposing a larger letter of credit on the school than is necessary will impose cost and financial burden on the school far greater than any possible benefits that the Department could obtain from the larger letter of credit, and will negatively impact students in the process.

Discussion: With regard to the comment that the Department cap any cumulative letters of credit to 25 percent of amount that would otherwise be required, we believe setting an inflexible cap would defeat the purpose of requiring financial protection that is commensurate with the risks posed by one or more of the triggering events. The Secretary currently has the discretion to establish the amount of financial protection required for a particular institution, starting at 10 percent of the amount the title IV, HEA program funds the institution received in the prior award year, and that discretion is not limited by these regulations. As noted previously in this preamble under the heading ''Composite Score and Triggering Events,'' the amount of the financial protection required is based on a recalculated composite score of less than 1.0—the total amount of financial protection required is, at a minimum, 10 percent of the title IV, HEA funds the institution received during its most recently completed fiscal year, and such added amount as the Secretary demonstrates is warranted by the risk of liabilities with regard to that institution.

We do not disagree with the general notion that the costs associated with a letter of credit have increased over time and that some institutions may not be able to secure, or may have difficulty securing, a letter of credit. We acknowledged this in the preamble to the NPRM and offered the set-aside as an alternative to the letter of credit. With regard to other alternatives, we are not aware of any surety instruments that are as secure as bank-issued letters of credit and that can be negotiated easily by the Department to meet the demands of protecting the Federal interests in a dependable and efficient manner. However, if surety instruments come to light, or are developed, that are more affordable to institutions than letters of credit but that offer the same benefits to the Department, we will consider accepting those instruments. To leave open this possibility, we are amending the financial protection requirements in § 668.175(f)(2)(i) to provide that the Department may, in a notice published in the **Federal Register**, identify acceptable surety alternatives or other forms of financial protection. We wish to make clear that the Department will not accept, or entertain in any way, surety instruments or other forms of financial protection that are not specified in these final regulations or that are not subsequently identified in the **Federal Register**. In this vein, the Department is continuing to examine generally the alternatives to a letter of credit to ensure that such alternatives strike a reasonable balance between protecting the interests of the taxpayers and the Federal Government and providing flexibility to institutions, and is revising the regulations to provide that all alternatives to a letter of credit or a set-aside arrangement, including cash, will be permitted only in the Secretary's discretion.

Lastly, as discussed previously throughout this preamble, an institution that can prove that it has sufficient insurance to cover immediate and potential debts, liabilities, claims, or financial obligations stemming from each triggering event, will not be required to provide financial protection of any kind.

With regard to the amount of financial protection stemming from the teach-out trigger for closed locations under § 668.171(c)(iv), by considering only closures of locations that cause the composite score to fall below a 1.0, we identify those events that pose a significant risk to the continued viability of the institution as a whole, and the financial protection needed should be based on the risk of closure and attendant costs to the taxpayer, not merely the expected costs of closed school discharges to students enrolled at the closed location.

Finally, the Department has long had discretion, under current regulations, in setting the amount of the required financial protection, and we are revising § 668.175(f)(4) to memorialize our existing discretion to require financial protection in amounts beyond the minimum 10 percent where appropriate.

Changes: We have revised § 668.175(f)(2)(i) to provide that the Secretary may identify acceptable surety instruments or other forms of financial protection in a notice published in the **Federal Register**. In each place in the regulations where we address acceptable forms of financial protection, we have revised the regulations to provide that alternatives to letters of credit and set-aside arrangements will be permitted in the Secretary's discretion. In addition, we have revised § 668.175(f)(4) to provide the minimum amount of financial protection required, specifically to set 10 percent of prior year title IV, HEA funding as the minimum required protection amount, with a minor exception for institutions that do not participate in the loan program, and to authorize the setting of such larger added amount as the Secretary determines is needed to ensure that the total amount of financial protection provided is sufficient to fully cover any estimated losses, provided that the Secretary may reduce this added amount only if an institution demonstrates that this added amount is unnecessary to protect, or is contrary to, the Federal interest. We made a conforming change to § 668.90(a)(3)(iii)(D).

Set-Aside § 668.175(h)

Comments: Commenters believed that the set-aside under proposed § 668.175(h) as an alternative a letter of credit or cash would not be a viable option. The commenters argued that most schools rely on title IV, HEA funds for cash flow purposes, so administratively offsetting a portion of those funds would likely force many schools to close. Similarly, if a school is placed on Heightened Cash Monitoring 2 (HCM2) or reimbursement because it cannot secure a letter of credit, the commenters asserted that the school would likely close because historically the Department and institutions have not been able to timely process funds under HCM2.

Other commenters acknowledged the Department's concern about getting financial protection into place quickly, but believed that 90 days would be a more reasonable timeframe. The commenters stated that under current conditions in the financial markets, even with the best efforts it is almost impossible to get a letter of credit approved within the proposed 30-day timeframe. Also, the commenters suggested that if the Department implements the set-aside because of a school's delay in providing the letter of credit, this section needs to allow for the set-aside agreement to be terminated once the school is able to provide the letter of credit.

Other commenters agreed that the Department needs some way to obtain funds from institutions that fail to provide a letter of credit. The commenters believed, however, that the proposed set-aside provisions are overly generous in terms of time and amount. In particular, the commenters suggested the following changes:

(1) *Make set-aside amounts larger than letter of credit requests.* An institution's inability to obtain a letter of credit may in and of itself be a warning sign that private investors do not trust the institution enough to be involved with it. Therefore, the commenters suggested that any amounts covered by the set-aside provision should be set at 1.5 times the size of a letter of credit. This would both encourage colleges to obtain letters of credit and also send a strong message that the set-aside is a last resort action.

(2) *Implement other limitations on colleges that cover letters of credit through set asides.* According to the commenters, the set-aside is not the ideal way to get institutions to provide their financial commitments. Accordingly, they proposed that this provision should come with greater protections for students and taxpayers or, at the very least, include some sort of limitation on Federal financial aid that prevents the institution from increasing the number of Federal aid recipients at the school and potentially even considers not allowing for new enrollment of federally aided students. Absent such protections, commenters noted that schools may face perverse incentives where they are encouraged to grow enrollment as a way of meeting the set-aside conditions.

(3) *Lessen the time period for collecting set-aside amounts.* Commenters noted that nine months is a long period of time for collecting amounts that an institution would otherwise be expected to provide in 30 days through a letter of credit. Nine months is also a long time in general—almost an entire academic year. Commenters stated that collecting the funds in this amount of time makes it possible for institutions to still enroll a large number of students and then run the risk of shutting down, and suggested that the Department shorten this time period to no more than half an academic year.

Discussion: While a set-aside may not be an option for an institution that is unable to compensate for a temporary loss of a percentage of its title IV, HEA funding, either by using its own resources or obtaining some form of financing, it is unlikely that the institution has any other options. For other institutions with at least some resources, we believe the set-aside is a viable alternative.

We disagree with the assertion that an institution is likely to close if it is placed on HCM2. Based on data available on the Department's Web site at *https://studentaid.ed.gov/sa/about/data-center/school/hcm,* approximately 60 percent of the institutions on HCM2 as of March 2015 were still on that status as of June 2016.

With regard to extending the time within which an institution must submit a letter of credit, we adopt in these regulations the Department's current practice of allowing an institution 45 days.

In addition, we are providing in the final regulations that when an institution submits a letter of credit, the Department will terminate the corresponding set-aside agreement and return any funds held under that agreement. With regard to the comments that the Department should increase the amount of the set-aside or shorten the time within which the set-aside must be fully funded, we see no justification for either action. The Department proposed the set-aside as an alternative for an institution that is unable to timely secure a letter of credit, so that inability cannot be used as a reason to increase the amount of financial protection under the set-aside arrangement. For the funding timeframe, the Department proposed nine months, roughly the length of an academic year, as a reasonable compromise between having financial protection fully in place in the short term and minimizing the consequences of reducing an institution's cash flow. We believe that shortening the funding timeframe may put unnecessary financial stress on an institution that would otherwise fulfill its obligations to students and the Department. We continue to analyze, and will publish in the **Federal Register**, the terms on which an institution may provide financial protection other than a letter of credit or set-aside arrangement.

Changes: We have revised § 668.175(h) to increase from 30 to 45 days the time within which an institution must provide a letter of credit to the Department and provide that the Secretary will release any funds held under a set-aside if the institution subsequently provides the letter of credit or other financial protection required under the zone or provisional certification alternatives in § 668.175(d) or (f).

Provisional Certification (Section 668.175(f)(1)(i))

Comments: Some commenters were concerned that the Department would place a school on provisional certification simply because of a triggering event in § 668.171(c), such as the school's cohort default rate, 90/10 ratio, or D/E rates under the GE regulations. The commenters argued that the regulations covering these measures did not intend or contemplate their use as reasons for placing an institution on provisional certification, so schools should not be subject to additional penalties.

Other commenters questioned whether the Department made a change in the applicability of the provisional certification alternative in § 668.175(f) that was not discussed in the NPRM. The commenters stated that it was unclear whether excluding the measures in § 668.171(b)(2) and (b)(3) from either zone alternative or the provisional certification alternatives in proposed § 668.175(d) and (f) was intentional or if the reference to § 668.171(b)(1) should just be § 668.171(b). In addition, the commenters noted that only the provisional certification alternative in proposed § 668.175(f) refers to the proposed substitutes for a letter of credit (cash and the set-aside), whereas both the NPRM and proposed § 668.175(h), by cross-reference to § 668.175(d), refer to the substitutes as applicable to the zone alternative.

One commenter noted that the current regulations create multiple options for institutions with a failing financial responsibility score, but the terms between the zone and provisional certification alternatives are not sufficiently equal. The commenter also contended that the time limits associated with the alternatives are unclear. To address this, the commenter recommended the following changes to the current regulations.

(1) Increase the minimum size of the initial letter of credit for institutions on provisional status.

Currently, an institution choosing this option only has to provide a letter of credit for an amount that in general is, at a minimum, 10 percent of the amount of title IV, HEA funds received by the institution during its most recently completed fiscal year, while an institution that chooses to avoid provisional certification must submit a 50 percent letter of credit. The commenter recognized that part of this difference reflects the bigger risks to an institution that come with being provisionally certified but believed the current gap in letters of credit is too large. The commenter recommended that the Department increase the minimum letter of credit required from provisionally certified institutions that enter this status after the final regulations take effect to 25 percent.

(2) Automatically increase the letter of credit for institutions that renew their provisional status.

The commenter stated that § 668.175(f)(1) of the current regulations suggests that an institution may participate under the provisional certification alternative for no more than three consecutive years, whereas § 668.175(f)(3) suggests that the Secretary may allow the institution to renew this provisional certification and may require additional financial protection.

The commenter requested that the Department clarify the terms on which it will renew a provisional status. In particular, the commenter recommended that we require the institution, as part of any renewal, to increase the size of the letter of credit to 50 percent of the institution's Federal financial aid. This amount would align with the current requirements for an institution with a failing composite score that does not choose the provisional certification alternative and, according to the commenter, would reflect that an institution has already spent a great deal of time in a status that suggests financial concerns.

(3) Limit how long an institution may renew its provisional status.

The commenter stated that § 668.175(f)(3) of the current regulations suggests an institution could potentially stay in provisional status forever. The commenter asked the Department to place a time limit on these renewals that would ideally be no longer than the period during which institutions can continue to participate in the title IV, HEA programs while subject to other conditions under the Department's regulations, which tends to be three years. However, the commenter believed that even six years in provisional status may be an unacceptably long amount of time.

Discussion: Contrary to the comments that the current cohort default rate, 90/10, and GE regulations do not contemplate provisional certification, we note the 90/10 and cohort default rate provisions do just that after a one- or two-year violation of those standards. In addition, we clarify that an institution under either the zone or provisional certification alternative may provide a letter of credit or, in the Secretary's discretion, provide another form of financial protection in a form or under terms or arrangements that will be specified by the Secretary or enter into a set-aside arrangement. The set-aside arrangement is not available to an institution that seeks to participate for the first time in the title IV, HEA programs or that failed the financial responsibility standards but seeks to participate as a financially responsible institution, because in either case the institution must show that it is financially responsible. That is, the institution must show that it has the financial resources to secure, or a bank is willing to commit the necessary resources on behalf of the institution to provide, a letter of credit. For the references to the general standards and triggering events, an institution that fails the general standards under § 668.171(b)(1) or (3), as reflected in the composite score or the triggering events under § 668.171(c), or no longer qualifies under the zone alternative, is subject to the minimum financial protection required under § 668.175(f). With respect to the numerous changes the commenter proposed for how the Department should treat institutions on provisional certification, since we did not propose any changes to the provisional certification requirements under § 668.175(f) or § 668.13(c), or to the long-standing minimum letter of credit requirements, the suggested changes are beyond the scope of these regulations.

Changes: None.

Financial Protection Disclosure

General

Comments: One commenter asserted that the proposed financial protection disclosure requirements exceed the Department's statutory authority because the financial responsibility provisions in the HEA, unlike other provisions of the Act, do not mention disclosures. The commenter maintained that such omissions must be presumed to be intentional, since Congress generally acts intentionally when it uses particular language in one section of the statute but omits it from another.

Discussion: We do not agree with the commenter. The financial protection disclosure requirements do not conflict with the financial responsibility provisions in the HEA. Furthermore, the lack of specific mention of such disclosures in the provisions of the HEA related to financial responsibility does not preclude the Department's regulating in this area. Courts have recognized that the Department under its general rulemaking authority may require disclosures of information reasonably considered useful for student consumers.[61]

As noted above, the Department continues to assert both its authority to require disclosures related to financial responsibility and the usefulness of those disclosures for student consumers. However, in the interest of clarity and ensuring that disclosures are as meaningful as possible, we have made several changes to proposed § 668.41(i). Under the proposed regulations, institutions required to provide financial protection to the Secretary must disclose information about that financial protection to enrolled and prospective students. These final regulations state that the Department will rely on consumer testing to inform the identification of events for which a disclosure is required. Specifically, the Secretary will consumer test each of the events identified in § 668.171(c)–(g), as well as other events that result in an institution being required to provide financial protection to the Department, to determine which of these events are most meaningful to students in their educational decision-making. The Department expects that not all events will be demonstrated to be critical to students; however, events like lawsuits or settlements that require financial protection under § 668.171(c)(1)(i) and (ii); borrower defense claims that require financial protection under § 668.171(g)(7); and two consecutive years of cohort default rates of at least 30 percent, requiring financial protection under § 668.171(f) are likely to be of more relevance to students. Findings resulting from the Department's administrative proceedings are included among these triggering events. The issue of students being ill-informed about ongoing lawsuits or settlements with their institutions was raised by students, particularly Corinthian students, during negotiated rulemaking, as well as by commenters during the public comment period. We also believe that students will have a particular interest in, and deserve to be made aware of, instances in which an institution has a large volume of borrower defense claims; this may inform their future enrollment decisions, as well as notify them of a potential claim to borrower defense they themselves may have. Finally, we believe that cohort default rate is an important accountability metric established in the HEA, and that ability to repay student loans is of personal importance to many students. Any or all of these items may be identified through consumer testing as important disclosures.

Changes: We have revised § 668.41(i) to clarify that all actions and triggering events that require an institution to provide financial protection to the Department will be subject to consumer testing before being required for institutional disclosures to prospective and enrolled students.

Comments: A few commenters expressed strong overall support for requiring disclosures to prospective and enrolled students of any financial protection an institution must provide under proposed § 668.175(d), (f), or (h). The commenters cited the significant financial stake an institution's students have in its continued viability, and a resulting right to be apprised of financially related actions that might affect that viability.

However, some commenters who supported the proposed requirements raised the concern that unscrupulous institutions might intentionally attempt to undermine the disclosures by burying or disguising them. Accordingly, those commenters suggested that the Department should prescribe the wording, format, and labeling of the disclosures. Other commenters expressed disappointment that the proposed regulations do not require institutions to deliver financial protection disclosures to prospective students at the first contact with those students, and strongly supported including such a requirement in the final regulations. Though acknowledging several negotiators' objections that establishing a point of first contact would prove too difficult, one commenter was unconvinced, and asserted the importance of requiring delivery of critical student warnings at a point when they matter most. The same commenter found the proposed regulatory language on financial protection disclosures to be vague, and requested clarification as to whether proposed § 668.41(h)(7) (requiring institutions to deliver loan repayment warnings in a form and manner prescribed by the Secretary) applies to financial protection disclosures as well. The commenter further asserted that information regarding financial protection is even more important to consumers than repayment rates, and therefore institutions' promotional materials should be required to contain financial protection disclosures in the same way that the proposed regulations require such material to contain repayment rate warnings.

Finally, some commenters urged that, notwithstanding the proposed financial protection disclosures required of institutions, the Department should itself commit to disclosing certain information about institutions that are subject to enhanced financial responsibility requirements. Specifically, the commenters suggested that the Department disclose the amount of any letter of credit submitted and the circumstances that triggered the enhanced financial responsibility requirement.

For several reasons described in this section, many commenters opposed either the concept of requiring institutions to make financial protection disclosures, or the way in which such disclosures are prescribed under the proposed regulations. One commenter suggested removing financial protection disclosure requirements solely on the grounds that students will neither take notice of nor care about this information. The commenter expressed the belief that most people do not really know what a letter of credit is, and that

[61] *See, e.g., Ass'n of Private Colleges & Universities* v. *Duncan,* 870 F. Supp. 2d 133 (D.D.C. 2012)(Department has broad authority ''to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department.'' 20 U.S.C. 1221e–3 (2006); *see also id.* § 3474 (''The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.''). The financial protection disclosures fall comfortably within that regulatory power.

therefore informing them of an institution's obligation to secure such an instrument would only cause confusion.

Discussion: We thank those commenters who wrote in support of the proposed financial protection disclosures. In response to the commenter who raised concerns about unscrupulous institutions attempting to undermine the proposed disclosures and warnings, including by burying or disguising them, we share those concerns and drafted the applicable regulatory language accordingly. Section 668.41(i)(1) of the final regulations requires that an institution disclose information about certain actions and triggering events (subject to and identified through consumer testing) it has experienced to enrolled and prospective students in the manner described in paragraphs (i)(4) and (5) of that section, and that the form of the disclosure will be prescribed by the Secretary in a notice published in the **Federal Register**. Before publishing that notice, the Secretary will also conduct consumer testing to help ensure the warning is meaningful and helpful to students. This approach both holds institutions accountable and creates flexibility for the Department to update warning requirements, including specific language and labels, as appropriate in the future. Based on these comments, and the comment expressing confusion as to which of the delivery requirements in this section apply to financial protection disclosures, we have revised § 668.41(i) to make the requirements that apply to the actions and triggering events disclosure and the process by which the language of the disclosure will be developed and disseminated more explicit.

While mindful of the potential benefit to prospective students of receiving disclosures early, we are not convinced that requiring institutions to deliver such disclosures at first contact with a student is necessary or efficacious. In many cases and at certain types of institutions, it is impractical if not impossible to isolate the initial point of contact between a student and an institutional representative. Such a requirement would place a significant burden on compliance officials and auditors as well as on institutions. Section 668.41(i)(5) of the final regulations requires institutions to provide disclosures to prospective students before they enroll, register, or enter into a financial obligation with the institution. We believe this provides prospective students with adequate advance notice.

Regarding whether requirements in the proposed regulations pertaining to the delivery of loan repayment warnings to prospective and enrolled students apply to financial protection disclosures as well, we are revising the regulations to separately state the requirements for loan repayment warnings and financial protection disclosures. Section § 668.41(i) states that, subject to consumer testing as to which events are most relevant to students, an institution subject to one or more of the actions or triggering events identified in § 668.171(c)–(g) must disclose information about that action or triggering event to enrolled and prospective students in the manner prescribed in paragraphs (i)(4) and (5).

However, the actions and triggering events disclosures are not required to be included in an institution's advertising and promotional materials. We concur with the commenter that such financial protection disclosures will provide critical information to students, but maintain that delivery of those disclosures to students through the means prescribed in revised § 668.41(i)(4) and (5), and posting of the disclosures to the institution's Web site as included in revised § 668.41(i)(6), are most appropriate for this purpose. The loan repayment warning provides information on the outcomes of all borrowers at the institution, whereas the financial protection disclosure pertains directly to the institution's compliance and other matters of financial risk. We believe this type of disclosure is better provided on an individual basis, directly to students, and that it may require a longer-form disclosure than is practicable in advertising and promotional materials.

Regarding the commenters' suggestion that the Department itself disclose certain information about institutions subject to enhanced financial responsibility requirements, we understand the value of this approach, especially with respect to uniformity and limiting the opportunity for unscrupulous institutions to circumvent the regulations. However, we remain convinced that schools, as the primary and on-the-ground communicators with their students, and the source of much of the information students receive about financial aid, are well-placed to reach their students and notify them of the potential risks of attending that institution. We do not believe there are any practical means through which the Department might similarly convey to individual students the volume of information suggested by commenters. Nevertheless, we intend to closely monitor the way in which institutions comply with the actions and triggering events disclosure requirements, and may consider at some point in the future whether the Department should assume responsibility for making some or all of the required disclosures. Additionally, the Department may, in the future, consider requiring these disclosures to be placed on the Disclosure Template under the Gainful Employment regulations, to streamline the information flow to those prospective and enrolled students.

We respectfully disagree with the commenter who suggested removing the financial protection disclosure requirements on the grounds that students will neither take notice of nor care about this information. Some of the information conveyed in the disclosures would undoubtedly be of a complex nature. We also recognize that many people have limited familiarity with financial instruments such as letters of credit. For that reason, and to minimize confusion, we proposed consumer testing of the disclosure language itself, in addition to consumer testing of the actions and triggering events that require financial protection, to ensure that the disclosures are meaningful and helpful to students. As discussed above, in the final regulations we are revising proposed § 668.41(i) to require consumer testing prior to identifying the actions and/or triggering events for financial protection that require disclosures. We believe this change will result in disclosures that are more relevant to students, and that relate directly to actions and/or events that potentially affect the viability of institutions they attend or are planning to attend. In keeping with the intent of the proposed regulations to ensure that disclosures are meaningful and helpful to students, the final regulations retain the use of consumer testing, not only in determining the language to be used in such disclosures but also the specific actions and triggering events to be disclosed.

Changes: We have revised § 668.41(i) to require consumer testing of disclosures of the actions and triggering events that require financial protection under § 668.171(c)–(g).

Comments: Several commenters contended that the proposed regulations inappropriately equate financial weakness with lack of viability, and would require institutions to make disclosures that are misleading or untrue. For example, an institution that is financially responsible may experience a triggering event that nevertheless requires the institution to disclose to students that it is financially at risk. In the opinion of one commenter, this constitutes compelling untrue speech and violates the First Amendment.

Echoing this overall concern, one commenter expressed the belief that warnings based on triggering events that have not been rigorously proven to demonstrate serious financial danger would destroy an institution's reputation based on insinuation, not fact. The commenter proposed that an institution should have the opportunity to demonstrate that it is not in danger of closing before requiring disclosures.

Strenuously objecting to financial protection disclosures, one commenter described the relationship between some of the triggering events listed in § 668.171(c) and the institution's value to students or its financial standing as tenuous. The commenter further argued that the ''zone alternative'' found in current § 668.175(d) recognizes the potential for an institution to be viable in spite of financial weakness; and that the proposed regulations weaken the zone alternative.

A commenter, although acknowledging that students should be made aware of some triggering events, took particular exception to the Department's assertion that students are entitled to know about any event significant enough to warrant disclosures to investors, suggesting that SEC-related disclosures are not a reliable basis on which to require disclosures to students. In support of this position, the commenter noted that SEC disclosure requirements may or may not indicate that a publicly traded institution will have difficulty meeting its financial obligations to the Department, because such disclosures serve a different purpose, namely to assist potential investors in pricing the publicly traded institution's securities. The commenter stated that linking financial protection disclosures to SEC reporting may create false alarms for students and cause them to react impulsively.

Discussion: We do not agree that the proposed regulations either inappropriately equate financial weakness with lack of viability, or require institutions to issue misleading or untrue disclosures.

Under the regulations, an institution is required to provide financial protection, such as an irrevocable letter of credit, only if that institution is deemed to be not financially responsible because of an action or event described in § 668.171(b). As described in the NPRM, we believe that the factors necessitating an institution to provide financial protection could have a significant impact on a student's ability to complete his or her education at an institution.

However, we recognize that not all of the actions and triggering events for financial protection will be relevant to students. Therefore, we have revised the requirement to clarify that the Secretary will select particular actions and events from the new triggers specified in § 668.171(c)–(g), as well as other events that result in an institution being required to provide financial protection to the Department, based on consumer testing. The events that are demonstrated to be most relevant to students will be published by the Secretary, and schools subject to financial protection requirements for those events will be required to make a disclosure, with language to be determined by the Secretary, to prospective and enrolled students about the event. In addition to making required disclosures more useful and understandable to students, while accurately reflecting concerns about the institution's financial viability, this change will ensure that the action or triggering events behind the disclosure are relevant to students.

As the actions and triggering events identified in proposed § 668.171(c) may affect an institution's ability to exist as a going concern or continue to deliver educational services, we continue to believe that, having made a substantial investment in their collective educations, students have an absolute interest in being apprised of at least several of these actions and events. This is not, as the commenter suggests, destruction of an institution's reputation by insinuation in place of facts, but rather the providing of factual information to students on which they can make a considered decision whether to attend or continue to attend that institution.

We agree with the commenter that noted that the purposes of disclosures to investors required by the SEC and these proposed disclosures are different in some respects. As discussed under ''Automatic Triggering Events,'' we are revising the triggers in § 668.171(c) to ensure that the triggers, including the proposed triggers that were drawn from SEC disclosure requirements, are tailored to capture events that are most relevant to an institution's ability to provide educational services to its students. With these changes, we believe that each of these triggers and the related disclosure will serve the Department's stated purpose.

We understand the commenters' concern that some students may draw undesirable or even erroneous conclusions from the disclosures or act impulsively as a result of the disclosures. As students must decide for themselves the value of any institution and the extent to which that value is affected by the event or condition that triggered the disclosure, there might always be some subjectivity inherent to an individual's reading of the required disclosure. However, we believe the benefit to those students in being apprised of actions or events that might affect an institution's viability outweighs this potential concern. Moreover, as previously discussed, the Department will conduct consumer testing to ensure that both the events that result in institutions being required to provide financial protection to the Department, as well as the language itself, is meaningful and helpful to students before requiring disclosures of those events. Our intent is for the required disclosures to convey accurate, important information.

Finally, with regard to the suggestion made by one commenter that institutions be afforded the opportunity to demonstrate that they are not in imminent danger of closing before having to provide financial protection and the accompanying financial protection disclosures, as discussed above under ''Reporting Requirements,'' we are revising § 668.171(h) to permit an institution to demonstrate, at the time it reports a triggering event, that the event or condition no longer exists, has been resolved or that it has insurance that will cover any and all debts and liabilities that arise at any time from that triggering event. If such a demonstration is successfully made, the institution will not be required to provide financial protection, and will not be subject to the financial protection disclosure requirement.

We agree with the commenter who pointed out that the ''zone alternative'' in current § 668.175(d) recognizes the potential for an institution to be viable in spite of financial weakness, but we do not concur with the assertion that the regulations would weaken the zone alternative. The zone alternative is specific to an institution that is not financially responsible solely because the Secretary determines its composite score is less than 1.5 but at least 1.0. Such an institution may nevertheless participate in the title IV, HEA programs as a financially responsible institution under the provisions of the zone. We are not proposing to change current regulations related to the zone alternative. Participation under the zone alternative is not an action or triggering event and would, therefore, not result in an institution having to make a disclosure.

Changes: We have revised § 668.41(i) to require consumer testing of disclosures of the actions and triggering events that require financial protection under § 668.171(c)–(g).

Scope of the Disclosure Requirement

Comments: Several commenters requested clarification as to the scope of the financial protection disclosure requirements. One commenter expressed concern about proposed § 668.41(i), which stated that an institution required to provide financial protection to the Secretary such as an irrevocable letter of credit under § 668.175(d, or to establish a set-aside under § 668.175(h), must provide the disclosures described in § 668.41(i)(1)–(3). The commenter contended that it is not clear whether the disclosure requirement pertains only to financial protections resulting from the new triggers in the proposed regulations, or whether the disclosures would be required for any financial protections, including those required under existing financial responsibility standards, such as the 50 percent letter of credit provided under current § 668.175(c). The commenter added that when an institution provides a letter of credit pursuant to current § 668.175(b) and (c), it qualifies as a financially responsible institution, and thus there should be no need for disclosures in these situations. However, the commenter asserted that the Department's frequent use of the undefined phrase ''financial protection,'' throughout § 668.175, has resulted in a lack of clarity. The commenter asked that the Department limit financial protection disclosures to the new triggers in § 668.171.

Another commenter noted that the zone alternative under § 668.175(d) does not include a requirement to provide financial protection to the Department and therefore should not be referenced in the disclosure requirement.

Discussion: We thank the commenter who brought to our attention the unintentional reference in § 668.41(i) to financial protection provided to the Secretary under § 668.175(d). As the commenter pointed out, § 668.175(d) relates to the zone alternative and does not include a requirement to provide financial protection. Proposed § 668.41(i) is intended to reference only financial protection provided to the Secretary under § 668.175(f), or the set-aside under § 668.175(h).

To clarify the scope of proposed § 668.41(i), that section would have required disclosures for any financial protection an institution is required to provide under § 668.175(f) or for any set-aside under § 668.175(h), not just financial protection provided as a result of the new triggering actions and events established in these regulations.

However, as described above, we are revising the financial protection disclosures so that the Secretary will conduct consumer testing to identify which actions and triggering events should be disclosed. Institutions will be required to disclose information about those events only if it is found to be relevant to students.

Changes: As described above, we have revised § 668.41(i) to require consumer testing of disclosures of the actions and triggering events that require financial protection under § 668.171(c)–(g).

Harm to Institutions

Comments: Several commenters addressed the potential harm to institutions they believe will result from the proposed financial protection disclosures. These commenters warned of irreparable damage to an institution's reputation that could drive away students, alarm potential donors, diminish access to capital, and unfairly brand an unknown number of institutions as untrustworthy. One commenter envisioned a cascading series of events in which declining enrollment and alumni and donor support forces tuition hikes, which in turn lead to further declines in enrollment and the institution's eventual closure.

Underlying the commenters' concern over potential negative outcomes was the opinion that the required disclosures are based on flawed financial standards that are not truly indicative of whether an institution is carrying out its educational mission. One commenter suggested that the Department might cause lasting and perhaps grave harm to institutions not currently at risk of failure, turning disagreements about accounting issues into existential enrollment threats. Another commenter pointed out that some nonprofit institutions operate close to the margin of sustainability because of their mission, or a charitable commitment to supporting needy students. The proposed financial protection disclosures would, in the opinion of the commenter, thrust such institutions into a cycle of failure.

Discussion: We understand the concern regarding the potential for the financial protection disclosures that were initially proposed, as well as the financial protection disclosures in these final regulations, to damage an institution's reputation. However, we do not believe that the possibility of harm to an institution's reputation is reason enough to withhold from students, who in many cases have borrowed heavily to finance their educations, information on the financial viability of the institutions they attend. Regarding the catastrophic series of events predicted by some commenters, we believe such occurrences are unlikely. However, in the event that some institutions do fall into what one commenter termed a cycle of failure, we believe that is more appropriately attributable to the actions or failures of the institutions themselves than to the financial protection disclosures.

We address earlier in this section the commenters' contention that the financial responsibility standards on which the actions and triggering events disclosure requirements are based are flawed and not indicative of institutions' actual financial positions. We do not agree with the observation of one commenter that the proposed regulations require financial protection disclosures for what are essentially disagreements about accounting issues. As discussed under ''Triggering Events,'' our analysis and assessment of the triggering actions and events which necessitate providing financial protection indicates they would have a demonstrable effect on an institution's financial position.

Lastly, with regard to the point made by one commenter that some nonprofit institutions operate close to the margin in adherence to a mission or particular commitment to funding needy students, the Department commends the efforts of such institutions. We do not believe that for the most part, such institutions have a heightened risk of experiencing a triggering action or event. The financial stress on institutions operating close to the margin of sustainability for the reasons noted above is most likely to reflect in a lower composite score than might otherwise be the case. Those institutions are frequently able to operate as financially responsible institutions under the zone alternative, and would not be subject to financial protection disclosures.

Changes: None.

Warnings to Students—General

Comments: Some commenters contended that the proposed provisions related to mandatory warnings to students are not consistent with the provisions and purposes of the HEA. They noted that the HEA enumerates an extensive list of information that institutions must ''produce . . . and [make] readily available upon request'' to current and prospective students (20 U.S.C. 1092(a)(1)), which includes, among other things, graduation rates and crime statistics, but makes no reference to any requirement to disclose information that bears on the institution's financial viability or its need to provide financial protection. *See id.* §§ 1092(a)–(m). Moreover, the commenters opined that the mandatory warning requirements run afoul of the First Amendment, arguing that compelled speech, as included in the proposed regulation's required warnings, is subject to strict scrutiny and permissible only if ''reasonably related to the State's interest in preventing deception of consumers.'' *R.J. Reynolds Tobacco Co.* v. *FDA,* 696 F.3d 1205, 1212 (D.C. Cir. 2012).

Discussion: Section 668.41(h)(3) and (i)(4) and (5) requires the institution to provide what are described as ''warnings'' to students, regarding the repayment rate of its alumni, through advertising and promotional materials, and ''disclosures'' regarding the actions and triggering events for any financial protection, identified pursuant to consumer testing, directly to prospective and enrolled students. The repayment rate provision requires the institution to state in its disclosure that: ''A majority of recent student loan borrowers at this school are not paying down their loans''—a statement that will rest squarely on factual determinations of repayment patterns demonstrated by a recent cohort of student borrowers from that institution, derived from data validated through a challenge process in which the institution may contest the accuracy of the data elements. The statement does not, unlike the warning criticized in a prior court ruling, state that the prospective student should expect difficulty in repayment.[62] It merely provides a factually accurate statement that ascribes no adverse quality to the institution itself as the cause of this pattern.[63] The regulation does not compel the institution to articulate a government position on the cause of that pattern, or to engage in or disseminate as true what is ''uncertain, speculative estimates.'' *Association of Private Sector Colleges & Universities* v. *Duncan,* 110 F. Supp. 3d 176, 199 (D.D.C. 2015), *aff'd* 640 Fed.Appx. 5 (D.C. Cir. 2016). Rather, the repayment rate provision simply requires disclosure of a factual statement that the Department considers valuable information to the consumer. The institution is free to explain, if it wishes, why it believes that pattern exists, or why it believes that the pattern does not indicate that it is unable to deliver a quality education. The statement falls well within the grounds upheld for other required disclosures.

Furthermore, the form, place, and even the actual language of this warning may change based on consumer testing or other factors to help ensure that the warning is meaningful and helpful to students, and if so, the Department will publish those matters in a notice in the **Federal Register**. § 668.41(h)(3). For the financial protection disclosures, the Secretary will also conduct consumer testing to determine precisely which actions and triggering events that require financial protection would be most relevant and important for prospective and enrolled students to know, and to determine the appropriate language for a disclosure. § 668.41(i).

We note first that the governmental interest in compelling speech is not limited to ''preventing deception,'' as the commenter appears to suggest.[64] This follows from the nature of the test applied to First Amendment challenges to compelled speech, as demonstrated in recent litigation challenging disclosures mandated by the Department's GE regulations. Because the required disclosures/warnings are commercial speech, the government may require the commercial disclosure of 'purely factual and uncontroversial information' as long as there is a rational justification for the means of disclosure and it is intended to prevent consumer confusion.'' *Ass'n of Private Colleges & Universities* v. *Duncan,* 870 F. Supp. 2d 133, 155 (D.D.C. 2012). As that court noted in upholding a requirement that an institution offering GE programs make disclosures about its programs, costs, and student outcomes:

. . . The Department has broad authority ''to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department.'' 20 U.S.C. 1221e–3 (2006); *see also id.* § 3474 (''The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.''). The disclosures mandated here fall comfortably within that regulatory power, and are therefore within the Department's authority under the Higher Education Act.

Ass'n of Private Colleges & Universities v. *Duncan,* 870 156.[65] The regulations accord the institution a challenge process regarding the calculation of the repayment rate itself, as well as an opportunity for a hearing to consider challenges to a requirement to provide financial protection. These procedures will produce a factual outcome; the factual outcome—like the disclosures about costs, placements, completion rate and repayment rate mandated in the GE regulations already upheld—may themselves also be ''vanilla'' disclosures of unpleasant, but factually accurate determinations. How alumni are repaying their loans, and whether the school has experienced actions or triggering events that pose financial risk to the government (and students), are of direct interest to consumers. We believe disclosures—and warnings—that convey determinations on those matters fall well with the kind of disclosures the courts have upheld.

Changes: None.

Proprietary Institution Loan Repayment Warning

General: Repayment Rate

Comments: A number of commenters supported requiring warnings for prospective and enrolled students at proprietary institutions with poor repayment rates. They argued that the warnings will provide useful information for students as they make educational and borrowing decisions. One group of commenters urged the Department to release all loan repayment rates publicly, including for

[62] ''[A] student who enrolls or continues to enroll in the program should expect to have difficulty repaying his or her student loans.'' Debt Measure Rule, 76 Fed.Reg. at 34,432. . . . the court doubts that the statement that every student in a program ''should expect to have difficulty repaying his or her student loans'' is a purely factual one. *Association of Private Colleges and Universities* v. *Duncan,* 870 F. Supp. 2d 133, 155 (D.D.C. 2012).

[63] Similarly, the statement simply describes whether borrowers are paying ''down'' their loans, a readily understood term meaning that the payments made are not *reducing* the loan amount—not whether they are repaying under whichever repayment plan they chose, or are in default.

[64] *Am. Meat Inst.* v. *U.S. Dep't of Agric.,* 760 F.3d 18, 22 (D.C. Cir. 2014) (upholding country of origin labelling requirements; overruling prior opinions of that court that limited requirements to those aimed at preventing deception).

[65] In contrast, the court there doubted that the language of the warning also required under those regulations (that every student in a program ''should expect to have difficulty repaying his or her student loans'') would have been ''purely factual and uncontroversial information.'' *Ass'n of Private Colleges & Universities* v. *Duncan,* 870 F. Supp. 2d 155. When that regulation was reissued and later challenged on First Amendment grounds, this same court upheld the disclosures required in the new rule, and in doing so contrasted the ''graphic, compelled speech'' challenged by tobacco advertisers in R.J. Reynolds, on which the commenters relay, with ''the vanilla, estimated-cost disclosures at issue'' in the Department regulation. *Id.* Moreover, the court further noted that even ''*R.J. Reynolds* acknowledged that the *Zauderer* standard applies not just to purely factual and uncontroversial information, but also to 'accurate statement[s].' . . . The 'total cost' estimates contemplated here certainly meet that description.'' *Ass'n of Private Sector Colleges & Universities* v. *Duncan,* 110 F. Supp. 3d 176, 200 n.12 (D.D.C. 2015), *aff'd sub nom. Ass'n of Private Sector Colleges & Universities* v. *Duncan,* 640 F. App'x 5 (D.C. Cir. 2016).

institutions that are not required to deliver loan repayment warnings under § 668.41(h).

However, several commenters argued that, because repayment behavior is not controllable by the institution, the repayment rate is not an appropriate institutional performance measure. Another argued that loan repayment rate reflects financial circumstances, but not educational quality, so it is not appropriate to require institutions to issue warnings based on their loan repayment rate.

Several commenters also raised concerns that § 668.41(h) would place an undue burden on institutions and duplicates other established disclosure requirements. They contended that the requirement is unnecessary, particularly because the proprietary institutions required to comply with § 668.41(h) are already subject to the GE reporting and disclosure requirements, including a repayment rate disclosure if specified by the Secretary; and because the Department already publishes both cohort default rates and institutional repayment rates on the College Scorecard. Other commenters suggested that the measure would increase costs of higher education due to higher administrative burden, and contended that the disclosures were not likely to make much impact, given the large number of mandated disclosures already in place.

Discussion: We appreciate the comments supporting the repayment rate warning provision. We agree that this provision will provide critical information for students that will help them to make well-informed decisions about where to go to college and their financial aid use. Repayment rates provide a key indicator of students' post-college repayment outcomes, which are of vital interest to students considering their families' personal financial circumstances, as well as to taxpayers and policymakers. The Department has already worked to promote greater access to such information through the GE regulations and the College Scorecard; we believe that the repayment rate warning requirement in these regulations will provide an important complement to those other efforts.

We do not agree with the commenters who stated that repayment does not constitute a measure of educational quality, or the commenter who argued that repayment rate is a measure of students' financial backgrounds and not academic quality. We believe that all students deserve to have information about their prospective outcomes after leaving the institution. Particularly for students who expect to borrow Federal loans to attend college, it is critical to know whether other students have been able to repay their debts incurred at the institution.

However, while we believe that this information is very important for prospective students to be aware of and to consider, we agree with the concerns that creating a new rate could confuse the borrowers who will also receive the GE program-level repayment rate disclosures using a different calculation and different cohorts for measuring borrower outcomes. While not decisive, we also recognize and understand the comments from those who raised concerns that the requirement may be overly burdensome because of the differences with the data used in the GE calculation. Requiring a separate data corrections process for proprietary institutions, which are already subject to reporting requirements for repayment rate under GE for virtually all of their borrowers, may be needlessly burdensome given the virtually complete overlap in students covered.

To avoid any confusion resulting from a new repayment rate calculation, as well as to limit burden on institutions, we are revising the repayment rate provision. Under this revised provision, the repayment rate data that proprietary institutions report at the program level will be used to calculate a comparable repayment rate at the institution level. Specifically, the Department will calculate, for those borrowers who entered repayment during a particular two-year cohort period, the repayment rate as follows: The number of borrowers in GE programs who are paid in full or who are in active repayment (defined as the number of borrowers who entered repayment and, during the most recently completed award year, made loan payments sufficient to reduce the outstanding balance of loans received for enrollment in the program by at least one dollar), divided by the number of borrowers reported in GE programs who entered repayment. Institutions with a repayment rate showing that the median borrower has not either fully repaid the borrower's loans by the end of the third year after entering repayment, or reduced their outstanding balance by at least one dollar, over the third year of repayment (which, under the calculation methodology, is equivalent to a loan repayment rate of less than 0.5) will be subject to a requirement that they include a warning, to be prescribed in a later **Federal Register** notice by the Secretary, in advertising and promotional materials. We are also removing the proposed requirement for direct delivery of repayment rate warnings to prospective and enrolled students, recognizing that the GE regulations already require those proprietary institutions to deliver a program-level disclosure template that includes repayment rate to those students. We believe that these changes will reduce administrative burden on institutions considerably, and help to ensure that increased administrative burden is not passed on by institutions in greater costs to students.

We disagree with the commenters who argued that the disclosures would not make much impact. A large and growing body of research suggests that in many cases, students and families react to information about the costs and especially the value of higher education, including by making different decisions.[66] To maximize the potential for effective warnings to students, the Department has revised the regulatory language about the warnings that must be included in advertising and promotional materials to maximize the likelihood that such information will be well presented in a timely manner. We believe that this information will build upon, and not conflict with, other disclosures that institutions currently make. In particular, we believe that the institutional warning requirement in advertising and promotional materials will provide a valuable caution to students in their early stages of considering which colleges to attend. We also believe that the institutional warning requirement will act as a complement to other disclosure requirements, including the disclosure template required to be provided under the GE regulations and the Department's own efforts to promote greater transparency and better-informed decision-making through the College Scorecard and the Financial Aid Shopping Sheet. The Department will also promote this information through its own channels to reach students, including through the College Scorecard or the FAFSA, after consideration of the most effective and efficient ways to do so.

[66] Wiswall, M., and Zafar, B. (2015). How Do College Students Respond to Public Information about Earnings? Journal of Human Capital, 9(2), 117–169. DOI: 10.1086/681542. Retrieved from ; Hastings, J., Neilson, C.A., and Zimmerman, S.D. (June 2015). The Effects of Earnings Disclosure on College Enrollment Decisions. Cambridge, MA: National Bureau of Economic Research. NBER Working Papers 21300. Retrieved from *www.nber.org/papers/w21300;* and Hoxby, C. and Turner, S. (2015). What High-Achieving Low-Income Students Know About College. Cambridge, MA: National Bureau of Economic Research. NBER Working Paper No. 20861. Retrieved from *www.nber.org/papers/w20861.pdf.*

Changes: We have revised the loan repayment rate calculation in § 668.41(h), altered the loan repayment rate issuing process to reflect that any corrections will occur under the GE regulations, and provided that proprietary institutions with a sufficiently large number of borrowers who are not covered under GE reporting may be exempt from the warning requirement (as described in more detail later in this section). We have made conforming changes to separate the loan repayment warning delivery provisions, which require a warning to be included in advertising and promotional materials but no individual disclosure to students, from the delivery provisions for the financial protection disclosure required under § 668.41(i) of the final regulations, which require delivery of the disclosure to prospective and enrolled students.

Legal/Process Concerns

Comments: Noting that the proposed loan repayment warning was not included in the Department's notice announcing its intent to establish a negotiated rulemaking committee published in the **Federal Register** on August 20, 2015 (80 FR 50588), one commenter contended that the requirement falls outside the scope of the rulemaking process.

Discussion: The first session of negotiated rulemaking, held January 12–14, 2016, included a discussion of the potential consequences for ''conditions that may be detrimental to students,'' including the possibility of disclosure requirements and student warnings. The Department proposed regulatory text concerning a repayment rate warning at the second negotiated rulemaking session (February 17–19, 2016), and the committee discussed the proposal during the second and third sessions. Moreover, the negotiated rulemaking process ensures that a broad range of interests and qualifications are considered in the development of regulations. We believe that sufficient notice was provided about the potential for inclusion of the repayment rate warning, and that the negotiators involved in developing these regulations were well-qualified to explore the option.

Changes: None.

Comments: One commenter argued that the loan repayment rate provision does not constitute ''reasoned decision-making,'' because the Department did not explain the evaluation of repayment on an individualized basis; the use of a median, rather than an average, borrower to determine the school's rate; the zero percent threshold; the length of the measurement window; and the exemption of in-school and military deferments only in the final year. Another commenter asserted that the requirement is arbitrary and capricious because several points in the preamble (such as the level of the calculation and the data challenge process) were unclear.

Discussion: We disagree with the commenters who stated that the repayment rate warning provision is arbitrary and capricious, and that it does not constitute reasoned decision-making. The repayment rate measure identified in the proposed regulations, while different from other repayment rate measures the Department has used in other contexts, was designed to measure repayment outcomes in greater detail than existing measures do (for instance, by looking at the percentage of the balance repaid rather than the share of borrowers who met a binary threshold of paying down at least one dollar in principal).

However, as described earlier, the Department has revised the repayment rate provision in the final regulations to mirror the program-level rates used under the GE regulations. Those rates calculate the share of borrowers who have made progress in repaying their loans, and will rely exclusively on data reported already under the GE regulations. We believe that these changes address the concerns of the commenters.

Changes: We have revised the calculation of the loan repayment rate in § 668.41(h), as previously described.

Proprietary Sector Requirement

Comments: Several commenters wrote that limiting the repayment rate provision to proprietary institutions is reasonable, given the differences in structure between those institutions and other sectors and the data that indicate poor repayment outcomes are widespread in the for-profit sector.

However, many commenters disagreed with the Department's proposal to limit the requirement to proprietary institutions. One commenter questioned the validity of the Department's argument that limiting the applicability of § 668.41(h) to proprietary institutions reduces the burden on institutions because only certain institutions benefit from the reduced burden. Noting that there is no similar limitation applicable to financial protection disclosures, one commenter suggested that the Department's limitation of the repayment rate provision to proprietary institutions was inconsistent. Some commenters argued that the Department was ignoring the needs of students at the estimated 30 percent of public and private nonprofit institutions with similarly low repayment rates that are not subject to the warning requirement, particularly because a majority of Federal student loan borrowers attend public institutions. Others stated that a repayment rate warning requirement for public and private nonprofit institutions is necessary to help students understand their choices and contextualize the information available to them. Several of these commenters proposed that public and private nonprofit institutions be required to disclose that the Department had not calculated a loan repayment rate for the institution and that it is therefore not possible to know whether the institution's repayment rate is acceptable.

Some commenters contended that there is no rationale for limiting the warning requirement to the proprietary sector. Other commenters stated that the Department lacked sufficient research to support the proposed regulations. Several commenters argued that the information cited as justification for limiting the repayment rate warning requirement to the proprietary sector was overstated or invalid. One commenter suggested that the Department cited inaccurate data from the College Scorecard. Several commenters noted that they could not replicate their Scorecard repayment rates due to inconsistencies in the National Student Loan Data System (NSLDS) data underlying the measure. Another commenter suggested that the cohort used to support the analysis did not reflect typical cohorts, since those students entered repayment during a recession. Several other commenters contended that the decision to limit the warning requirement to proprietary institutions violates GEPA and has no basis in the HEA.

A number of commenters suggested removing the loan repayment warning provision entirely, while several proposed expanding its application to all institutions with low repayment rates, regardless of sector. Several commenters suggested limiting the repayment rate warning requirement to institutions at which a majority of students are enrolled in programs subject to the Department's GE regulations, because, according to the commenters, students at career-oriented institutions frequently have misconceptions about their likely earnings. Alternatively, commenters suggested limiting the requirement to schools with ''financially interested boards'' to include proprietary institutions that have converted to nonprofit status.

Discussion: We appreciate the comments supporting the limitation of the repayment rate warning to proprietary institutions in light of the concentration of poor repayment outcomes in the proprietary sector and the risk of excessive and unnecessary burden to institutions with a far lower likelihood of poor repayment rates. As discussed in both the NPRM[67] and in the Gainful Employment final regulations,[68] a wide body of evidence demonstrates that student debt and loan repayment outcomes are worse for students in the proprietary sector than students in other sectors.

Most students in the proprietary sector borrow Federal loans, while borrowing rates among public and private nonprofit institutions are far lower; and debt levels are often higher. For instance, as also noted in the final Gainful Employment regulations, in 2011–2012, 60 percent of certificate students who were enrolled at for-profit two-year institutions took out Federal student loans during that year, compared with 10 percent at public two-year institutions. Of those who borrowed, the median amount borrowed by students enrolled in certificate programs at two-year for-profit institutions was $6,629, as opposed to $4,000 at public two-year institutions. Additionally, in 2011–12, 66 percent of associate degree students who were enrolled at for-profit institutions took out student loans, while only 20 percent of associate degree students who were enrolled at public two-year institutions did so. Of those who borrowed in that year, for-profit two-year associate degree enrollees had a median amount borrowed during that year of $7,583, compared with $4,467 for students at public two-year institutions.[69]

In addition to higher rates of borrowing, students at proprietary schools also default at higher rates than borrowers who attend schools in other sectors. Proprietary institutions have higher three-year cohort default rates than other sectors (15.0 percent, compared with 7.0 percent at private nonprofit institutions and 11.3 percent at public institutions in fiscal year 2013), and enroll a disproportionate share of students who default relative to all borrowers in the repayment cohort.[70]

In the final regulations, the Department seeks to reduce confusion among students and families by using rates that parallel the Gainful Employment program-level repayment rate, including using the same cohorts of students as the GE rates do. As a result of these changes, the repayment rate will be calculated using data that institutions already report to the Department through the GE regulations, rather than through a distinct data reporting and corrections process. This eliminates many of the concerns raised by commenters and discussed in the NPRM about the burden to institutions of complying with the repayment rate calculation provision.

However, the Department believes that, because of the changes, it would be inappropriate to apply an institutional warning to sectors other than the proprietary sector, because public and private nonprofit institutions are not typically comprised solely of GE programs and the repayment rate warning may not be representative of all borrowers at the school. Federal student loan borrowers also typically represent a relatively small proportion of the student population in the public sector, whereas borrowing rates are much higher, on average, at proprietary institutions (for instance, among full-time undergraduates enrolled in 2011–12, 19.7 percent borrowed Stafford loans at public less-than-two-year institutions, compared with 82.9 percent at for-profit less-than-two-year institutions and 83.3 percent at for-profit two-year-and-above institutions).[71] Moreover, the mix of programs at public and private nonprofit institutions may shift from year to year, changing the share of GE borrowers at the institution on an annual basis; including such institutions in the repayment rate requirement would require the Department to expend annual efforts to identify schools that are comprised entirely of GE programs for a relatively small number of schools. Therefore, this requirement is limited only to proprietary institutions. We recognize that some proprietary institutions may have Federal student loan borrowers in non-GE programs under section 102(b)(1)(ii) of the HEA. Accordingly, the final regulations specify that proprietary institutions with a failing repayment rate may appeal to the Secretary for an exemption from the warning requirement if they can demonstrate that including non-GE borrowers in the rate would increase the rate to passing.

With these changes, we believe that the Department's decision to limit the repayment rate warning to proprietary institutions is well-founded and does not raise concerns about excessive burden or inaccurate representation of student outcomes, and we disagree with the commenters who stated that the limitation to proprietary schools is not appropriate.

In response to the commenter who asserted that requiring only proprietary institutions to disclose repayment rates is inconsistent, as noted earlier, we decided to limit the repayment rate warning requirement to the sector of institutions where the frequency of poor repayment outcomes is greatest. Also as described earlier, the Department's analysis of data shows the financial risk to students to be far more severe in the proprietary sector; and data suggest that an institution-wide warning about borrower outcomes is more appropriate in the proprietary sector, given higher rates of borrowing among students (particularly in GE programs).

While we recognize some users' concerns with specific elements of the data cited in the NPRM, we believe that the data corrections process that will be established through the GE regulations will ensure the accuracy of the information on which the warning in advertisements and promotional materials is based. We recognize the concerns of the commenter who stated that the data cited in the NPRM reflect a cohort that entered repayment during the recession, but believe that this regulation will appropriately capture the actual outcomes of students, given that even students who enter repayment during a recession will be required to repay their loans in accordance with the terms and conditions of the Federal student loan programs. The provision of GEPA to which the commenter refers requires uniform application of regulations throughout the United States. 20 U.S.C. 1232(a). The HEA authorizes the Department to adopt disclosure regulations as does the general authority of the Secretary in 20 U.S.C. 1221e–3 and 20 U.S.C. 3474. *Assn. of Private Coll. and Univs.* v. *Duncan,* 870 F. Supp. 2d at 156. We believe that our analysis of the outcomes provides a reasonable basis on

[67] *www.regulations.gov/document?D=ED-2015-OPE-0103-0221.*

[68] *www.regulations.gov/document?D=ED-2014-OPE-0039-2390.*

[69] National Postsecondary Student Aid Study (NPSAS) 2012. Unpublished analysis of restricted-use data using the NCES PowerStats tool.

[70] ''Comparison of FY 2013 Official National Cohort Default Rates to Prior Two Official Cohort Default Rates.'' U.S. Department of Education. Calculated August 6, 2016: *http://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf.*

[71] U.S. Department of Education, National Center for Education Statistics, 2007–08 and 2011–12 National Postsecondary Student Aid Study (NPSAS:08 and NPSAS:12). (This table was prepared July 2014.) *https://nces.ed.gov/programs/digest/d15/tables/dt15_331.90.asp?current=yes.*

which to focus this requirement on for-profit schools.

We disagree with the commenters who propose to remove the repayment rate warning provision from the regulations. The Department believes that this information is critical to ensure students and families have the information they need to make well-informed decisions about where to go to college. Given the concerns discussed earlier about the inaccuracy of applying a warning to an entire institution based on data that do not necessarily represent all borrowers at the school, and the added burden both on public and private nonprofit institutions and on the Department to identify the relatively few institutions that might be accurately represented by such a rate, we believe it is appropriate to maintain the repayment rate warning provision only for proprietary schools. We appreciate the comments from those who suggested tying the repayment rate warning requirement to those institutions with a significant proportion of students in GE programs, and have adopted a version of that requirement (*i.e.,* the warning requirement applies only to those institutions at which a majority of GE borrowers are not in active repayment or repaid in full; and only at proprietary institutions, where effectively all programs are subject to the GE requirements). While we appreciate the comments from those who proposed instead limiting the requirement to ''financially interested boards'' to prevent certain institutions from avoiding the requirements, we believe that the requirements as stated in the final regulations will cover the vast majority of students at institutions with such boards, and that the added burden of identifying those institutions in another way would not yield much additional coverage for the requirement.

Changes: We have revised § 668.41(h) to provide that, if a proprietary institution has a repayment rate that shows that the median borrower has not either fully repaid, or made loan payments sufficient to reduce by at least one dollar, the outstanding balance of the borrower's loans, it may seek to demonstrate to the Secretary's satisfaction that it has borrowers in non-GE programs who would increase the school's repayment rate above the threshold for the warning requirement if they were included in the calculation. If an institution demonstrates this to the Secretary's satisfaction, it will receive an exemption from the warning requirement.

Income-Driven Repayment (IDR) Enrollment

Comments: A number of commenters asserted that § 668.41(h) conflicts with the Administration's income-based repayment plan enrollment campaigns. One commenter pointed to a Council of Economic Advisers report that states that borrowers on IDR plans are from more disadvantaged backgrounds than those on the standard repayment plans, suggesting that borrowers' investments in higher education pay off over time. That commenter contended that measuring borrowers' repayment behavior in the first five years is not appropriate because of the long-term payoff of postsecondary education. Other commenters argued that institutions would be unfairly—and retroactively—penalized for encouraging students to sign up for IDR plans.

Several commenters proposed to remove from the repayment rate calculation any borrower making payments under any Federal repayment plan, including IDR plans. Alternatively, one of the commenters proposed that the Department should allow institutions to include in the warning to students that the negative amortization of its borrowers occurred because of federally authorized repayment plans where that is the case.

Discussion: We disagree with the commenters' statements that income-driven repayment plans conflict with the loan repayment warning provision. The IDR plans that Congress and the Department provide to borrowers were created to act as a safety net for struggling borrowers—those whose debts are sufficiently high, or incomes are sufficiently low, to make repaying them on the expected timeline exceedingly difficult. However, a post-college safety net program for borrowers does not eliminate the responsibility the institution has to provide a high-quality education that ensures borrowers are able to, at a minimum, afford to pay down their loans, even in the first years after entering repayment. Moreover, the Department agrees with the commenter who noted that many of the borrowers currently enrolled in income-driven repayment (IDR) plans would otherwise be in distress on their loans, and may thus be in negative amortization regardless of whether they were on an IDR plan or may have defaulted. For instance, a recent report from the Council of Economic Advisers found that over 40 percent of borrowers who entered repayment in fiscal year 2011 and later enrolled in income-driven repayment had defaulted, had an unemployment or economic hardship deferment, or had a single forbearance of more than two months in length before entering their first income-driven repayment plan.[72] While the report shows that measurements of short-term distress were mitigated for the borrowers who enrolled in income-driven repayment plans, the Department believes that the fact that such borrowers experienced types of financial distress—whether failure to pay down the outstanding balance of the loans or deferments, forbearances, and defaults that suggest acute problems in repaying in the initial several years after leaving school—constitute critical information that prospective students and potential borrowers should be aware of prior to making enrollment or financial aid decisions. To that point, we do not agree with the commenters who stated that enrollment in IDR plans among students would unfairly penalize institutions; on the contrary, borrowers who enroll in IDR plans and still do not have sufficiently high incomes or low debts to pay down the balance on their loans are experiencing precisely the negative post-college outcomes about which students, taxpayers, and the Department should have concerns. This argument is especially relevant for institutions that are eligible for title IV, HEA aid on the basis of providing educational programs that prepare students for gainful employment in a recognized occupation. Students considering such programs should be warned if the majority of borrowers do not have sufficient income to pay down their Federal student debt, even if those borrowers are protected from default by enrolling in IDR plans.

Changes: None.

Inconsistency of Rates

Comments: Several commenters noted that the Department has considered many variations of a repayment rate calculation in recent years. They stated that none of these rates has been subject to peer-review research and that the Department has not sufficiently supported its proposal with research. Several commenters raised concerns that the use of multiple repayment rates would lead to significant confusion. These commenters urged the Department to use an existing definition of repayment rate, or to remove the provision entirely.

Discussion: We appreciate the commenters' concerns that multiple

[72] ''Investing in Higher Education: Benefits, Challenges, and the State of Student Debt.'' Council of Economic Advisers. July 2016: *www.whitehouse.gov/sites/default/files/page/files/20160718_cea_student_debt.pdf.*

repayment rates, particularly where provided to the same students, may lead to confusion. While we believe that this is important information for students and families to consider while deciding where to apply and enroll in college, we do not wish to create confusion for borrowers.

To that end, as described earlier, the Department has revised the repayment rate provision in the final regulations to mirror the program-level rates used under the GE regulations. Those rates calculate the share of borrowers who have made progress in repaying their loans; and will rely exclusively on data already reported under the GE regulations. We believe that these changes address the commenters' concerns. Moreover, the GE definition of ''repayment rate'' has been subjected to research, analysis, and consumer testing by the field.

Changes: We have revised the calculation of the loan repayment rate in § 668.41(h), as described in more detail earlier in this section.

Technical Comments About the Calculation

Comments: A number of commenters suggested specific changes to the repayment rate. One commenter disagreed with the Department's proposed use of a median repayment rate, rather than a mean. Several others argued that an institutional median is not appropriate because post-college repayment outcomes may vary significantly by program. One commenter was confused as to whether the loan repayment rate would be calculated on a per-borrower or a per-loan basis. Another commenter proposed to separate out, and create distinct loan repayment rates and warnings for graduate, undergraduate, and Parent PLUS Loan debts. Several commenters stated that the treatment of consolidation loans was unclear. One commenter suggested changing treatment of payments on consolidation loans by attributing the same payments to loans at multiple institutions, rather than attributing payments based on the share of debt from each institution.

One commenter expressed confusion over the use of ''accrued interest'' in the definition of ''original outstanding balance,'' and the use of ''capitalized interest'' in the definition of current outstanding balance for the repayment measure. Another commenter proposed that, for graduate programs that prepare students for medical residencies, the original outstanding balance should be defined as the principal balance after the medical residency forbearance period.

Other commenters suggested minor changes to the proposed calculation. One commenter argued that the Department proposed inconsistent treatment of borrowers who default on their loans. This commenter urged the Department to ensure that all defaulters appear as a zero percent repayment rate, or that defaulters are given no distinct treatment. Another commenter proposed that, under § 668.41(h)(6)(i), there should be a minimum of 30 students in the cohort, rather than 10, before requiring a loan repayment warning.

As noted earlier, several commenters argued that the zero percent repayment rate threshold was not supported by any evidence or analysis, and one contended that it is legally unsupportable.

Several commenters raised concerns about the five-year window for measuring borrowers' repayment. Some argued that the five-year measurement period is not predictable because of insufficient data. Some commenters argued that a two- or three-year measurement period would be better supported; or alternatively, proposed to use a 10-year window. Another commenter stated that analysis of data from the College Scorecard found that three- or seven-year repayment rates would be more reliable. One commenter argued that the repayment rate window for medical schools should be seven years, as in the Gainful Employment regulations; while another commenter proposed that repayment rates for graduate programs that prepare students for medical residencies should be measured five years from the end of their medical residency forbearance period.

Several commenters raised concerns about excluding from the measurement only those students who are in certain deferments during the measurement year. One commenter proposed to extend the measurement window of borrowers who spend several years in in-school deferments, while others proposed to exclude any borrower who entered an in-school or military deferment at any point during the measurement period.

Several commenters argued that borrowers' backgrounds affect their repayment rates; one commenter asserted that when borrowers' backgrounds are taken into consideration, repayment rates of low-income students and students enrolled at proprietary institutions are similar to those of their higher-income peers. One commenter suggested that the Department should revise the loan repayment rate methodology to exclude all borrowers with an Expected Family Contribution of zero dollars in any year of attendance. Another proposed to disclose the percentage of Pell Grant recipients or adjust the threshold at institutions with a high enrollment of Pell Grant recipients.

Discussion: We appreciate the commenters' concerns about the specific calculation of the repayment rate. We have made changes to the calculation of the repayment rate, as described earlier, that address or eliminate many of the concerns raised, including clarifying that the median rate over a mean is comparable to a proportion of borrowers; the use of program-level data to calculate an institution-level rate, ensuring that borrowers in GE programs receive warnings if either or both rates raise cause for concern; and whether the rate would be calculated on a per-borrower or per-loan basis (because the rate was replaced by a proportion of borrowers who have not repaid at least one dollar in outstanding balance). We disagree with the commenter who suggested that creating distinct repayment rates and warning requirements for particular programs is necessary, because such rates will already be made available at the educational program level through the GE regulations; this warning requirement is designed to complement and supplement that rate with a broader measure of the entire institution.

We believe that we have clarified the treatment of consolidation loans, which will mirror the treatment of such loans in the GE regulations. We also believe that additional clarification of the definitions of ''accrued'' and ''capitalized'' interest, and one commenter's proposed change to the definition for graduate programs that prepare students for medical residencies, is not necessary because the repayment rate will instead rely on data already reported under the GE regulations. Similarly, the treatment of defaulted student loans will mirror the GE data that are already reported to the Department. We will continue to use a minimum cohort size of 10, rather than 30 as one commenter proposed, because 10 is a sufficiently large size to meet both minimum requirements and best practices for the protection of student privacy; a minimum count of 10 borrowers is also the standard already used in the GE regulations for repayment rate and other metrics. With respect to concerns from several commenters about the use of negative amortization as a threshold for requiring warnings, we disagree that there is no support in research for doing so. Based on internal analysis of data from the National Student Loan Data System

(NSLDS), the typical borrower in negative amortization—more than half of those who have made no or negative repayment progress in the third year after entering repayment—experienced long-term repayment hardship such as default. Those borrowers are especially unlikely to satisfy their loan debt in the long term.[73] Additionally, several public comments received and papers published during the negotiations for the Department's GE regulations include reference to negative-amortization thresholds for student loan repayment rates.[74] Moreover, we believe this will be an understandable measure to help inform consumer choice.

We agree with commenters who stated that a measurement three years after entering repayment (*e.g.,* examining borrowers' outcomes three years after they enter repayment) is well supported. Given the other changes to the repayment rate calculation made to mirror the GE repayment rate metric, we will use this period, rather than the five-year period included in the proposed regulations, to calculate the institutions' rate. We believe that a 10-year window, as some commenters proposed, would be too long to provide relevant and timely data; such long-term outcomes would fail to incorporate improvement in quality or other changes at the institution since those borrowers entered repayment, and would likely fail to capture many of the signs of short-term financial distress that some borrowers experience. We agree with the commenter who stated that the repayment rate window should be lengthened for medical schools; we are revising the provision to provide that the same period will be used for this requirement as is used in the GE regulations.

With respect to comments raised about students who use in-school or military deferments, we will again mirror the provisions outlined in the GE regulations. Because that calculation measures active repayment during the most recently completed award year, we believe that we have addressed concerns about borrowers who may have used deferments in the interim. For the purposes of this calculation, the Department plans to rely on the data reporting and data corrections under the GE regulations for the purposes of calculating repayment rates.

We disagree with the commenters who stated that borrowers' backgrounds drive their ability to repay, and that institutions should therefore not be held accountable for their repayment rates. One of the central missions of institutions of higher education is to ensure low-income students receive an education that will help them to earn a living and successfully repay their loans. At institutions where more than half of borrowers do not successfully pay down the balance on their loans, the Department believes that students have the right to know—before they enroll or borrow financial aid—that the majority of borrowers have not repaid even one dollar in outstanding balance three years out of school.

Changes: We have revised § 668.41(h) as described earlier in this section.

Challenge Process

Comments: One commenter asked the Department to clarify whether institutions will have an opportunity to challenge the Department's student-level data. Another commenter recommended that the Department use a 20.8 percent borrowing rate in place of the proposed two-step borrowing rate calculation in order to simplify the calculation and reduce the associated burden.

Discussion: We appreciate the commenter's concern for the accuracy of the data. Given the changes to the rate described earlier, there will be no additional data corrections process beyond the one already provided for in the GE regulations. Institutions will already be responsible for reporting accurate data under the GE regulations, and for making any necessary corrections to the data. The Department will use those already-corrected data to derive the institution-level repayment rate. However, a proprietary institution at which the median borrower has not repaid in full, or paid down the outstanding balance of, the borrower's loans may receive an exemption from the warning requirement if the institution demonstrates that not all of its programs constitute GE programs and that if the borrowers in the non-GE programs were included in the calculation of the loan repayment rate, the loan repayment rate would be equal to or greater than 0.5, meaning that the median borrower had paid down the outstanding balance of the borrower's loans by at least one dollar.

Additionally, we do not believe the participation rate index (*i.e.,* the index comparable to the 20.8 percent borrowing rate percentage) appeal is still necessary under this revised version of the repayment rate. The GE repayment rate calculation does not include such an exception, and limiting the warning requirement only to proprietary institutions means that the rates will cover all borrowers at the institution, accurately representing the universe of students with Federal loan debt. In the interest of ensuring consistency between the GE repayment rates and this one, and of reducing burden on both institutions and the Department, we have removed the participation rate index appeal.

Changes: We have revised § 668.41(h) to remove the data corrections process and the participation rate index appeal. We have also added § 668.41(h)(4)(ii), which creates an exemption to the warning requirement for institutions that demonstrate that they have borrowers in non-GE programs and that, if those borrowers were included in the loan repayment rate calculation, the loan repayment rate would meet the threshold.

Warnings

Comments: Several commenters supported using a plain-language warning that has been tested with consumers, and that is timely for students. One commenter supported incorporating those warnings into institutional promotional materials, and suggested expanding the definition of "promotional materials" to include all materials and services for which an institution has paid or contracted. Several commenters requested that we further clarify how the warning must be presented, so that it is not difficult for the public to see. Other commenters expressed disappointment that the proposed regulations do not require institutions to deliver repayment rate warnings to prospective students at the first contact with those students, when the information may be most valuable to students, and strongly supported including such a requirement in the final regulations.

However, several commenters suggested that the loan repayment warning raises First Amendment concerns. Some commenters believed that the requirement would both target institutions at which borrowers are appropriately using IDR plans and excuse private nonprofit and public institutions with similarly poor loan repayment rates. One commenter raised concerns that the specific language provided for illustrative purposes in the

[73] Analysis of NSLDS data was based on a statistical sample of two cohorts of borrowers with FFEL Loans and Direct Loans entering repayment in 1999 and 2004, respectively. The repayment statuses of the loans were tracked at 10 and 15 years after entry into repayment, depending on the age of the cohort.

[74] For instance, "TICAS Detailed Comments on Proposed Gainful Employment Rule," The Institute for College Access and Success. May 27, 2014. *http://ticas.org/content/pub/ticas-detailed-comments-proposed-gainful-employment-rule;* and Miller, Ben. "Improving Gainful Employment: Suggestions for Better Accountability." New America. *www.newamerica.org/education-policy/policy-papers/improving-gainful-employment/.*

NPRM did not accurately describe the loan repayment rate.

One commenter believed that the warning would be most effective if it were included within other loan and borrowing information, rather than delivered separately along with other disclosures. The commenter also stated that institutions should not be required to provide the warning to students who do not intend to borrow Federal student loans.

Several commenters argued that requiring institutions to include the entire content of the warning in advertising and promotional materials would be cost-prohibitive. Instead, commenters proposed that institutions provide a briefer statement, similar to the requirements in the Gainful Employment regulations.

Discussion: We appreciate the support of commenters who stated that they agreed with the Department's proposed use of a plain-language, consumer-tested warning. We also agree with commenters who supported incorporating warnings into a wider range of promotional materials, and have strengthened the definitions for warnings and promotional materials accordingly. We recognize and agree with the concerns of commenters who suggested additional clarity around the presentation of the warning to prevent obfuscation. To that end, we have clarified the requirements for promotional materials to ensure the warning will be prominent, clear, and conspicuous, including a variety of conditions both for advertising and promotional materials. The Secretary may require the institution to modify its materials if the Department determines that the warning is not sufficiently prominent or conspicuous. The Secretary may also issue guidance describing form, place, and manner criteria that would make the warning sufficiently prominent, clear, and conspicuous.

We also appreciate the perspective of commenters who supported hand-delivered warnings at early stages in a student's college search. However, we recognize that many of these goals will be accomplished under the GE regulations, which require that program-level data be provided on a GE disclosure template to students. To that end, we have removed the requirement that an institution-level warning also be provided directly to prospective and enrolled students, and instead will require that the warnings be provided through advertising and promotional materials. This also resolves the concerns of the commenter who believed that the warning would be most effective if accompanied by other loan and borrowing information; and the commenter who argued that institutions should be required to provide the warning directly to only those students who intend to borrow Federal student loans.

While we recognize that some institutions believe providing these warnings in advertising and promotional materials would be cost-prohibitive, we believe that this is important information to help students themselves make critical cost-benefit analyses prior to investing their time and money in an institution.

We address the First Amendment concerns above in the section ''Warnings'' and do not repeat them here. We also remind commenters that the warning language included in the final regulations may be subject to consumer testing and may change in accordance with the results of that testing. The precise warning language, if revised, will be published in the **Federal Register** by the Secretary.

Changes: We have revised § 668.41(h) to remove the delivery of a repayment rate warning to prospective and enrolled students. Instead, we have strengthened the requirements under § 668.41(h)(3) to ensure the materials are appropriately provided in advertising and promotional materials.

Agreements Between an Eligible School and the Secretary for Participation in the Direct Loan Program (Section 685.300)

Legal Authority and Basis for Regulating Class Action Waivers and Arbitration Agreements

Comments: Several commenters objected that the Department lacks the legal authority to ban either mandatory predispute arbitration agreements or class action waivers. These commenters strongly believed that by this regulation, the Department would be inappropriately interfering with institutional operations, violating established Federal law, and interfering with parties' freedom to contract. Commenters suggested that the Department has ignored clear messages from both Congress and the Supreme Court indicating Federal policy favoring arbitration.

Many commenters argued that the Federal Arbitration Act (FAA) precludes the Department from restricting the use of arbitration agreements. Commenters noted that the FAA makes arbitration agreements ''valid, irrevocable, and enforceable as written,'' reflecting a national preference for resolving disputes by arbitration. These commenters believed that the proposed regulations run counter to public policy and violate the FAA. According to commenters, the prohibition on arbitration in the proposed regulations is precisely the type of agency action that Congress sought to curtail with the FAA.

The commenters asserted that the Supreme Court has repeatedly demonstrated its support for the FAA and for arbitration as an effective method of dispute resolution. Commenters cited cases in which they view the Supreme Court as having struck down regulations and statutes that are inconsistent with the pro-arbitration policy established by the FAA, such as *DirecTV* v. *Imburgia,* 136 S.Ct. 463 (2015). Commenters further cited to a line of Supreme Court precedent favoring arbitration, including *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.,* 552 U.S. 576 (2008), and *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.,* 460 U.S. 1 (1983). According to these commenters, the Department's proposed regulations are contrary to well-established law.

Commenters contended that, under the FAA, the Department may not issue the proposed regulations absent a clear congressional command, which they argued the Department lacks. According to commenters, when Federal law is silent as to whether Congress intended to override the FAA for a claim, the FAA requires that an arbitration agreement be enforced according to its terms. Here, in the absence of explicit congressional command, commenters believed that the Department is not authorized to restrict arbitration. To support this position, commenters noted that Congress has granted the necessary authority to other agencies in other circumstances. Commenters suggested that because Congress has granted agencies this authority in the past, but has not granted this authority to the Department, this silence means that Congress did not intend for the Department to exercise such authority.

Specifically, commenters stated that the HEA does not authorize the Department to supersede the FAA. As a result, commenters contended that the proposed ban on arbitration must yield to the FAA. Specifically, commenters noted that sections 454(a)(6) and 455(h) of the HEA, which the Department cites in the proposed regulations, provide no indication that the Department is authorized to override the FAA. One commenter contended that the Department has misinterpreted its statutory mandate by relying on these provisions to justify the proposed arbitration ban. Specifically, this commenter asserted that, unlike other sections of the HEA, section 454(a)(6) does not contain a provision that expressly makes the FAA inapplicable. According to the commenter, the Department should interpret this distinction to mean that the Department may not disregard the FAA in its actions pursuant to this provision.

Further, another commenter stated that section 454(a) of the HEA does not relate to contracts between students and schools and that none of the current regulatory requirements governing PPAs regulate contracts between students and the institution. These commenters objected that the Department is acting outside the scope of its statutory authority by attempting to become involved in contractual relationships between students and institutions.

Other commenters, in contrast, asserted that the Department has authority to regulate the use of arbitration. One commenter stated that the FAA does not limit the Department's ability to require schools to remove forced arbitration clauses and class action waivers from enrollment contracts. The commenter noted that the FAA legal analysis is not triggered in the absence of an arbitration clause and that the FAA does not preclude laws or regulations preventing parties from placing arbitration provisions in their contracts. This commenter asserted that the history of the FAA and judicial treatment of arbitration provisions does not suggest an absolute right to impose an arbitration agreement.

Another commenter strongly asserted that the Department may condition Federal funding on a school's agreement not to use forced arbitration clauses without violating the FAA. This commenter cited to section 2 of the FAA, stating that agreements to arbitrate are ''valid, irrevocable, and enforceable,'' except where grounds ''exist at law or in equity for the revocation of any contract.'' This commenter suggested that the proposed regulations would not interfere with existing arbitration agreements and that students would still have the ability to arbitrate if they chose to do so. One commenter noted that the Department's authority to adopt stand-alone conditions on funding as part of its PPAs is broad with respect to the Direct Loan Program, and stated that barring predispute arbitration agreements is within the scope of this authority. The commenter noted that including this restriction in PPAs would force schools to internalize the cost of their misconduct and minimize costs imposed on the public.

Another commenter cited the Spending Clause of the Constitution in support of its position that the Department is authorized to impose conditions of this nature on Federal funding recipients. The commenter stated that the Supreme Court has recognized the constitutionality of such conditional funding in *South Dakota* v. *Dole,* 483 U.S. 203 (1987). In addition to citing this holding, the commenter noted that other agencies, such as the U.S. Commodity Futures Trading Commission (CFTC) and the U.S. Department of Defense (DoD) place similar conditions on recipients of their funding.

Discussion: Addressing the comment that the Department lacks legal authority to ban either class action waivers or predispute arbitration agreements regarding borrower-defense type claims, we repeat the position and rationale for each as stated in the NPRM. As we stressed there, the HEA gives the Department the authority to impose conditions on schools that wish to participate in a Federal benefit program. In this regulation, the Department is exercising its broad authority, as provided under the HEA, to impose conditions on schools that wish to participate in the Federal Direct Loan Program. Section 452(b) of the HEA states, ''No institution of higher education shall have a right to participate in the [Direct Loan] programs authorized under this part [part D of title IV of the HEA].'' 20 U.S.C. 1087b(b). If a school chooses to participate in the Direct Loan Program, it must enter into a Direct Loan Program participation agreement (PPA). 20 U.S.C. 1087d. Section 454(a)(6) of the HEA authorizes the Department to include in that PPA ''provisions that the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of'' the Direct Loan Program. 20 U.S.C. 1087d(a)(6); 81 FR 39385.

This regulation addresses class action waivers and predispute arbitration agreements separately, because the proscriptions adopted here are distinct and apply to each separately. As we explained in the NPRM, recent experience with class action waivers demonstrates that some institutions, notably Corinthian, aggressively used class action waivers to thwart actions by students for the very same abusive conduct that government agencies, including this Department, eventually pursued. Corinthian used these waivers to avoid the publicity that might have triggered more timely enforcement agency action, which came too late for Corinthian to provide relief to affected students. 81 FR 39383.[75] Corinthian's widespread use of these waivers and mandatory arbitration agreements resulted in grievances against Corinthian being asserted not against the now-defunct Corinthian, but as defenses to repayment of taxpayer-financed Direct Loans, with no other party from which the Federal government may recover any losses. As noted, Corinthian was not alone in this practice. The absence of class action risk coincided with the use of deceptive practices in the industry during this same period, as recounted in the NPRM and in the earlier NPRM for Program Integrity: Gainful Employment. 79 FR 16426 (March 24, 2014). We infer that from the continued misconduct and from the extensive use of class action waivers that the waivers effectively removed any deterrent effect that the risk of such lawsuits would have provided. These claims, thus, ended up as defenses to repayment of Direct Loans. This experience demonstrates that class action waivers for these claims substantially harm the financial interest of the United States and thwart achievement of the purpose of the Direct Loan Program. Accordingly, section 454(a)(6) of the HEA authorizes the Department to ban Direct Loan participant institutions from securing class action waivers of borrower-defense type claims.

Separately, we considered the effect of predispute arbitration agreements on the achievement of Direct Loan Program objectives and the Federal interest, as evidenced during the same period. A major objective of the program is protecting the taxpayer investment in Direct Loans. That objective includes preventing the institutions empowered to arrange Direct Loans for their students from insulating themselves from direct and effective accountability for their misconduct, from deterring publicity that would prompt government oversight agencies to react, and from shifting the risk of loss for that misconduct to the taxpayer. Predispute arbitration agreements, like class action waivers, do each of these, and thus jeopardize the taxpayer investment in Direct Loans. Aligned with these steps

[75] As one commenter noted, during the period in question—2011 to 2015—very few Corinthian students pursued arbitration, according to records maintained by the American Arbitration Association, and even fewer received any award. *www.regulations.gov/document?D=ED-2015-OPE-0103-10723,* citing Consumer Arbitration Statistics, Provider Organization Report, available at *www.adr.org.* This data supports our conclusion that widespread use of mandatory arbitration agreements effectively masked serious misconduct later uncovered in government enforcement actions, while providing minimal relief for students.

to protect the taxpayer investment in Direct Loans, we note that these regulations replace, for new loans, the State law cause of action standard with a new Federal standard. Negotiators had objected to that change, and we retained the State law option for those State law claims reduced to judgment. Mandatory predispute arbitration agreements would have made this standard a null option.

For all these reasons, as explained in the NPRM, we concluded that agreements barring individual or joint actions by students frustrate Federal interests and Direct Loan Program objectives for the same reasons as did class action waivers. Therefore, we concluded that section 454(a)(6) of the HEA authorizes the Department to regulate the use of predispute arbitration agreements.

As explained in the NPRM, we acknowledge that the FAA assures that agreements to arbitrate shall be valid, and may not be invalidated ''save upon such grounds as exist at law or in equity for the revocation of any contract.'' 9 U.S.C. 2. Contrary to the commenters' assertion, none of the case authority to which the commenters cite addresses Federal regulations that may affect arbitration, and the disputes addressed in that case authority appear to involve litigation between private parties regarding rights arising under Federal, State, or local law or contracts between those parties.

As we also stated in the NPRM, the Department does not have the authority, and does not propose, to displace or diminish the effect of the FAA. 81 FR 39385. These regulations do not invalidate any arbitration agreement, whether already in existence or obtained in the future. Moreover, the Department does not have the authority to invalidate any arbitration agreement, did not propose to do, and does not in this final rule attempt to do so.

However, as we explained in the NPRM, and repeat under ''Class Action Waivers'' here, the Department considers the regulation of class action waivers and predispute arbitration agreements to be justified because they affect Direct Loan borrowing.[76] The arguments that, by these regulations, the Department attempts to override, displace, or disregard the FAA mischaracterize the regulations. The regulations do not control the conduct of purely private transactions between private parties, transactions unrelated to the Direct Loan Program.[77] Direct Loans are not purely private transactions; but for the Direct Loan, the student may very likely not have enrolled at all in a chosen school. The terms of enrollment agreements between the institution and the student loan recipient, and the school's performance with respect to the education financed by that loan, directly affect the Direct Loan program. These regulations impose a condition on the participation by a school in this specific Federal program, a Federal program in which Congress explicitly stated that ''no institution shall have a right to participate . . .'' 20 U.S.C. 1087b(b). The final regulations do not bar schools from using any kind of predispute arbitration agreements, or class action waivers, so long as they pertain only to grievances unrelated to the Direct Loan Program. The regulations merely require that a school that participates in the Direct Loan program cannot enter into a predispute arbitration agreement regarding borrower defense-type claims with a student who benefits from aid under that program.

These requirements are well within the kind of regulation upheld by courts that address the authority of the government to impose conditions that limit the exercise of constitutional rights by beneficiaries. That case law gives strong support for the position that the Department has authority to impose limits of the kind adopted here on the use of class action waivers and predispute arbitration agreements. For example, the government may impose a restriction on the exercise of a recipient's First Amendment rights so long as that restriction does not extend beyond the recipient's participation in the Federal program:

> Our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

Agency for Int'l Dev. v. *All. for Open Soc'y Int'l, Inc.,* 133 S. Ct. 2321, 2330–31 (2013), *quoting Rust* v. *Sullivan,* 500 U.S. 173, 197 (1991).[78] Here, the scope of the federally funded program—the Direct Loan Program—extends far beyond the simple act of originating the loan on behalf of the Department; the HEA itself regulates a broad range of school actions *as they relate to Direct Loan participation,* from advertising and recruiting practices that lead to enrollment to refunding tuition payments after a student drops out. *See, e.g.,* 20 U.S.C. 1094(a)(20) (incentive compensation); 20 U.S.C. 1094(a)(22) (refund requirements). Section 454 of the HEA provides that under the Direct Loan program, the school acts as the Department's loan originator, and accepts responsibility and financial liability for failure to perform its functions pursuant to the Direct Loan PPA. 20 U.S.C. 1087d(a)(3). The HEA gives the Secretary the authority to modify the terms of the PPA as needed to protect Federal interests and promote the objectives of the program. 20 U.S.C. 1087d(a)(6). The Department issues these regulations pursuant to that authority, to regulate conduct well within the ''scope of the federally funded program'' at issue here. As we explained in the NPRM and earlier in this discussion, the restrictions involve terms, conditions, and practices that directly and closely affect the objectives of the Federal Direct Loan Program.[79]

For several reasons, the fact that Congress gave certain agencies power to regulate arbitration, or outright banned mandatory arbitration, supports no inference that Congress considered other agencies, such as the Department, to lack the power to regulate.[80] First, these enactments regulate purely private transactions between private parties. As such, transactions in these contexts fall squarely within the terms of the FAA, a Federal statute, and arbitration clauses in these transactions would be deemed valid and enforceable if Congress had not, by Federal legislation, barred or nullified their use, or explicitly

[76] 81 FR 39382–39383.

[77] Purely private transactions are the kinds of relationships that the CFPB may regulate under section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5518(b) (authority to regulate the use of agreements between covered persons and consumers).

[78] The Spending Clause of the Federal Constitution grants Congress the power ''[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.'' U.S. Const. art. I, § 8, cl. 1. The clause provides Congress broad discretion to tax and spend for the ''general Welfare,'' including by funding particular State or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust* v. *Sullivan,* 500 U.S. 173, 195, n. 4, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (''Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.''). *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.,* 133 S. Ct. 2321, 2327–28, (2013).

[79] See 81 FR 39383–84.

[80] See, *e.g.,* 10 U.S.C. 987(f)(4), (h) (authorizing the DoD to regulate use of mandatory arbitration in extensions of credit to servicemembers); 12 U.S.C. 5518 (authorizing the CFPB to regulate use of arbitration in consumer financial services); 15 U.S.C. 78o (authorizing the SEC to regulate use of mandatory arbitration in certain investment relationships); 15 U.S.C. 1639c(e) (barring mandatory arbitration in extensions of credit secured on the principal dwelling of a consumer); and 18 U.S.C. 1514A(e) (prohibiting use of arbitration in regard to certain whistleblower proceedings regarding securities).

authorized a Federal agency to do so by regulation. Federal legislation was therefore essential to achieve the intended restriction of arbitration in that context. None of the situations cited involve the terms and conditions of participation in a Federal benefit program.[81] Second, these latter enactments offer no legislative interpretation of the 1993 amendment to the 1965 Higher Education Act, which enacted section 454, because they deal with different subject matters. Thus, courts interpret statutes *with similar language,* and which address *the same general subject matter,* ''as if they were one law.'' *See Erlenbaugh* v. *United States,* 409 U.S. 239, 243–44 (1972). In such a case, a ''later act can . . . be regarded as a legislative interpretation of (an) earlier act . . .'' *United States* v. *Stewart,* 311 U.S. 60, 64–65 (1940) (construing two statutes that both address the scope of the tax exemption afforded farm loan bonds).

Here, newer enactments addressing arbitration provide no ''legislative interpretation'' of the HEA, because they share neither language nor subject matter with the 1965 Higher Education Act in general or the 1993 Direct Loan Program statute in particular. To the contrary, Congress has generally rejected any inference that other Federal law regulating consumer lending, most prominently, the Truth in Lending Act (TILA), operates on ''the same general subject matter'' as Federal education loans financed under the HEA. See, *e.g.,* 15 U.S.C. 1603(7) (exempting from TILA those loans made, insured, or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965). Section 454 itself—the statutory basis for adopting ''other provisions'' needed to protect Federal interests evidences this distinction in subject matter by repeatedly referencing not other Federal laws addressing consumer lending, but specific disclosure requirements in the HEA itself, as well as provisions barring the school from charging fees for arranging Direct Loans. 20 U.S.C. 1087d(a)(1)(E). This context compels the conclusion that the scope of the power to regulate under section 454 was to be governed by reference to the Federal objectives stated in this very statute, not by inferences drawn from subsequent legislation addressing very different objectives in transactions involving different—private—participants. The objection that section 454(a)(6) of the HEA does not authorize the Department to involve itself in the contractual relationships—or impair its freedom to contract with others and exercise rights under existing contracts—ignores a host of HEA provisions that regulate the ''contractual relationships'' between the school and other parties. These provisions restrict, and in some instances ban, the exercise of rights that the school may already have under existing contracts or wish to include in future contracts. The HEA thus regulates contractual relationships with students: The qualifications for enrollment of students who may become borrowers, 20 U.S.C. 1091(a), (d); the manner in which the school must determine whether the student borrower is making academic progress while enrolled, 20 U.S.C. 1091(c); banning the school from imposing penalties and late fees on students whose tuition payments may be delayed for various reasons, 20 U.S.C. 1094(a)(19); and determining when that student has ceased enrollment and whether and how much the school must refund to the student and the Department of tuition payments the school has already received for that student, 20 U.S.C. 1091b. The HEA, moreover, imposes significant prohibitions that ban the institution from the exercise of rights it may have under its existing contracts with its employees and third parties, or may wish to include in future contracts with those employees and with third parties. Thus, an institution cannot compensate its employees on the basis of success in securing enrollments (''incentive compensation''). 20 U.S.C. 1094(a)(20). More recently, section 487 of the HEA was amended by Public Law 110–315, the Higher Education Opportunity Act of 2008, to impose significant new restrictions on the exercise by institutions and affiliated entities of rights under existing contracts with lenders that provided financing for their students. That act mandated adoption and compliance by institutions with a code of conduct governing their relationships with lenders that made both Federal loans and private loans for their students, and banned numerous practices in widespread use at the time under arrangements between the institution, affiliated entities, its own employees and their family members, and lenders. 20 U.S.C. 1094(a)(25), (e). These amendments were effective on the date of enactment. Public Law 110–3110–315, § 3, August 14, 2008, 122 Stat 3078. Thus, the HEA itself repeatedly conditions participation in title IV, HEA programs on an institution's refraining from exercising rights the institution may already have under existing contracts or may acquire under new contracts. These regulations similarly operate within the very scope of the Federal program in which these HEA provisions operate, to bar the institution from exercising certain rights it may have already acquired or wished to acquire by contract. In doing so, neither the HEA nor these regulations improperly infringe on the institution's freedom of contract or freedom of expression.

Changes: None.

Comments: A few commenters suggested that the proposed regulations may violate the rights of institutions under the First Amendment, by compelling speech, and under the Takings and Due Process Clauses of the Fifth Amendment by interfering with or depriving the institution of its contractual rights in arbitration and class action waiver agreements. Several commenters objected that by applying to existing contracts, the regulations are impermissibly retroactive.

Discussion: The regulations effect neither a deprivation of a property right of an institution in agreements it already has with students, nor an impairment of those contracts. The regulation affects the terms on which an institution may continue to participate in a Federal program. The institution has no property right to continue to participate on the terms under which the institution previously participated. See *Ass'n of Private Sector Colleges & Universities* v. *Duncan,* 110 F. Supp. 3d at 198. Rights acquired by the institution under agreements already executed with students remain fully enforceable on their own terms.

Like any new regulations, these regulations impose requirements on the future conduct of institutions that intend to continue to participate in the Direct Loan Program. Regulations commonly change the future consequences of permissible acts that occurred prior to adoption of the regulations, and such regulations are not retroactive, much less impermissibly retroactive, if they affect only future conduct, and impose no fine or other liability on a school for lawful conduct that occurred prior to the adoption of the regulations. The regulations do not make an institution prospectively ineligible because it has already entered into contracts with arbitration provisions. The regulations impose no fine or liability on a school that has already obtained such agreements. The regulations address only future conduct by the institution, and only as that conduct is related to the institution's participation in the Federal Direct Loan Program. The institution is not obligated

[81] Congress's power to regulate in these matters rests, thus, on the Commerce Clause, not the Spending Clause.

to continue to participate in the Direct Loan program. If it chooses to continue to participate, it agrees to do so under rules such as these that change—prospectively—the conduct in which it can engage. These rules thereafter bar the institution that chooses to continue to participate from exercising rights acquired by the institution under agreements already executed with students. The regulations abrogate none of those agreements; an institution that chooses not to continue to participate is free to rely on those agreements.

In response to the assertion that requiring the institution to include provisions in any arbitration agreement it has obtained or obtains in the future violates the First Amendment, we note that the regulations compel action, not merely speech. The requirements of § 685.300(e)(1) and (2) and (f)(1) and (2) are different than the warnings required under § 668.41, and those warnings and disclosures regarding gainful employment programs that were challenged and upheld in *Ass'n of Private Sector Colleges & Universities* v. *Duncan,* 110 F. Supp. 3d 176, 182 (D.D.C. 2015), *aff'd sub nom. Ass'n of Private Sector Colleges & Universities* v. *Duncan,* 640 Fed. Appx 5 (D.C. Cir. 2016). Section 685.300(e) and (f) requires an institution that has obtained a class action waiver or predispute arbitration agreement that included borrower defense-type claims to, most importantly, take no action to enforce that waiver or agreement and, secondly, to notify the affected student that it does not intend to enforce the agreement. The regulations further require the institution to avoid certain actions, or to conduct those actions in a particular manner, which include adding a clause to new agreements to advise the student of its commitment. To the extent that the regulations compel speech, they compel commercial speech, like other communications with students required by Department regulations, and the content of the speech is limited to stating that the institution agrees to comply with a particular Federal regulation. The regulations do not require the institution to express the viewpoint of any other party on the value of arbitration, much less to disparage arbitration. Nor do they prevent the institution from advocating in its communications with students its opinion of the benefits of arbitration and the disadvantages of litigation, or from encouraging students who have a grievance with the institution from agreeing to arbitration. To the extent that the regulations compel speech, therefore, they compel only factual, non-controversial speech.

Changes: None.

Comments: Several commenters considered the Department's proposed arbitration and class action waiver bans to be arbitrary and capricious agency actions, adopted without proper, reasoned decision-making. Some commenters contended that the Department did not gather sufficient evidence to support its positions in the NPRM. Commenters also believed that the Department relied too heavily on a CFPB study that they believed was not relevant to the public student loan context at issue. Additionally, commenters believed that the Department did not sufficiently consider conflicting evidence, such as the benefits of arbitration and the drawbacks of class actions. A commenter cited to literature and academic studies that the commenter asserts demonstrate the merits of arbitration.

Discussion: As discussed elsewhere, we do not deny the merits of arbitration, and the regulations do not ban arbitration. The Department gathered substantial evidence to support the position taken in the regulations, as described in detail in the NPRM. That evidence showed that the widespread and aggressive use of class action waivers and predispute arbitration agreements coincided with widespread abuse by schools over recent years, and effects of that abuse on the Direct Loan Program. It is undisputable that the abuse occurred, that a great many students were injured by the abuse, that the abusive parties aggressively used waivers and arbitration agreements to thwart timely efforts by students to obtain relief from the abuse, and that the ability of the school to continue that abuse unhindered by lawsuits from consumers has already cost the taxpayers many millions of dollars in losses and can be expected to continue to do so.

Regarding the commenter that objected to our reliance on the CFPB study because that study may not be relevant to the Federal student loan market, the CFPB's study did analyze the prevalence of arbitration agreements for private student loans as well as disputes concerning those loans. Schools participating in the Direct Loan Program not infrequently provide or arrange private student loans to their students; these private loan borrowers may also have Direct Loans, and in any case can be expected often to share characteristics with Direct Loan borrowers.

Changes: None.

Comments: One commenter stated that the arbitration ban falls outside the scope of topics the Department announced that it would be addressing in development of these regulations and therefore the Department is not authorized to address the issue.

Discussion: The proposal to include consideration of arbitration agreements and class action waivers was presented in writing by at least one negotiator during the negotiated rulemaking proceedings, and was the subject of significant discussion during the final negotiated rulemaking session. The issue was highly relevant to the consideration of borrower defense claims, the core of the rulemaking exercise, and was duly and properly considered.

Changes: None.

Class Action Waivers

Comments: Commenters offered opposing views on the treatment of class action waivers under the regulations. Several commenters approved of the Department's proposal to prohibit the use of class action waivers, noting the government's obligation to protect taxpayers and students from misuse of funds dispensed through the Direct Loan Program. One commenter cited research from the CFPB showing that class actions are more effective at securing relief for consumers than individual arbitrations. This commenter suggested that arbitration agreements prevented Corinthian students from receiving relief from the institution, and that class actions are essential to safeguarding taxpayer money. This commenter asserted that the provisions in the proposed regulations addressing class action waivers are narrowly tailored, consistent with precedent established in *Rust* v. *Sullivan*, 500 U.S. 173 (1991).

Another commenter suggested that class actions are beneficial to students because they minimize resource obstacles often faced by students. According to this commenter, class actions are powerful tools that can rectify wrongs and create incentives for industries to change behavior. Further, this commenter noted that class actions enable students to band together to seek relief, rather than bringing such grievances to the Department as defenses to repayment of taxpayer-funded Direct Loans.

Other commenters disapproved of the Department's proposed ban on class action waivers. These commenters contended that class actions only benefit lawyers and are not helpful to students. A few commenters noted that an individual participant in a class action often receives only nominal returns for his or her claim, while attorneys receive disproportionately large returns. One commenter suggested that class actions cannot be effective because the needs and particular circumstances of individuals within the class cannot be properly considered, so students cannot receive the appropriate tailored relief.

Another commenter criticized class actions as being incredibly time consuming and yielding minimal public benefit. The commenter stated that attorneys are less likely to represent students from small schools in class actions because of the lower potential rewards, leaving injured students at small schools without adequate recourse.

One commenter rejected the Department's position that class actions are likely to have a deterrence effect, contending that plaintiffs' lawyers often pursue frivolous claims for which institutions could not anticipate liability and therefore could not effectively monitor their own behavior.

One commenter stated that the ban on class action waivers would be harmful to schools, particularly private institutions that lack the legal protections afforded to public institutions. A commenter contended that the rule would expose institutions to frivolous lawsuits and thus would divert funds needed for educational expenses to pay the costs of litigation.

Discussion: In the NPRM, we described in detail the actual effect that class action waivers have had in the postsecondary education field on students and Federal taxpayers. 81 FR 39382. Nothing in the comments opposing the regulation demonstrates that these effects are exaggerated or mischaracterized, that the substantial problems created by the use of class action waivers can be reduced or eliminated by more modest measures, that the disadvantages and burdens the regulation would place on schools outweigh the costs and harm that use of class action waivers has already caused, or that there is any reason to expect that this pattern will change so that such waivers will not cause these same problems in the future. It is possible that banning class action waivers may increase legal expenses and could divert funds from educational services, or lead to tuition increases.[82] We expect that the potential exposure to class actions will motivate institutions to provide value and treat their student consumers fairly in order to reduce the likelihood of suits in the first place.[83]

We expect that institutions, like other parties that provide consumer services, already monitor, and will continue to monitor, court rulings to guide these efforts. By strengthening the incentive for all institutions to serve consumers fairly, and thereby reduce both grievances by students and attendant scrutiny by the Department (and other enforcement agencies), we expect that the limits we adopt here will tend to reduce the likelihood that an institution that neglects these efforts will enjoy a competitive advantage over those that engage in these efforts. Although it is possible that frivolous lawsuits may be brought, and that institutions will incur costs to defend such suits, institutions already face that risk and expense. We do not dismiss this risk, but we have no basis from which to speculate how much this regulation might increase that risk and attendant expense. We see that risk as outweighed by the benefits to students and the taxpayer in allowing those students who wish to seek relief in court the option to do so.

Commenters who oppose the regulations on the ground that class actions benefit lawyers more than consumers, and may result in modest returns for an individual member of the class, disregard the need for this regulation in this field. Contrary to the assertion that class actions provide only modest returns, we note that the CFPB found, in its study, that the 419 consumer finance class actions during the five-year period it studied produced some $2.2 billion in net cash or in kind relief to consumers in those markets.[84] Whether or not consumer class actions have produced minimal or no actual benefit to the consumers who comprise the class, there is little evidence that this has happened in the postsecondary education industry.[85] Rather, precisely because of schools' widespread and aggressive use of class action waivers, and even opposition to class arbitration, as described in the NPRM, there appears to be no history of such minimal benefits in this market.

We do not suggest that class actions are a panacea, and the criticisms of class actions in other markets may also apply to class actions in the postsecondary education market if such suits were available. We stress that class actions have significant effects beyond financial recovery for the particular class members, including deterring misconduct by the institution, deterring misconduct by other industry members, and publicizing claims of misconduct that law enforcement authorities might otherwise have never been aware of, or may have discovered only much later. The CFPB described these effects in its proposed rule,[86] and as we demonstrated in the NPRM, recent history shows the significant consequences for students and taxpayers in an industry that has effectively barred consumers from using the class action tool. As to the comment that class actions would harm private non-profit institutions, we note that these institutions are already subject to that risk, and nevertheless, only a small percentage of non-profit institutions currently use arbitration agreements with their students.[87] This suggests that institutions in this sector have generally felt no need for such protection, and we see no reason to expect that this regulation will change the exposure of non-profit institutions to class actions or other suits.

Changes: None.

Comments: A commenter objected that the proposed regulations would improperly restrict borrowers' choices regarding how they are represented. This commenter expressed concern that borrowers from small schools would be overlooked under the proposed regulations because they would not be able to share the costs of litigation with a larger group. Another commenter objected that the regulations would adversely affect students who could not successfully pursue class actions because their claims would not meet the commonality and predominance requirements for class actions. This commenter asserted that alternative forms of aggregate litigation other than class action suits are essential to ensuring that students are able to obtain

[82] It is probable that institutions against whom arbitrations have been filed are already incurring legal costs for arbitration. The CFPB study found that on the average, over 90 percent of the companies involved in the arbitrations it surveyed were represented by counsel in those proceedings. CFPB, Arbitration Study, § 5.5.3.

[83] ''[C]lass actions increase negative publicity of for-profits and draw attention to deceptive recruiting in a much more public fashion than bilateral arbitration. '' Blake Shinoda, *Enabling Class Litigation As an Approach to Regulating for-Profit Colleges*, 87 S. Cal. L. Rev. 1085 (2014).

[84] 81 FR 32858.

[85] It appears that at least in the postsecondary education market, the claim is unfounded; in one of the few class actions to proceed to trial, a class of students obtained two million dollars in relief from a for-profit school. *Jamieson* v. *Vatterott Educational Centers, Inc.,* 259 FRD. 520 (D. Kan. 2009); Nick DeSantis, *Missouri Court Upholds Ex-Student's Win in Suit Against Vatterott College,* Chronicle of Higher Education, The Ticker (Aug. 27, 2014), available at *www.chronicle.com/blogs/ticker/mo-appeals-court-upholds-ex-students-win-in-suit-against-vatterott-college/84777.*

[86] See, *e.g.,* 81 FR 32861–32865.

[87] Tariq Habash and Robert Shireman, *How College Enrollment Contracts Limit Students' Rights,* The Century Foundation, (April 28, 2016), available at *https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/.*

judicial relief, and found the regulations insufficient to enable those actions.

Discussion: The objective of § 685.300(e) is to ensure that those students who choose to pursue their claims against a voluntarily participating school by a class action are not prevented from doing so by agreements they are compelled to enter in order to enroll at the school. The Department cannot change the rules and practical consequences of class action litigation so that groups of students would be spared the costs and risks incurred by class action litigants, and did not intend to do so in these regulations. Similarly, the Department has neither the mandate nor the authority to create alternative forms of aggregate litigation in other forums, but the regulations, by ensuring that individuals are free to retain the right to sue for relief, necessarily enable those individuals to enjoy the benefits of joinder under Fed. R. Civ. Proc. 20 or comparable State rules, as an alternative to class actions.

Changes: None.

Arbitration Agreements

Comments: Several commenters urged the Department to bar the use of any predispute arbitration agreements by schools. Commenters asserted that limiting the regulation to mandatory predispute agreements would prove ineffective for several reasons: The agreement could be presented to the student as part of a packet of enrollment materials, or included as another term in a mandatory enrollment agreement with merely an opportunity to agree or decline; the agreement could be required as a condition of other benefits, even if not a condition of enrollment; or the clause could be included, with an ''opt-out'' provision. The commenters stressed that for a student to understand the significance of the agreement, the school would have to explain its significance, a duty that the proposed rule did not impose. The commenters further contended that even if the student were to be aware of the clause, it is reasonable to expect that the student would not understand the significance of entering into such an agreement. A commenter stated that numerous student consumers represented by the commenter had agreed to arbitration, stating that they did so even, in some instances, where the agreement was labeled voluntary, because they did not understand the significance of the agreement itself or their ability to opt out, or because they relied on misstatements by recruiters.[88] Other commenters stressed that the literature is replete with evidence that consumers do not understand the terms of agreements governing the consumer financial transactions in which they engage, making it unlikely that the student would fully understand either the significance of the agreement itself or a warning that the student need not agree to arbitration in order to enrollment. A commenter provided declarations and statements from students attesting to their lack of understanding either that they had executed agreements to arbitrate, or what arbitration meant, or both.[89]

Commenters also addressed the issue of ''opt-out'' clauses with similar concerns. A comment signed by sixteen attorneys general urged that the regulation ban the use of ''opt-out'' clauses, which they viewed as unfair as mandatory arbitration clauses. They asserted that predatory for-profit schools, in particular, have a history of using arbitration clauses to violate the rights of their students, and that in their experience, students often do not consider the consequences of an arbitration agreement, or the value of opting out, until they have a legitimate complaint against the school, at which point it is too late to opt out of any arbitration agreement that may have appeared in the student's enrollment agreement. Other commenters strongly believed that arbitration agreements containing opt-out clauses should still be considered mandatory, and should be prohibited under § 685.300(f). According to these commenters, opt-out provisions are highly ineffective because students misunderstand the provisions or choose not to accept them to avoid being disagreeable. Commenters also asserted that recruiters at proprietary institutions are trained to manipulate students and may be able to convince them to sign agreements even if students are apprehensive about the meaning and consequences. Some commenters noted that students are unable to make informed decisions about whether to accept these optional agreements because students must understand and exercise the option well before any disputes arise. One commenter cited to a CFPB study that found that, even when consumers are afforded the opportunity to opt-out of arbitration clauses, many are either unaware of this option or do not exercise this right. Another commenter cited to examples from court records indicating that students who receive an opt-out provision rarely take advantage.

Based on these concerns, commenters recommended that the Department prohibit schools from entering into any predispute arbitration agreements, even those containing opt-out provisions. Commenters cautioned that the Department's failure to explicitly prohibit these agreements would create an exception that swallows the Department's proposed rule on forced arbitration. Some commenters suggested that failure to ban opt-out clauses would actually make students worse off than if the agreements had no such option. According to these commenters, students who unknowingly sign arbitration agreements containing opt-out provisions may face greater hurdles in any efforts to circumvent them by demonstrating their unconscionability, as is generally required for challenges to arbitration agreements. Additionally, commenters suggested that, as proposed, it would be more difficult for the Department to take enforcement actions against schools that take advantage of loopholes in the regulations.

Another commenter believed that allowing the enforcement of arbitration agreements containing opt-out provisions would be highly beneficial to both students and the Department. This commenter believed that these provisions afford students a higher degree of choice and control over their situations. Additionally, this commenter believed that allowing such provisions would relieve the Department of a potential influx of claims.

Discussion: The Department solicited comments on how the regulations should treat agreements that would mandate arbitration of borrower defense claims but that contain opt-out clauses. We have considered the comments received, as well as the findings of the CFPB cited by the commenter as relevant to this question. We have considered as well the comments about students' lack of awareness either that they were executing an agreement to arbitrate, or that doing so had significant consequences that they did not understand, or both. The same considerations that apply to opt-out clauses apply as well to our proposal in the NPRM that would ban only mandatory predispute arbitration.

Our proposal in the NPRM to bar only mandatory ''take it or leave it'' predispute arbitration agreements rested on the expectation that a student consumer could make an informed choice prior to a dispute to agree to arbitrate such a dispute, and that this

[88] *www.regulations.gov/document?D=ED-2015-OPE-0103-10729.*

[89] *www.regulations.gov/document?D=ED-2015-OPE-0103-10723.*

objective could realistically be accomplished by having the agreement presented to the student in a manner that would separate the agreement from the bulk of enrollment material presented to the borrower on or at the beginning of class, with a clearly-worded notice that the student was free not to sign the agreement. These comments have persuaded us that the steps we proposed in the NPRM would not produce an informed decision, because even if the agreement were to be presented to students in this manner, it is unrealistic to expect the students to understand what arbitration is and thus what they would be relinquishing by agreeing to arbitrate. The submissions from commenters provide specific evidence of this lack of understanding in the postsecondary education market among students enrolled in the very sector of that market that far more commonly uses predispute arbitration agreements.[90] They are not alone. The literature regarding use of arbitration agreements in consumer transactions provides repeated anecdotal and empirical evidence that consumers commonly lack understanding of the consequences of arbitration agreements.[91] In its survey of credit card users, the CFPB found generally that ''consumers generally lack awareness regarding the effects of arbitration agreements'' and specifically that ''[r]espondents were also generally unaware of any opt-out opportunities afforded by their issuer.'' CFPB, Arbitration Agreements, 81 FR 32843 (May 24, 2016).[92]

We see no reason to expect that students who are now enrolled or will enroll in the future will be different than those described or included in the comments. We see no realistic way to improve this awareness, and thus, we do not believe that the use of predispute agreements to arbitrate will result in well-informed choices, particularly by students in the sector of the market in which such agreements are most commonly used. Based on the lack of understanding of the consequences of these agreements evidenced in the CFPB survey of credit card users, in the literature dealing with credit cards and other financial products, and in the examples of individual postsecondary students' lack of awareness, we consider predispute arbitration agreements, whether voluntary or mandatory, and whether or not they contain opt-out clauses, to frustrate achievement of the goal of the regulation—to ensure that students who choose to enter into an agreement to arbitrate their borrower defense type claims do so freely and knowingly.

Changes: We have revised § 685.300(f)(1) to delete the words ''will not compel a student''; we have revised § 685.300(f)(1), (2), and (3)(i) and (ii) to remove the word ''mandatory'' each time it appears; we have revised § 685.300(g)(1)(ii) to delete the word ''predispute''; and we have revised § 685.300(i) to delete paragraph (i)(4). We also have removed the definition of a ''voluntary agreement'' from § 685.300(f)(1)(ii) and revised the definition of ''predispute arbitration agreement'' in § 685.300(i).

Comments: Several commenters believed that the proposed regulations would unfairly deny students the opportunity to seek relief through arbitration. Commenters suggested that if given the option, many students would choose to seek relief through arbitration, rather than litigation. Multiple commenters suggested that limiting the availability of arbitration would be highly burdensome for students, particularly those from low-income backgrounds who are less likely to be able to afford attorneys and fees associated with litigation. These commenters suggested that without arbitration, many low-income students may be prevented from actively pursuing relief. These commenters contended that arbitration is beneficial to students and should remain available to those students who would like to pursue it as a means of obtaining relief.

Some commenters lauded arbitration as fair and legally sound. One commenter noted that under a particular arbitration agreement, students received a fair and impartial hearing, comprehensive review of evidence, and an impartial ruling by an independent arbitrator. This commenter also noted that the arbitration agreement in question is governed by State law, which the commenter believes provides sufficient legal oversight.

Other commenters noted that arbitrators generally have more subject area expertise than judges, which makes them more qualified to issue an informed decision on a particular matter. One commenter suggested that students benefit from widespread arbitration because administrators learn to run more effective and service-oriented schools by participating in arbitration proceedings. One commenter noted that the benefits of arbitration are particularly profound in smaller institutions with closer relationships between students and administrators.

Further, commenters suggested that arbitration is more efficient than litigation, and suggested that limiting the availability of arbitration would unduly delay provision of relief to students. Some commenters suggested that students benefit from the flexibility afforded by arbitration agreements. According to a few commenters, the flexibility available in arbitration proceedings allows participants to schedule events around their availability. Additionally, commenters believed that parties benefit from not being restricted by requirements that they adhere to traditional rules of evidence or civil procedure.

One commenter asserted that arbitrators are generally very fair to students. This commenter opined that the consumer arbitration rules are particularly friendly to plaintiffs, particularly because of lower fees associated with proceedings. Another commenter asserted that plaintiffs prevail in arbitration proceedings at least as frequently as they do in court. Some commenters believed that the arbitration process often facilitates more positive outcomes because both students and institutions participate fully in the process, and are more invested in the outcomes.

Additionally, some commenters suggested that in the absence of widespread arbitration, legal fees associated with litigation would take money away from institutions that could be used towards resources that

---

[90] Indeed, a commenter noted testimony in one case that the school official shared her students' lack of understanding: None of [the students] knew what arbitration was or asked any questions about the arbitration provision. Ms. Dennison testified that, although she interviews hundreds of applicants each year, she has never been asked a question about the arbitration provision and she has not mentioned it when meeting with prospective students. In fact, Ms. Dennison testified that she did not understand the arbitration provision herself.

Rude v. *NUCO Edn. Corp.,* 2011 WL 6931516 Ohio Ct. App. Dec. 30, 2011.

[91] See: Jeff Sovern, et al., ''*Whimsy Little Contracts*'' *with Unexpected Consequences,* 75 Md. L. Rev. 1, at 21 (2015): The degree of literacy required to comprehend the average disclosure form and key contract terms simply is not within reach of the majority of American adults.'' Judge Posner has explained ''not all persons are capable of being careful readers.'' Former Federal Reserve Chair Ben S. Bernanke, whose agency was responsible for administering the Truth in Lending disclosures, among others, has said that ''not even the best disclosures are always adequate. . . . [S]ome aspects of increasingly complex products simply cannot be adequately understood or evaluated by most consumers, no matter how clear the disclosure.'' And noted scholar and now-Senator Elizabeth Warren . . . has been quoted as saying about a credit card contract: ''I teach contract law at Harvard, and I can't understand half of what it says.''

[92] The CFPB stated that it focused on use of credit card users, a subset of the financial products included in its Study, because ''credit cards offer strong market penetration across the nation.'' Id.

would improve educational outcomes for students. Several commenters suggested that the arbitration ban may ultimately lead to tuition increases as institutions are required to spend more money on litigation. These commenters also noted that the arbitration ban will be particularly harmful to smaller institutions that lack the resources necessary to hire robust legal teams. One commenter believed that some smaller institutions may be forced to close if responsible for funding costly litigation. This commenter also worried about ''ambulance chasing'' attorneys encouraging students to bring frivolous suits.

On the other hand, a number of commenters supported the proposed ban on mandatory predispute arbitration agreements for various reasons. Several commenters suggested that arbitration systems create structures that the commenters view as inherently biased against students. Commenters noted that arbitrators are often paid on a case-by-case or hour-by-hour basis, which can create incentives for them to rule in favor of institutions, which are more likely than individuals to be able to produce repeat business for them. One commenter cited to empirical evidence that the commenter viewed as supporting its position that arbitration is harmful to consumers. Additionally, commenters noted that because arbitrators are not bound by adhering to precedent, their decisions are less predictable and reliable.

Further, commenters stated that arbitration can be extremely costly. Commenters attributed the high costs of arbitration to the private nature of the system, noting that individual parties are often responsible for paying costs associated with arbitration, which may include high fees that arbitrators may tack on to total costs without sufficient notice. One commenter also cited the procedural limitations of arbitration as another detriment. This commenter stated that students may miss out on the opportunity for discovery in arbitration because the discovery process is not formalized in the same manner as civil lawsuits. According to the commenter, students are often denied access to information that is essential to their claims. Additionally, the commenter noted that there is a lack of oversight in arbitration proceedings, which may result in a lack of accountability among arbitrators for following by their own established procedures. This commenter also believed that the appeal process under arbitration is inadequate and that the narrow grounds and limited time frame for appeals ultimately harms students. Several commenters also suggested that the lack of transparency in the arbitration system works to the detriment of students. These commenters believed that the public and parties benefit from the transparency offered by civil litigation. Unlike civil litigation, arbitration is generally not public, transcripts are not provided to the public at large, and some proceedings include gag clauses to maintain privacy.

One commenter believed that forced arbitration impedes the Department's ability to effectively oversee Federal assistance programs and ensure proper use of taxpayer dollars. This commenter also suggested that forced arbitration is unfair to students and deprives them of the opportunity to receive an education in a well-regulated system. Several commenters lauded the Department for taking measures to ensure that students who are wronged by unscrupulous schools receive their day in court. These commenters were particularly concerned that many students have been signing their rights away upon enrollment and urged the Department to prevent the continuation of that practice.

Discussion: We appreciate the support for the proposed regulations from many of the commenters. For those commenters that did not support § 685.300(f), many of their objections incorrectly suggested the regulations pose an outright ban or effectively preclude any use of arbitration. The regulations do not bar the use of arbitration and therefore do not deny students the benefits that the commenters ascribe to arbitration. Rather, consistent with the scope of our statutory authority, the regulations ban predispute arbitration agreements for borrower defense-type claims.

The regulations do not bar the school from seeking to persuade students to agree to arbitrate, so long as the attempt is made after the dispute arises. The regulations, moreover, extend only to predispute agreements to arbitrate borrower defense-type grievances. They do not prohibit a school from requiring the student, as a condition of enrollment or continuing in a program, to agree to arbitrate claims that are not borrower defense-related grievances. Consistent with our statutory authority to regulate Direct Loan participation terms, the regulations address only predispute arbitration agreements for claims related to borrower defenses and not for other claims.

Changes: None.

Comments: A commenter suggested that the private nature of arbitration affords a level of protection to parties. According to this commenter, because arbitration proceedings are not public, parties need not be concerned about private information being revealed during proceedings.

Discussion: The regulations do not ban arbitration entirely, but only arbitration achieved through predispute arbitration agreements for borrower defense-type claims. Students and institutions are free under this rule to agree to arbitration if privacy is an important consideration to the student. We expect that a student who chooses to litigate rather than pursue arbitration is already aware that generally litigation is a public proceeding, or becomes aware of that fact very quickly, and accepts that fact voluntarily. The regulations simply assure that a student will have the option to choose that forum.

Changes: None.

Comments: A few commenters addressed the effect of delegation clauses within arbitration agreements—provisions that assign, or delegate, to the arbitrator, not a court, the power to decide whether a particular claim or grievance falls within the agreement to arbitrate. The commenters considered such delegation clauses problematic because they allow arbitrators who, according to the commenters, may have financial incentives that impact their neutrality, to make decisions regarding whether a claim belongs in court or arbitration. The commenters suggested that if the Department does not address delegation provisions, the proposed regulations may not fulfill their intended purpose. The commenters urged the Department to prohibit the use of delegation clauses to ensure that any questions about the enforceability or scope of predispute arbitration agreements are resolved by a court rather than an arbitrator, so that schools cannot force students into time-consuming arbitration proceedings to resolve threshold questions about enforceability.

Discussion: The commenters identify an important issue, one made particularly significant because § 685.300(e) and (f) distinguish between borrower defense-type claims or grievances, which the regulations address, and other student claims, which it does not. The commenters rightly argue that the objective of the regulation may be frustrated if the school resists a suit by moving to compel arbitration and the arbitrator, not the court, were to have authority under the agreement to decide whether the claim is one that the student must arbitrate. In the NPRM, we described the recent history of aggressive actions to compel arbitration of student claims, and consider it reasonable to expect that schools will continue to oppose lawsuits by moving to compel arbitration, and would rely on delegation clauses in arbitration agreements to support these efforts. We did not explicitly address in the NPRM the use of delegation clauses, but we proposed there to preclude attempts, where the student had agreed to a class action waiver, to ''seek[ ] dismissal, deferral or stay'' of ''any aspect of a class action,'' § 685.300(e)(2)(i), or, if the student had entered into a mandatory predispute arbitration agreement, to ''seek[ ] dismissal, deferral or stay'' of ''any aspect of a judicial action filed by the student.'' § 685.300(f)(2)(i).[93] These prohibited actions could rest on an express delegation clause committing to the arbitrator the determination whether the claim was a borrower-defense type claim. We did not intend to allow that action, and in response to the commenters who stressed the significance of this issue, we are adding language making it clear that the court, not the arbitrator, is to decide the scope of any arbitration agreement or class action waiver. Of course, if the student has in fact agreed to arbitrate some or all claims in a post-dispute agreement, then the school has every right, pursuant to these terms of its Direct Loan agreement with the Department, to oppose litigation by relying on that arbitration agreement. However, the regulation is intended to protect the rights of students who agree, predispute, only to arbitration of other kinds of claims, to have their borrower defense claims heard by a court. To ensure that goal is achieved, we believe that any arbitration agreement with a Direct Loan borrower should place power to decide the scope of the agreement in the court, not the arbitrator.

Changes: We have modified §§ 685.300(e)(3) and 685.300(f)(3) to add to the required provisions and notices the statement that ''we agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Direct Loan or the provision of educational services for which the loan was obtained.''

Comments: A few commenters recommended alternatives to proposed § 685.300(f). One commenter recommended that the Department eliminate its ban and instead provide suggested best practices to facilitate dispute resolution. Another commenter recommended that the Department develop rules to govern arbitration proceedings rather than banning them entirely. Some rules proposed by the commenter included: (1) A neutral arbitrator, (2) more than minimal discovery, (3) a written arbitration award, (4) all forms of relief available in court available in arbitration, and (5) prohibition on imposing unreasonable costs in arbitration. Another commenter suggested that the Department establish an annual threshold for the number of arbitration settlements for all institutions. Under this proposal, institutions would only be held accountable if their number of arbitration proceedings exceeded this threshold.

Discussion: The regulations do not ban arbitration entirely, as suggested by some of the commenters. Rather, the regulations ban predispute arbitration agreements for borrower defense-type claims. We discussed at some length in the last negotiated rulemaking session the proposal to regulate the conduct of arbitration, rather than banning compelled predispute arbitration agreements, but in issuing this final rule, we conclude that limiting agreements to arbitrate borrower defense claims to those entered into after a dispute has arisen will achieve the goal of an informed decision by the borrower. Therefore, we have no reason to set a limit on the number of such arbitrations a school may conduct. The regulations do, however, require information from the school about the substance and outcomes of arbitration.

Changes: None.

Comments: One commenter suggested that eliminating mandatory arbitration would be overly burdensome on our judicial system because many claims that otherwise would have gone to arbitration will wind up in court.

Discussion: The regulations allow students who agree to arbitration to use that method, rather than pursuing relief through a lawsuit, and we have no expertise or experience from which to estimate the effect of the regulation on judicial filings.

Changes: None.

Comments: One commenter contended that the Department's position is logically inconsistent, because the commenter viewed the Department as simultaneously asserting that courts do not provide adequate relief for students, while also asserting that access to the judicial system is essential for students to obtain relief.

Discussion: We do not believe, and did not state, that the judicial system provides inadequate relief for students; to the contrary, we noted that recent history shows that access to the judicial system was denied by widespread use of mandatory predispute arbitration agreements and class action waivers. Far from implying that the judicial system did not or could not provide relief, we included in the new borrower defense Federal standard, for new loans, an alternative that rests entirely on a court judgment on a borrower defense claim based on State law.

Changes: None.

Comments: One commenter stated that permitting only post-dispute arbitration agreements would be entirely ineffective and cautioned the Department against allowing only post-dispute arbitration as an option to students. Another commenter urged the Department to implement additional safeguards to protect students under post-dispute arbitration agreements. This commenter was concerned that schools could potentially force students to sign post-dispute arbitration agreements with prohibitions limiting their ability to seek relief and urged the Department to take measures to prevent schools from engaging in this activity.

Discussion: Section 685.300(f) does not limit the ability of the school to enter into a post-dispute arbitration agreement, even one that would include arbitration of a borrower defense-type claim. A student with an actual claim has every reason to question the consequences of agreeing to arbitrate the claim, as opposed to filing suit, and at that point we expect such a decision to be an informed choice by the student.

Changes: None.

Comments: A commenter noted that some students would have difficulty joining in a class action for various reasons, and would lack the resources to pursue an individual suit, but that recently consumers have had success by participating in aggregate litigation. The commenter feared that the NPRM by barring class action waivers would not have barred the institution from attempting to force an individual student to pursue litigation alone and not as part of a combined suit.

Discussion: The regulation as proposed would bar an institution from relying on a mandatory predispute arbitration agreement by ''dismissal, deferral, or stay of any aspect of a judicial action filed by the student.'' § 685.300(f)(2)(i). We consider that language to include the action described by the commenter, such as actions to challenge the student's joinder in a single suit under Fed. R. Civ. Proc. 20 or a similar rule by which individual litigants may consolidate their actions.

[93] Indeed, in at least two of the cases cited in the NPRM, an essential element of the ruling turned on whether the student had agreed to arbitration of issues about the arbitrability of the claims at issue. *Eakins* v. *Corinthian Colleges, Inc.,* No. E058330, 2015 WL 758286 (Cal. Ct. App. Feb. 23, 2015); *Kimble* v. *Rhodes College,* No. C–10–5786, 2011 WL 2175249 (N.D. Cal. June 2, 2011).

We clarify that in this final regulation. An institution remains free to seek relief on grounds other than that the individual is barred from joinder in an action by reason of the terms of the arbitration agreement.

Changes: Section 685.300(f)(2)(i) is revised to include opposing joinder in a single action.

Internal Dispute Processes

Comments: One commenter expressed strong approval for § 685.300(d), which would ban schools from requiring students to use the school's internal complaint process before seeking remedies from accrediting agencies or government agencies. However, a few commenters strongly believed that students should exhaust internal grievance procedures before seeking relief externally. These commenters noted that internal grievance procedures offer students adequate opportunities to seek relief. A few of these commenters touted the transparency and collaboration between students and institutions that results from engaging in these proceedings.

Discussion: The regulations do not discourage the use and promotion of internal grievance procedures, and we encourage schools to adopt those procedures in order to remedy grievances before they become claims that lead to litigation or arbitration. The regulations also do not bar the institution from addressing the grievance as fully as it may wish immediately, whether or not the student chooses to raise the complaint to authorities. The institution may succeed in resolving the matter. However, if the student believes that the grievance is significant enough to warrant the attention of law enforcement officials or bodies empowered to evaluate academic matters, we believe that the benefit of bringing that complaint to their attention outweighs the benefits of attempting to compel the student to delay. The regulations do not impose any duty on an authority or accreditor to take any particular action, and they may choose to defer or delay consideration of the complaint until completion of the institutional process. However, the regulations would help those authorities better monitor institutional performance by making timely notice of complaints more likely.

Changes: None.

Comments: One commenter suggested that proposed § 685.300(d) conflicts with State law that requires that students exhaust internal dispute resolution procedures prior to seeking other relief.

Discussion: State law may require a consumer to make a written demand on a merchant before filing suit, and the regulations do not supersede such a law. Some State laws or case law may also require a student to exhaust a school's administrative appeal process before filing suit on a grievance.[94] Section 685.300(d) addresses not the filing of a lawsuit, but rather a very different matter: Seeking redress from the State agency with authority to address the complaint, or the accreditor for the school. If those authorities decline to intervene, the student is left in effect with the need to pursue any internal grievance process. The regulations in no way require those authorities to exercise their independent judgment. The regulations simply bar the school from attempting to block the student from seeking redress from those authorities. The regulations leave the school free to respond to a student's lawsuit by contending that applicable law precludes judicial review of the claim or requires the litigant to first exhaust available internal procedures.

Changes: None.

Forbearance (Sections 685.205(b)(6) and 682.211)

Comments: Several commenters expressed support for the Department's proposal to grant an administrative forbearance to a Direct Loan borrower who applies for relief under the borrower defense provisions. Commenters were also supportive of the proposal to grant FFEL borrowers the same type of administrative forbearance that Direct Loan borrowers would receive.

Multiple comments supported the Department's proposed use of forbearance (along with information about how to decline forbearance and providing information about income-driven repayment plans). One commenter, however, recommended that the Department require borrowers to request forbearance instead of expecting borrowers to decline forbearance (opting-in rather than opting-out). Commenters also expressed the view that forbearance should apply to all loan types.

Another commenter suggested that the use of administrative forbearance or the suspension of collection activity would lead to frivolous claims intended to delay repayment.

A group of commenters recommended that forbearance for a borrower who files a borrower defense claim be granted in yearly increments, or for some other explicit time frame designated by the Department, during which the Department will make a determination of eligibility for a borrower defense claim. These commenters noted that servicing systems generally require periods of forbearance to have explicit begin and end dates. The commenters believed that the proposed change would resolve the servicing requirement and permit the Department to designate an explicit time frame for servicers (such as one to three years) during which the Department would make a determination of eligibility for relief under a borrower defense claim.

Under the commenters' proposal, upon receiving the notification of the Department's determination of eligibility for relief under borrower defenses, FFEL Loan servicers would either end the forbearance and resume servicing or maintain the forbearance until the borrower's loans are consolidated into a Direct Consolidation loan. A group of commenters recommended that, if the Department plans to begin the process for prequalification or consolidation before the effective date of the final regulations, the Department consider permitting early implementation of the new mandatory administrative forbearance under § 682.211(i)(7). The commenters noted that without the new authority to grant mandatory administrative forbearance, discretionary forbearance can be used to suspend servicing and collection. However, these commenters pointed out that discretionary forbearance requires a borrower's request and agreement to the terms of the forbearance. A discretionary forbearance may also be subject to a borrower's cumulative maximum forbearance limit. If a borrower has reached his or her maximum forbearance limit, the loan holder would have no other remedy but to provide a borrower relief during the review period. The commenters believed that early implementation of § 682.211(i)(7) would be more efficient and provide a necessary benefit for borrowers that have reached their cumulative maximum forbearance limit while the Department makes a discharge eligibility determination.

One commenter noted that, under the proposed regulation, a borrower who files a defense to repayment claim will experience immediate relief due to forbearance or suspension of collection. However, any interest that is not paid during forbearance will be capitalized. This commenter suggested that a borrower should not be discouraged from mounting a defense to repayment that could involve extended

[94] See, *e.g., Susan M.* v. *New York Law Sch.,* 76 N.Y.2d 241, 556 NE.2d 1104 (1990).

investigation by having accrued interest capitalized if the claim is rejected. The commenter recommended that the Department set a limit on the interest that can be capitalized or limit the length of time for which accrued interest can be capitalized.

A group of commenters recommended a conforming change to § 682.410(b) to address defaulted loans held by a guaranty agency. In such cases, a guaranty agency is the holder of a loan for which the Department is making a determination of eligibility, not a lender. Under the conforming change, when the guarantor is the holder of a loan, the Department will notify the guarantor to suspend collection efforts, comparably to when a lender is notified by the Department under § 682.211(i)(7) of a borrower defense claim. Upon receiving notification of the Department's determination, a guarantor would either resume collection efforts or maintain the suspension until the borrower's loans are consolidated into a Direct Consolidation loan.

Discussion: We appreciate the commenters' support for granting forbearance and providing information about alternatives and believe it will aid borrowers while the Department reviews their applications. Forbearance is available to Direct Loan borrowers and administered by the loan servicers.

The Department will allow lenders and loan holders to implement § 682.211(i)(7) early, so that they may grant the forbearance prior to July 1, 2017. Lenders and loan holders will be required to grant such forbearance as of July 1, 2017, the effective date of these regulations.

We disagree that forbearance should be an opt-in process, as we believe that the majority of borrowers will want to receive the forbearance, making an opt-out process both more advantageous to borrowers and more efficient.

We also disagree that providing forbearance and suspending collection activities will lead to substantial numbers of frivolous claims. Borrowers experiencing difficulty with their monthly loan obligations may avail themselves of income-driven repayment plans, loan deferment, and voluntary forbearance upon request. Additionally, because applicants for forbearance are required to sign a certification statement that the information contained on their application is true and that false statements are subject to penalties of perjury, we do not expect a sizeable increase in fraudulent claims.

We disagree with the recommendation that the Department set a limit on the amount of accrued interest that may be capitalized, or the length of time that interest may be allowed to accrue, during the administrative forbearance. We have seen no evidence that capitalization of interest that accrues during a forbearance period while a discharge claim is being reviewed discourages borrowers from applying for loan discharges. Even in situations when the suspension of collection activity may be for an extended period of time—such as during bankruptcy proceedings—interest that accrues during the suspension of collection activity is capitalized. We see no justification for limiting capitalization of interest during the period in which a borrower defenses claim is being evaluated by the Department.

We agree with the commenters that it is preferable to have a set time period for mandatory forbearances granted during the period that the Department is reviewing a borrower defense claim. In addition to resolving the systems issues raised by the commenters, it would help borrowers to have precise begin and end dates for the forbearance. Granting these forbearances in yearly increments, with the option to end the forbearance earlier if the borrower does not qualify, would be consistent with most of the other mandatory forbearances in the FFEL Program, which are granted in yearly increments, or a lesser period equal to the actual period of time for which the borrower is eligible for the forbearance. In most cases, we do not believe that the full year for the forbearance will be required.

We also agree to make the conforming changes that would address defaulted loans held by a guaranty agency.

Changes: We have modified § 682.211(i)(7) to specify that the administrative forbearance is granted in yearly increments, until the loan is consolidated or the Department notifies the loan holder to discontinue the forbearance.

We have added a new § 682.410(b)(6)(viii), requiring a guaranty agency to suspend collection activities on a FFEL Loan held by the guaranty agency for borrowers seeking relief under § 682.212(k) upon notification by the Department.

Closed School Discharges (Sections 674.33, 682.402 and 685.214)

General

Comments: Several commenters supported the proposed closed school discharge regulations. These commenters appreciated the Department's proposal to provide more closed school discharge information to borrowers and to increase access to closed school discharges. One commenter strongly supported the proposed changes to the closed school discharge regulations that would require greater outreach and provision of information to students at schools that close, and would automatically discharge the loans of students from closed schools who do not re-enroll within three years. This commenter believed that too many students at schools that close neither receive a closed school discharge nor complete their program at another school.

A group of commenters also felt that too few eligible borrowers apply for closed school discharges, primarily because these borrowers are unaware of their eligibility. These commenters believed that amending the regulations to provide additional closed school discharge information to borrowers, to make relief automatic and mandatory for borrowers who do not re-enroll within one year, and to provide for review of guaranty agency denials, would ensure that eligible students get relief.

One commenter supported strengthening regulations to hold institutions accountable and protect student borrowers from fraudulent and predatory conduct. This commenter applauded the Department's efforts on behalf of Latino students who are overrepresented in institutions that engage in this conduct, while suggesting that more must be done to ensure the success of these students.

A group of commenters recommended that the Department broaden the scope of the proposed regulation to apply to any planned school closures, rather than only school closures for which schools submit teach-out plans. These commenters noted that very few closing schools arrange for teach-outs at other schools, and that many of the recent school closures did not involve teach-outs. These commenters believed that the proposed regulations would fail to ensure that students at closing schools that do not submit teach-out plans receive accurate, complete, and unbiased information about their rights prior to the school closure.

One commenter recommended that the Department require institutions to facilitate culturally responsive outreach and counseling to students who opt-in to teach-out plans to ensure that they understand the benefits and consequences of their decision.

Discussion: We thank the commenters for their support. We agree that these are important provisions, and note that through our intended early implementation of the automatic closed school discharge provisions, students affected by the recent closure of Corinthian will be able to benefit from a more streamlined, automatic process for relief sooner. However, we do not believe that it is necessary to broaden the scope of the regulations to apply to ''any planned school closures'' because the current regulations already cover all planned school closures. Current 34 CFR 668.14(a)(31) requires a school to submit a teach-out plan under several conditions, including a school intending to close a location that ''provides at least 100 percent of at least one program'' or if the school ''otherwise intends to cease operations.'' 34 CFR 668.14(a)(31)(iv) and (v). Therefore, the provision of the teach-out plan triggers the provision of the closed school disclosures and application form.

Although we agree that schools should provide culturally responsive outreach and counseling to students who opt-in to teach-out plans, we believe that it would be difficult to establish standards for such outreach and counseling or to define ''culturally responsive'' through regulation. However, we expect institutions to be cognizant of the needs of their student population, and to provide appropriate outreach and counseling for their students. At a future date, the Department may consider providing resources, guidance, or technical assistance to institutions to facilitate a culturally responsive dissemination of information.

Changes: None.

Availability of Disclosures

Comments: Many commenters supported the Department's proposed regulations that increase disclosure requirements for schools that are closing. These commenters shared the Department's concern that many borrowers are unaware of their eligibility for a closed school discharge because of insufficient outreach and information. These commenters noted that, in some instances, closing schools inform borrowers of the option to complete their program through a teach-out, but either fail to advise them of the option for a closed school discharge, or advise them of the option in a way that discourages them from pursuing a discharge. According to these commenters, students often receive a closed school loan discharge application from the Department after deciding whether to enroll in teach-out programs. The commenters believe that students must receive clear, accurate, and complete information much earlier in the process when they are making major decisions. The commenters speculated that students who have enrolled in, but have not completed, a teach-out program may not realize they are still eligible for a closed school discharge, and may feel committed to pursuing the teach-out even though it is not in their best interest to do so.

A group of commenters urged the Department to clarify that closed school discharges may be available to eligible students who have re-enrolled in another institution. These commenters argued that relief should not be limited to students who do not re-enroll in a title IV-eligible institution. Commenters stated that the HEA and current regulations provide that a borrower is eligible for closed school discharge if the borrower did not complete a program due to school closure and did not subsequently complete the program through a teach-out or credit transfer. Students who participate in a teach-out or who transfer credits but do not complete their program remain eligible for a closed school discharge, as do students who re-enroll in a different institution but do not transfer credits or transfer some credits to an entirely different program. According to these commenters, this clarification is particularly important because students attending closing institutions have reported frequent instances of having been misled by closing institutions and recruiters from proprietary schools.

In these commenters' view, the low application rate for closed school discharges is due to a lack of understandable and accessible information about closed school discharges.

A group of commenters noted that in some cases it may be unclear when loan discharge information should be provided because the 60-day forbearance or suspension of collection activity period may expire while the borrower is still within the six-month grace period before collection begins. Therefore collection activities will not be resumed by the guaranty agency or lender under § 682.402(d)(6)(ii)(H), or by the Department under § 685.214(f)(4). These commenters urged the Department to revise the regulations to clarify that the closed school discharge information must be provided either when collection first begins (when a borrower enters repayment after the grace period and will be more inclined to exercise their discharge rights) or when collection is resumed, whichever is applicable.

A group of commenters supported the Department's proposal to require closing schools to provide discharge information to students. When schools announce that they are closing, they currently have no obligation to inform their students about their loan discharge rights and options. According to these commenters, students feel compelled to continue their educations in ways that may not be in their best interests because they lack sufficient information. For example, commenters contended that when a teach-out is offered, students often believe they are obligated to participate, even though they have a right to opt for a closed school discharge instead. Alternatively, although instruction may be seriously deteriorating, students may feel compelled to complete the program at the closing school, unaware that they have a right to withdraw within 120 days of the closure and receive a closed school discharge. These commenters also suggested that students may feel compelled to accept another school's offer to accept their credits, without understanding that by accepting the offer they may become ineligible for a closed school discharge.

Because of the issues discussed above, these commenters supported the Department's proposal to require schools to provide borrowers with a notice about closed school discharge rights when they submit a teach-out plan after the Department initiates an action to terminate title IV eligibility or other specified events.

A group of commenters recommended that we revise the regulations to require that whenever a school notifies the Department of its intent to close, it must provide a written notice to students about the expected date of closure and their closed school discharge rights, including their right to a discharge if they withdraw within 120 days prior to closure.

One commenter stated that the proposed regulations would require the dissemination of a closed school discharge application to students who are not and will not be eligible for discharge. The commenter recommended that the Department revise proposed § 668.14(b)(32) so that an institution would not be required to disseminate a closed school discharge application if the institution's teach-out plan provides that the school or location will close only after all students have graduated or withdrawn. According to this commenter, if a school that plans to close remains open until all students have graduated or withdrawn, few if any students would be eligible for a loan discharge.

The commenter believed that the proposed regulations create incentives to withdraw that are contrary to public policy favoring program completion. The commenter recommended that proposed § 668.14(b)(32) be revised to provide that when an institution arranges a teach-out opportunity that would permit a student to complete his or her program, the institution would only be required to provide the discharge application and accompanying disclosure if the student declines the teach-out opportunity. The commenter suggested that the Department require that institutions inform students of their opportunity to discharge their loans before the school closes and before the student makes any decision as to whether to participate in the teach-out. The commenter believed that it is unrealistic to assume that students will not take advantage of the opportunity to discharge their loan debt, particularly when students can simply enroll in another institution and complete their program after receiving a discharge.

Another commenter disagreed with the inclusion of voluntary school closures in § 668.14(b)(31)(iv) where the institution intends to close a location that provides 100 percent of at least one program. The commenter stated that when a school decides that a particular location is no longer desirable or viable, and makes plans to responsibly teach-out the enrolled students itself, the school should not be treated like a school which has lost State approval, accreditation, or Federal eligibility. The commenter believed that the proposed regulation would discourage schools from acting responsibly and undertaking the considerable expense to voluntarily teach-out a location because after receiving a discharge application, students would be more likely to withdraw and seek a discharge rather than finishing their education. This commenter recommended limiting the requirement that closing schools provide a discharge application and a written disclosure to situations described in § 668.14(b)(31)(ii) and (iii), where there is some likelihood that the school's behavior may have disadvantaged students.

Some commenters urged the Department to locate the provision requiring closing schools to provide a discharge application and written disclosures in § 668.26, rather than § 668.14, the section of the regulations pertaining to the PPA. These commenters asserted that placing this provision in the PPA could lead to potential False Claims Act liability centered around disputes of fact that cannot be resolved absent undergoing discovery in a court proceeding. According to these commenters, schools would face the risk of costly litigation to address issues of fact regarding whether students received proper notice, even where schools have documented the proper provision of notice.

One commenter recommended a technical change for non-defaulted loans, by moving the proposed requirement to provide a second application from guarantor responsibilities in § 682.402(d)(6)(ii)(J) to lender responsibilities in § 682.402(d)(7)(ii).

Discussion: We appreciate the support of the commenters who agreed with our proposed changes to the disclosure requirements. The commenters are correct that a borrower may receive a closed school discharge even if the borrower re-enrolls at another institution of higher education. Under current § 685.214(c)(1)(C), an otherwise eligible borrower who re-enrolled at another institution may qualify for a closed school discharge if the borrower did not complete the program of study at another school, or by transferring credits earned at the closed school at another school.

With regard to the recommendation that the Department revise the regulations to specify that closed school discharge information be provided either when collection first begins, or when collection resumes, whichever is applicable, we do not believe that a lender in the FFEL program would find the use of the term ''resume'' confusing. We note that current regulations in § 682.402(d)(7)(i) use the term ''resume.'' We are not aware of any cases in which a FFEL lender failed to meet the requirements in the current regulations to ''resume'' collections activities because the lender had not yet begun collection activities.

We disagree with the recommendation that a school that plans to keep a closing location open until all of the students have either graduated or withdrawn should be exempted from the requirement to provide its students with the closed school disclosures or the application. Because all students at such a school or location are entitled to the option of a closed school discharge, we believe that all such borrowers should receive this information, so that they have full knowledge of their options. While many of the students at such a school location may plan to take advantage of the teach-out, not all necessarily will.

We disagree with the recommendation that the closed school discharge form only be provided to borrowers who decline the teach-out. As other commenters pointed out, students may accept a teach-out not realizing that they have other options. The disclosure information and the information on the discharge application form will apprise borrowers of their options, and help the borrower to make an informed decision based on full knowledge of the borrower's options.

We disagree with the comment suggesting that the proposed regulations create an incentive to withdraw that is contrary to public policy. Although public policy generally favors higher rates of program completion, it is not always in the individual borrower's best interest to continue a program through graduation. In a closed school situation, the value of the degree the borrower obtains may be degraded, depending on the reasons for the school closure. Borrowers at closing schools may incur unmanageable amounts of debt in exchange for relatively low-value degrees. We do not believe that it is good public policy to require these borrowers to repay that debt if they cannot or choose not to complete the program and are eligible for a closed school discharge.

Similarly, we disagree with the recommendation that voluntary school closures be exempted from the requirements. As noted earlier, the teach-out requirements in 34 CFR 668.14(a)(31) apply whether the school is forced to close or voluntarily closes. We see no basis for exempting schools that voluntarily close from the closed school discharge requirements promulgated in these final regulations.

With regard to schools being discouraged from acting responsibly and voluntarily providing teach-outs, as noted above, closing schools are *required* to provide teach-outs. A school that declines to provide teach-outs as a result of these final regulations would be in violation of the requirements specified in the school's PPA.

We do not agree with the recommendation that a school be required to provide disclosures whenever a school notifies the Department of its intent to close. The regulations as proposed require a school to provide disclosures as result of any of the events in section 668.14(b)(31)(ii)–(v), which includes ''an institution otherwise intends to cease operations.'' We disagree with the recommendation that the provision in § 668.14 be moved to § 668.26. We believe the provision is more appropriately included in § 668.14, which enumerates the requirements of a school's PPA. We do not agree that schools are at greater risk of costly litigation if the provision is located in § 668.14 than they would be if the provision were located in § 668.26. To the extent that a closed school would face potential liability under the False

Claims Act for claims for Federal funds made after the school failed to comply with this requirement, we see little difference in the risk based on where the regulatory requirement is located in the Code of Federal Regulations.

We agree with the recommended technical change that, for non-defaulted FFEL Program loans, the regulations should include the requirement to provide a borrower a second closed school application under lender responsibilities in § 682.402(d)(7).

Changes: We have revised § 682.402(d)(7)(ii) to require a lender to provide a borrower another closed school discharge application upon resuming collection.

Content of Disclosures

Comments: Under the proposed regulations, institutions are responsible for providing written disclosures to students to inform them of the benefits and consequences of a closed school discharge. A group of commenters made recommendations for the content of the written materials that schools would be required to provide to students under proposed § 668.14(b)(32). Specifically, these commenters suggested that the written disclosure describing the benefits and consequences of a closed school discharge as an alternative to program completion through a teach-out should encourage program completion, because earning a degree can lead to employment. These commenters encouraged the Department to work with the postsecondary education community to draft discharge applications and disclosures that encourage program completion.

This group of commenters also recommended modifications to the closed school discharge regulations, to proscribe the content of the disclosures. These commenters believed that if the Department provided or approved the written disclosures, it would help ensure that borrowers are able to make better-informed choices over how they proceed with their higher education.

These commenters believed that the Department should not rely on failing schools to ensure that students receive this information prior to closure. According to these commenters, because these schools can be liable for the closed school discharges, closing schools often provide inaccurate closed school discharge information or provide information in a format that students are unlikely to read or notice.

To prevent misleading disclosures, which would defeat the purpose of the proposed regulation, these commenters recommend that the Department amend proposed § 668.14(b)(32) to require that the written disclosure the school gives to its students be in a form provided or approved by the Secretary.

This group of commenters recommended that the closed school disclosures also include the expected closure date. These commenters asserted that when schools announce that they are closing, but plan on teaching out all the existing programs themselves, they currently have no obligation to inform their students about the expected date of closure. These commenters suggest that, as a result, students who experience a deterioration in the level of instruction are hesitant to withdraw and in many cases do not know they have the right to withdraw. These commenters contend that even students who are aware of their right to withdraw do not know when they can withdraw while remaining eligible for a closed school discharge.

To provide borrowers with more choice over how they proceed with their higher education, these commenters recommended that, upon notifying the Department of its intent to close and teach-out all existing students, the regulations require a school to provide a written notice to students about the expected date of closure and their right to a discharge if they withdraw within 120 days prior to closure.

One commenter contended that schools required to post letters of credit before closing have a strong financial incentive to minimize the number of students who choose to take a closed school discharge, regardless of what is in each student's best interest. In addition, this commenter suggested that unscrupulous schools often aggressively recruit students from closed schools. This commenter recommended that, to ensure students at closing schools receive clear, accurate, and complete information about their options, the Department should require schools to use standard language and/or a standard fact sheet approved by the Department in their disclosures.

This group of commenters recommended that the disclosures clearly explain the student's closed school discharge rights. The commenters asserted that closing schools often obfuscate a borrower's discharge rights and options. In the commenters' view, the Department's proposal would only encourage continued obfuscation. Under the proposed regulations, a school must provide a disclosure that describes the benefits and consequences of a closed school discharge as an alternative to a teach-out agreement. The commenters believe that a school could comply with this proposed requirement by providing a long, complicated disclosure about benefits and consequences, while burying a borrower's right to obtain a closed school discharge instead of participating in a teach-out. To prevent obfuscation and confusion the commenters recommended that the Department revise proposed § 668.14(b)(32) to require a clear and conspicuous written disclosure informing students of their right to seek a closed school discharge as an alternative to a teach-out.

Discussion: We do not have plans to develop written closed school discharge disclosure materials for schools to use, although we may develop such materials in the future if warranted. In addition, we may provide technical assistance to schools required to develop school discharge disclosure materials. We note that the Department already provides information on closed school discharges on our *studentaid.gov* Web site.

The current closed school discharge form provided to borrowers, *Loan Discharge Application: School Closure,* is a Department form. The Department has developed this form in consultation with the student financial aid community. The form is due to expire on August 31, 2017. In the coming months, we will revise the form to reflect the changes in the closed school discharge regulations. The revised version of the form will go through two public comment periods before it is implemented.

We disagree with the recommendation that we require schools to provide students with the expected date of a school closure. The expected date of closure may not be the actual closure date, and the school may actually close earlier or later than that date. Providing a date that may or not be accurate could be confusing to borrowers. It may also discourage borrowers from continuing in their education programs when, in some cases, it may be beneficial for them to complete their programs at that institution.

Changes: None.

Procedures for Providing Disclosures

Comments: A group of commenters expressed support for the Department's closed school discharge proposal, but strongly recommended several modifications to further the Department's goal of increasing the numbers of eligible students who receive closed school discharges. Under current § 685.214(f)(2), after the Department confirms the date of a school closure, the Department mails a closed school discharge application to borrowers affected by the closure. The Department suspends collection efforts on applicable loans for 60 days. If the borrower does not submit the closed school discharge application within that timeframe, the Department resumes collection on the loan, and grants forbearance for the 60-day period as provided for under § 685.214(f)(4). These commenters noted that, currently, after a school closes, the Department or guaranty agency is required to provide discharge applications to borrowers who appear to have been enrolled at the time of the school's closure or to have withdrawn not more the 120 days prior to closure. The Department or guaranty agency often sends this information one to six months after the school has closed. Then, the Department or guaranty agency must refrain from collecting on the loans obtained to attend the closed school for 60 days. If the borrower does not apply for a closed school discharge during that time, the Department or guaranty agency is required to resume collection on their loans if the loans are not still within the six-month grace period that begins when a borrower ceases to be enrolled at an eligible school on at least a half-time basis, as provided for under §§ 685.207(b)(2)(i) and 685.207(c)(2)(i).

Some commenters believed that many borrowers do not respond to the notice regarding closed school discharge because it is typically provided within the six-month grace period. At that time the borrower is focused on his or her school closure rather than debt burden. These commenters contend that providing another closed school discharge application when the loan is actually being collected, and the borrower faces the burden of loan payments, is likely to increase the borrower response rate.

Another group of commenters proposed that after one year, the Department or guaranty agency should provide a closed school discharge application and information to borrowers who have re-enrolled in a title IV institution, noting that borrowers who have re-enrolled may still qualify for a closed school discharge.

These commenters also recommended requiring that closed school discharge information be provided with the borrower's monthly payment statement upon beginning or resuming collection, or the appropriate entity if the borrower is in default. These commenters contended that many closed school borrowers receive fraudulent solicitations containing inaccurate information. These commenters asserted that many borrowers are confused about which notifications are legitimate and which are not, and are most likely to trust and pay attention to the monthly payment statement from their loan servicer.

This group of commenters recommended that the Department take measures to ensure that disclosures are provided on a timely basis. In the commenters' view, the Department's proposal does not address a situation in which the school fails to provide the required information. The commenters noted that most schools close due to financial problems, and that by the time they submit teach-out plans (if they do submit such plans), most schools have lost significant personnel and their operations are in disarray. As a result, commenters suggested that some schools are likely to fail to provide the required notices. The commenters recommended that the Department clarify that, if a school fails to provide the notice required under proposed § 668.14(b)(32) within five days after submission of a teach-out plan, the Secretary would be required to provide timely disclosures before any student may take steps toward participation in a teach-out plan that may impact his or her discharge eligibility.

Similarly to teach-outs, a group of commenters recommended that whenever a school notifies the Department of its intent to close, the Department provide a written notice to students about the expected date of closure and their closed school discharge rights, including their right to a discharge if they withdraw within 120 days prior to closure, if the school fails to do so within five days of informing the Department of closure.

Discussion: Although we agree that providing the disclosures with the monthly payment statement would be an effective way of providing the disclosures to students, there are a variety of methods in which a loan holder can provide such disclosures to borrowers, and we do not believe that the Department should specify which method to use through regulation. However, nothing in the regulations prevents a loan holder from providing the closed school discharge disclosures in this manner.

We have concerns with the recommendation that a second closed school discharge application be provided to the borrower when payment resumes, either after the six-month grace period has elapsed or after the end of the 60-day forbearance period. We also have concerns about the recommendation that a second closed school discharge application be provided after one year if the borrower has re-enrolled. Borrowers are often overwhelmed with information that is provided to them related to their student loans, either by the Department or other sources. Providing multiple copies of the discharge form to borrowers at different points in time would likely add to the information overload that student loan borrowers currently experience. We also point out that the Department's current closed school discharge form is easily available on the Department's *studentaid.gov* Web site.

We disagree with the recommendation that the Department provide the required disclosures if the school does not provide them within five days of submission of the teach-out plan. We do not believe that the commenters' suggestion is feasible or practical. The Department expects regulated parties to comply with regulatory requirements, and typically reviews for such compliance in program reviews or audits. It would be difficult for the Department to determine whether the school has provided the disclosures within five days of submission of the teach-out plan without such a review or audit.

Changes: None.

Discharge Without An Application

Comments: The Department proposed revisions to § 674.33(g)(3), § 682.402(d)(8), and § 685.214(c)(2) that would permit the Department to discharge loans of borrowers who do not re-enroll in a title IV-eligible institution within three years of their school's closure. Several commenters supported the Department's proposal to grant a closed school discharge without a borrower application, based on information in its possession indicating that the borrower did not subsequently re-enroll in any title IV-eligible institution within three years after the date the school closed.

One commenter applauded this proposal, noting that 47 percent of all Direct Loan borrowers at schools that closed from 2008–2011 did not receive a closed school discharge or title IV, HEA aid to enroll elsewhere in the three years following the school's closure. The commenter asserted that students were left with debt but no degree, putting them at great risk of default. The commenter asserted that research has consistently shown that students who do not complete their programs are among the most likely to default on their loans, leaving them worse off than when they enrolled. The commenter recommended that the final preamble clearly state that after three years, an eligible borrower's loans shall be discharged without an application and any amounts paid shall be refunded. This commenter believed that the preamble to the NPRM suggested discharge of loans without an application for students who have not re-enrolled within three years is optional, not required.

One of the commenters supportive of the proposal noted that the proposed regulations would not discharge the loans of students who enroll in a teach-out program but do not complete it and are not still enrolled within three years of a school's closure. The commenter noted that these borrowers may be unaware of their eligibility for a closed school discharge. The commenter recommended that the Department use available data on program completion among students receiving title IV, HEA aid to automatically discharge the loans of students who did not complete and are not enrolled in a comparable program within three years of their school closing.

A commenter recommended that the final regulation provide for automatic discharges of the loans, to the extent that data are available to identify them, for borrowers who:

- Transfer credits from a closed school and enroll in, but do not complete, a comparable program, and
- Transfer credits to enroll in a completely different program.

Several commenters did not support the automatic discharge provision of the proposed rule. One group of commenters contended that under the proposed regulations, the Department would discharge the loan absent any evidence that the failure of the student to re-enroll in another school was a result of the closed school or that the student did not receive any value for the education received from the closed school. This group of commenters believed the proposed rule would not serve the public interest, as it would minimize borrowers' incentives to continue educational pursuits. These commenters recommended that the automatic discharge provision be deleted from the final rule. These commenters further recommended that if the automatic discharge provision is not removed, that schools should not be held liable for loans that have been automatically discharged due to a student's failure to re-enroll in another school.

Another commenter believed that it would not be appropriate for the Department to grant a closed school discharge without a borrower application. In this commenter's view, a loan servicer may easily provide a borrower with the information necessary to apply for a closed school discharge. This commenter noted that in many instances a student may have completed his or her education under a teach-out agreement without necessarily receiving any additional title IV, HEA aid, and NSLDS may not indicate that the student enrolled in another institution.

A group of commenters that supported the Department's proposal to allow loan holders to grant closed school discharges without applications to borrowers who do not re-enroll in a new institution within three years of their schools' closures noted that, although the disclosures discussed earlier in this section will increase the number of closed school discharge applications submitted by eligible borrowers, many borrowers will still not likely respond to the disclosures. These commenters noted that borrowers in closed school situations, even students who receive information about their rights from State agencies and the Department, are often confused by contradictory information from their schools, as well as aggressive solicitations from other proprietary schools and fraudulent student loan debt relief companies.

The commenters also urged the Department to make additional revisions in the final regulations. They recommended that the Department make automatic discharges mandatory for borrowers who have not re-enrolled in a title IV-eligible institution within three years of their schools' closures. These commenters believed that discharges under the proposed rule would be entirely discretionary, noting that under the proposed rule, loan holders ''may'' grant discharges in certain circumstances. The commenters expressed concern that, given that the Department and guaranty agencies have conflicting duties and motivations to collect on loans, the discretionary language could make this regulation meaningless. These commenters also noted that the proposed regulations lack a mechanism for allowing an organization, borrower, or attorney general to demand that the Department or guaranty agency implement the automatic discharge provision. These commenters recommended that the Department make automatic discharge mandatory, noting that the Department proposed to make this provision mandatory during the negotiated rulemaking sessions.

This group of commenters also recommended shortening the re-enrollment period from three years to one year. These commenters stated that the vast majority of closed school borrowers who are able to transfer their credits do so within several weeks to several months after a school closes. They noted that other schools often market their programs to affected students immediately following a school closure. They also claimed that that other schools, including community colleges, often reach out to students within the first few weeks after a school closure, and that students actively search for a new school to accept their closed school credits.

Commenters contended that because very few students transfer their closed school credits after one year, all closed school borrowers who do not re-enroll in a title IV institution within one year should be granted a closed school discharge without any application. These commenters believed that it would be unfair to require these borrowers to wait three years for a closed school discharge, during which time they will make payments and may face burdensome involuntary debt collection tactics if they default.

This group of commenters anticipated that the vast majority of eligible borrowers would likely want a closed school discharge. However, these commenters asserted that some borrowers may not want a discharge. These commenters propose addressing this potential issue through an opt-out procedure, in which students receive notice of the consequences of the discharge and are afforded the opportunity to opt-out of a discharge within 60 days of receiving the notice.

One commenter raised concerns that the proposal to discharge loans without an application from a borrower would deny institutions due process. This commenter proposed revising the regulations to clarify whether there is a presumption that the borrower did not re-enroll absent evidence to the contrary, or whether the Department must have in its possession evidence that the borrower did not re-enroll in another institution. The commenter also recommended that the regulation be revised to afford the closed school with notice and the opportunity to contest the student's eligibility for a loan discharge (*e.g.,* whether the borrower was enrolled within 120 days of the closure or whether the borrower was enrolled at another institution or participated in a teach-out).

In the commenter's view, the procedures the Department follows to discharge a student loan and make a determination regarding amounts owed by an institution constitute informal agency adjudication, and even in the context of informal adjudication, an agency must provide fundamental due process. The commenter contended that due process requires that a participant in an agency adjudication must receive adequate notice and ''the opportunity to be heard at a meaningful time and in a meaningful manner.'' Though the Department has flexibility in the way it provides such due process, the Department may not deny closed institutions the opportunity to communicate with the Department prior to a discharge and recovery action. The commenter also expressed the view that, as a matter of public policy, it would benefit the Department to involve closed schools before discharging any loans in order to ensure that discharges are only granted to eligible borrowers.

Another group of commenters recommended eliminating the automatic discharge provision. These commenters expressed concern with the concept of an automatic closed school discharge, especially if the Department intends to rely on the school's NSLDS enrollment reporting process for information about student re-enrollment. In the school enrollment reporting process for NSLDS, schools are only required to include title IV recipients. Therefore, NSLDS may not identify students who re-enrolled but did not receive title IV, HEA aid. As a result, commenters suggested that borrowers who received credit from attending the closed school for the same or similar program of study could be improperly identified as eligible to receive a discharge.

Under proposed § 682.402(d)(6)(ii)(K)(*3*), if the Department determines that the borrower meets the requirements for a closed school discharge, the guaranty agency, within 30 days of being informed that the borrower qualifies, will take the actions described under § 682.402(d)(6) and (7). Section 682.402(d)(6) and (7) specifies the responsibilities of a guaranty agency. A group of commenters expressed the view that the cross-reference to § 682.402(d)(6) is too broad. Theses commenters believed that § 682.402(d)(6)(ii)(E) and § 682.402(d)(6)(H)(1) more specifically describe the required action by the guarantor and should replace § 682.402(d)(6) in the cross-reference. These commenters also stated that if the Department determines that the borrower is eligible for a discharge, the guaranty agency will pay the claim and the lender actions in § 682.402(d)(7)(iv) do not change.

These commenters also recommended changes to the regulations to provide that the guarantor pay the claim if the Department determines a borrower is eligible for a discharge. This change would not impact lender actions in § 682.402(d)(7)(iv).

These commenters also recommended that, if the Department continues using NSLDS and providing an automatic discharge after three years, the Department should be responsible for monitoring identified borrowers during this period, and notifying the applicable guarantor when a closed school discharge must be processed.

Discussion: We agree with the commenters who recommended that the Department clarify the final regulations to provide that closed school discharges for Perkins, FFEL and Direct Loan borrowers who have not re-enrolled in a title IV-eligible institution within three years of their schools' closures are not discretionary. We have revised §§ 674.33(g)(3), 682.402(d)(8), and 685.214(c)(2) to clearly delineate the circumstances under which a closed school discharge is discretionary as opposed to required.

We recognize that some borrowers will qualify for closed school discharges, but will not receive an automatic closed school discharge because they re-enrolled in a title IV school within the three-year timeframe. If the borrower is not participating in a teach-out, or transferring credits from the closed school to a comparable program at the new school, the borrower would still be eligible for a closed school discharge. We do not agree, however, that the Department should automatically grant closed school discharges in these situations. A borrower in this type of situation still has access to a closed school discharge; however, the borrower must apply directly for the discharge. The provisions for discharges without an application are intended to provide closed school discharges to borrowers that the Department can readily determine qualify for the discharge, based on information in our possession. A borrower who re-enrolled within the three-year time period may or may not qualify for a closed school discharge, depending on whether the borrower transferred credits from the closed school to a comparable program. A borrower who re-enrolled, but still qualifies for a closed school discharge, would have to provide more detailed information to the Department through the closed school application process to allow for a determination of the borrower's eligibility for a closed school discharge. However, the Department has continued to increase and improve the quality of data reporting by institutions, including beginning the collection of program-level data for borrowers through recently implemented Gainful Employment regulations and through recent Subsidized Stafford Loan reporting requirements. While current data limitations make it challenging to definitively identify a borrower who has enrolled in a comparable program or who has successfully transferred credits, in future years, the Department may be able to identify those eligible borrowers who did re-enroll, but *not* in a comparable program. In that case, the Department may revisit its ability to provide closed school discharges automatically to those borrowers, using the discretion available to the Secretary and mirroring the three-year provision set forth in these regulations. This will help to ensure that as many eligible borrowers as possible receive the discharges for which they qualify.

We disagree with the commenters who recommended eliminating automatic closed school discharges from the final regulations. We note that the current regulations already provide for a closed school discharge without an application, and believe that this is an important benefit to borrowers. We also believe that the final regulations provide sufficient safeguards to prevent abuse, such as the three-year period before an automatic closed school discharge is granted. Therefore, we also decline to accept the recommendation that we reduce the three-year time period to one year.

With regard to the three-year time period, we note that the discharge of a loan is a significant benefit to a borrower, with potentially significant fiscal impacts. Absent a closed school discharge application from a borrower, we do not believe that a one-year period of non-enrollment would be sufficient to discharge a borrower's debt.

We see no basis for exempting schools from liability for closed school discharges when the discharge is granted without an application.

We do not believe an opt-out notice for the automatic discharge without an application is necessary. It is unlikely that a sufficient number of borrowers will choose not to have their loans discharged to justify the administrative burden involved in sending the borrower an opt-out notice. We are also concerned that an opt-out notice could be confusing, and result in ''false positives''—borrowers inadvertently choosing to opt out of the discharge.

We acknowledge that the automatic discharge process could result in discharges being granted to some borrowers who were able to complete their programs but we believe this would be a negligible number of borrowers. Even a borrower who does not receive title IV, HEA aid to attend another school, may still receive an in-school deferment. Both receipt of additional title IV, HEA aid and receiving an in-school deferment would be reported to NSLDS. Unless the borrower is attending in a less-than-half-time status, the Department will be able to determine whether a borrower has re-enrolled at another title IV eligible institution during the three-year period. We believe that the likely minimal potential cost of granting discharges to a very small number of borrowers who do not qualify is counterbalanced by the benefit of granting closed school discharges to large numbers of borrowers who qualify for them, but do not receive them under our current procedures.

The comment regarding the Department monitoring borrowers during the three-year period relates to operationalization of the final regulations. The Department will develop procedures for determining whether borrowers qualify for a closed school discharge without an application, and the appropriate method of notifying guaranty agencies if the Department makes such a determination. We note, however, that the final regulations in § 682.402(d)(8)(iii) give guaranty agencies the authority to grant closed school discharges without an application based on information in the guaranty agency's possession.

We disagree with commenters who stated that closed school discharge procedures may deny schools of due process. The closed school discharge procedures do not currently involve the school in the determination process. The Department currently pursues recovery of the amounts lost through closed school and other discharges under section 437(c) of the HEA through the ordinary audit and program review process. Thus, in the final audit determination or the final program review determination issued upon closure of a school or one of its locations, the Department asserts a claim for recovery of the amounts discharged. The school may challenge that claim in an appeal under Subpart L of Part 668, as it can with any other audit or program review liability.[95]

Changes: We have revised §§ 674.33(g)(3), 682.402(d)(8), and 685.214(c)(2) to clearly delineate the circumstances under which a closed school discharge is discretionary, as opposed to required.

Comments: None.

Discussion: Upon further review, the Department determined that the proposed regulations related to automatic closed school discharges needed to specify the period of time for which borrowers from closed schools would be evaluated to determine whether they would qualify for automatic discharges. The Department concluded that it would be administratively feasible to conduct such an evaluation for borrowers at schools that closed on or after November 1, 2013.

Changes: We have revised §§ 674.33(g)(3)(ii), 682.402(d)(8)(ii), and 685.214(c)(2)(ii) to specify that they apply with respect to schools that closed on or after November 1, 2013.

Review of Guaranty Agency Denials

Comments: Some commenters expressed strong support for the proposed regulation that would allow borrowers the right to appeal to the Department when guaranty agencies deny closed school discharges. One commenter noted that the right to appeal is paramount to due process. This commenter stated that the right to appeal provides qualified borrowers with a safety net for obtaining debt relief and also provides a framework for accountability in guaranty agency decisions.

These commenters noted that the guarantor in this case would need to notify the lender to resubmit the closed school claim for reimbursement.

A group of commenters recommended that the Department retain current language requiring the guaranty agency to state the reasons for its denial. The group of commenters supported the Department's proposal to provide for the review of guaranty agency denials of closed school discharge applications for FFEL Loans. These commenters averred that FFEL borrowers, whose loans are held by guaranty agencies, should have the same right to challenge an erroneous unpaid refund or closed school discharge denial as Direct Loan and FFEL Loan borrowers whose loans are held by the Department. The commenters noted that current FFEL Loan regulations do not provide borrowers with any right to seek review of guaranty agency denials of closed school discharges. The commenters also noted that, even when FFEL borrowers are entitled to administrative review, their right to seek further review in court is not clear, unlike Direct Loan borrowers. Commenters noted that the APA does not provide for judicial review of decisions by private, non-governmental entities such as guaranty agencies, nor is there any explicit right to judicial review of guaranty agency decisions in the HEA.

As a result, commenters said that FFEL borrowers whose loans are held by guaranty agencies have no clear way to challenge an erroneous closed school discharge decision from a guaranty agency. Only Direct Loan and FFEL Loan borrowers whose loans are held by the Department may seek judicial review of administrative unpaid refund or closed school discharge denials. These commenters believe that the Department's proposed rule would address what the commenters consider an arbitrary denial of borrower due process.

This group of commenters recommended one modification to the proposed regulations. Under current § 682.402(d)(6)(ii)(F), if a guaranty agency denies a closed school discharge application, it must notify the borrower in writing of its determination and the reasons for the determination. Under the proposed regulation, a guaranty agency would still be required to notify the borrower of its determination, but would not be required to notify the borrower of its reasons for the determination. These commenters believed that removing this requirement would frustrate the purpose of the review process and urged the Department not to remove the notification requirement.

Multiple groups of commenters noted that the proposed regulations do not provide a time frame during which a borrower can request an appeal of a denied closed school discharge by the guarantor. These commenters recommended a 30-day timeframe, which would align with the timeframe allowed for an appeal of a false certification discharge denial. These commenters also proposed language that would allow a borrower to submit a request after the 30-day period.

One group of commenters proposed that the guarantor would still submit the appeal to the Department; however, collection of the loan would continue during the Department's review.

Another group of commenters also recommended additional language to address situations in which a borrower submits a request after the 30-day period. The commenters suggested that in this case, the guarantor would still submit the appeal to the Secretary; however, unlike with a timely request, collection of the loan (nondefaulted or defaulted) would continue during the Secretary's review.

[95] See, *e.g., In the Matter of Coll. of Visual Arts, Respondent,* Docket No.: 15–05–SP, 2015 WL 6396241, at *1 (July 20, 2015); *In the Matter of Pennsylvania Sch. of Bus., Respondent,* Docket No. 15–04–SA, 2015 WL 10459890, at *1 (Oct. 27, 2015).

This group of commenters stated that the proposed regulations are not clear on the availability of an appeal option for non-defaulted borrowers. These commenters recommended adding language to clarify that non-defaulted borrowers should be afforded the same opportunity to appeal. Under the proposed regulations, a guarantor would be responsible for notifying a defaulted borrower of the option for review by the Secretary. For consistency, the commenters believed it would be reasonable for the guarantor to utilize this same process for non-defaulted borrowers.

These commenters also believed that it would be less confusing for a borrower for the guarantor to retain the loan until 30 days after the agency's notification to the borrower of the right to appeal. Commenters proposed that if the borrower appeals within 30 days, the loan should remain with the guarantor until the Secretary renders a final determination on the borrower's appeal. These commenters recommended that the guarantor should be responsible for notifying defaulted and non-defaulted borrowers of the option for review by the Secretary.

Under proposed § 682.402(d)(6)(ii)(K)(*3*), if the Department determines that the borrower meets the requirements for a closed school discharge, the guaranty agency, within 30 days of being informed that the borrower qualifies, will take the actions described under § 682.402(d)(6) and § 682.402(d)(7). Section 682.402(d)(6) specifies the responsibilities of a guaranty agency and 682.402(d)(7) specifies the responsibilities of a lender.

A group of commenters expressed the view that the cross-reference to § 682.402(d)(6) is too broad. These commenters believed that § 682.402(d)(6)(ii)(E) and 682.402(d)(6)(ii)(H)(1) more specifically describe the required action by the guarantor and should replace § 682.402(d)(6) in the cross-reference. These commenters also recommended that we clarify under § 682.402(d)(6)(ii)(K)(*3*) if the Department determines that the borrower is eligible for a discharge, the guaranty agency will pay the claim and the lender will be required to take the actions specified in § 682.402(d)(7)(iv).

Discussion: We do not believe that a 30-day timeframe for appealing a denial of a closed school discharge claim by a guaranty agency is sufficient. We have retained the language in the NPRM, which did not provide a timeframe for such an appeal.

We agree with the commenters who recommended that proposed § 682.402(d)(6)(ii)(F) be revised to specify that, when a guaranty agency notifies a borrower of the denial of a closed school discharge claim and of the opportunity to appeal the denial to the Department, that the notification from the guaranty agency should state the reasons for the denial. Since the proposed revision to the regulation is intended to provide borrowers an opportunity to appeal a negative decision, a borrower should have the opportunity to address the issues that led to the denial during the appeal process.

We agree with the commenters that the regulations should provide for an appeal process for non-defaulted FFEL borrowers (whose loans are held by lenders) as well as for defaulted FFEL borrowers (whose loans are held by guaranty agencies). Although the NPRM only addressed an appeal process for FFEL Program loans held by a guaranty agency, our intent was to provide an appeal process for FFEL Program loans held by either a lender or a guaranty agency.

We agree that the cross-references to § 682.402(d)(6)(ii)(K)(*3*) should be written more narrowly, and have made additional technical corrections to the FFEL regulations, based on the recommendations relating to the process for granting discharges in the FFEL Program. These technical corrections are identified in the ''Changes'' section, below.

Changes: We have revised § 682.402(d)(6)(ii)(F) to stipulate that a guaranty agency that denies a borrower's closed school discharge request must notify the borrower of the reasons for the denial.

We have revised the cross-references in § 682.402(d)(6)(ii)(K)(*3*), to more specifically describe the guarantor's action. We have also changed the cross-reference from (d)(7) to (d)(7)(iv), clarifying that after the guaranty agency pays the claim the lender actions in (d)(7)(iv) do not change.

We have made a technical correction to § 682.402(d)(6)(ii)(H), deleting the reference to a guaranty agency exercising a forbearance during the suspension of collection activity.

We have revised § 682.402(d)(7)(iii) to clarify that a borrower whose FFEL Loan is held by a lender, has the same appeal rights as a borrower whose loan is held by a guaranty agency if the guaranty agency denies the closed school discharge request.

Miscellaneous Recommendations

Comments: One commenter supported the proposed changes to the closed school discharge regulations, but believed that the proposal did not go far enough to provide displaced students with comprehensive assistance and an explanation of their right to debt relief. This commenter urged the Department to ensure that a clearly identifiable, knowledgeable, and accessible representative is made available on campus immediately after announcement of an impending closure, to provide in-person, meaningful assistance to displaced students.

In addition, this commenter recommended that the Department offer ongoing assistance through the creation of a student loan discharge hotline and/or on-line computer chat, and hyper-links on the Department's Web site directing students to assistance in their local communities. The commenter averred that assistance should be made available in multiple formats (telephone, smartphone apps, mail, in person, and on-line), as many students at closing or closed schools do not own or have limited access to computers.

A group of commenters recommended that the discharge regulations for Perkins and Direct Loans be amended to extend the 120-day look back period by the number of days between the expected and actual date of closure whenever the actual closure date is later than the expected and disclosed closure date.

Another commenter recommended prohibiting the capitalization of interest when the collections process has been suspended because a student is filing for a closed school discharge.

A group of commenters recommended that the terminology throughout § 682.402(d) be updated for consistency with current § 682.402 regulations for other discharges types. Specifically, commenters suggested replacing references to written and sworn statements with references to applications.

Discussion: We appreciate the recommendations for additional steps the Department may take to assist borrowers in closed school situations. Many of these recommendations relate to activities that are not governed by regulations, or are out of the scope of this regulatory action.

With regard to the comment recommending that we extend the look-back period beyond 120 days if the expected closure date is different than the actual closure date, we do not believe such a change is necessary. Under current regulations in

§ 685.214(c)(1)(B), the Department has the authority to extend the look-back period due to ''exceptional circumstances.'' We believe that this provision provides appropriate flexibility to the Department in cases where it may be necessary to extend the look-back period.

Under § 682.202(b)(2)(ii) and (iii) a lender may capitalize interest that accrues during a period of authorized deferment or forbearance. We see no justification for exempting the 60-day forbearance period from this practice.

We agree with the recommendation to update the terminology throughout § 682.402(d) for consistency with current § 682.402 for other discharges types, and will make those changes in the final regulations.

Changes: In §§ 682.402(d)(6)(ii)(B)(*1*), (d)(6)(ii)(B)(*2*), (d)(6)(ii)(F)(*5*), (d)(6)(ii)(G), and (d)(6)(ii)(H) of the FFEL closed school discharge regulations, we have replaced the terms ''sworn statement'' or ''written request'' with the term ''application'', to conform the regulations with the current closed school discharge application process.

Data Requests

Comments: A group of commenters recommended that the Department disclose, at the school level, information about closed school discharges, including information about the Department's outreach to borrowers, the number of applicants, the number of applicants who receive a discharge, the total amount discharged, and the amount collected from schools to offset the discharged amounts. Similarly, this group of commenters requested that the Department disclose, at the school and discharge type level, information about false certification discharges, including the number of applicants, the number of applicants who receive a discharge, and total amount discharged and related offsets. In addition, this group of commenters recommended that the Department disclose the number of borrowers for whom a death discharge has been requested, the number of borrowers for whom a death discharge has been granted, and the total discharged amount.

Discussion: We thank the commenters for their thoughtful reporting recommendations; however, we do not have plans to provide such information at this time. We note that publication of data at this level may require providing the school with the opportunity to review and challenge or correct inaccurate information. However, the Department may be able to publish more aggregated versions of these data for public review at a later date. The Department is not prepared to implement such processes at this time, but will consider releasing these data moving forward.

Changes: None.

False Certification Discharges (Section 685.215)

High School Diploma

Comments: Commenters generally supported the proposed improvements to the false certification process. Some commenters noted that broadening the reasons that loans may be discharged due to false certification may provide a simpler process for loan discharge than borrower defense to repayment for many borrowers.

A group of commenters expressed support for the proposed regulatory changes that would provide a false certification loan discharge to borrowers whose schools have falsely reported that they earned a high school diploma, including schools that have facilitated the borrower's attainment of a fabricated high school diploma. The commenters noted that that proposed § 685.215(a)(1)(ii) would allow for discharge of a borrower's loan if the school falsified the borrower's high school graduation status; falsified the borrower's high school diploma; or referred the borrower to a third party to obtain a falsified high school diploma. The commenters viewed this proposed regulation as a critical improvement over the current false certification regulations.

However, several commenters expressed concern that some otherwise eligible borrowers may be denied discharges because their financial aid applications, which were completed by the school, indicate that they reported having earned a high school diploma.

A group of commenters recommended revisions to the final regulations regarding what they referred to as ''unfair'' evidentiary burdens. These commenters recommended that the Department clarify that students whose schools falsely certified that they have high school diplomas, including schools that do so by falsely certifying financial aid applications, are eligible for false certification discharges.

One group of commenters recommended that the Department further modify the regulatory language to clarify that borrowers who report to their school that they earned a high school diploma are ineligible for a false certification loan discharge, but that borrowers whose FAFSA falsely indicates the borrower had earned a high school diploma may be eligible for a false certification loan discharge.

Another group of commenters believed that the Department should revise the proposed regulations to ensure that a borrower will qualify for a false certification discharge only if the borrower can fulfill the bases for discharge. These commenters recommended that the Department revise proposed § 685.215(c) to require borrowers to demonstrate each element of the bases for discharge under proposed § 685.215(a)(l) in order to qualify for a discharge. The commenters also recommended that the Department provide guidance regarding acceptable online high schools.

These commenters observed that the Department's intent, as stated in the preamble to the NPRM, is that borrowers who provide false information to postsecondary schools regarding high school graduation status will not obtain a false certification discharge. Proposed § 685.215(a)(l) (''Basis for Discharge'') states that a false certification discharge is available if a borrower reported to the postsecondary school that the borrower did not have a high school diploma. The commenters believed that the section of the proposed regulation regarding borrower qualifications for discharge does not reflect the Department's intent. Proposed § 685.215(c) (''Borrower qualification for discharge'') does not require a borrower to demonstrate that the borrower presented accurate information regarding the borrower's high school graduation status to the postsecondary school.

These commenters believe that under the proposed regulations, taxpayers may be forced to pay for false certification discharges for borrowers who did not meet the test in proposed § 685.215(a)(l) and yet qualified under proposed § 685.215(c)(1). The commenters noted that the Department can seek recovery from institutions for certain losses determined under proposed § 685.2125(a)(l). However, if borrowers are granted discharges under the weaker standard at proposed § 685.215(c)(1), then in many cases the Department will be unable to collect from institutions under the stronger standard at proposed § 685.215(a)(l).

The commenters believed that schools should be able to rely on the fact that a high school is accredited by a reputable accrediting agency, absent a list of high schools that provide instruction to adult students and that are acceptable to the Department. Another commenter requested that the Department provide schools with a reliable source of information regarding appropriately accredited high school diploma programs available to adults, including those that are offered online.

A group of commenters expressed concerns that the proposed false certification and unauthorized payment discharge rule would penalize institutions for the false certification of the student or the independent actions of a third party.

In addition, these commenters recommended that, under the evidentiary standards articulated in proposed § 685.215(c)(1), a borrower requesting a false certification loan discharge should be required to certify that, at the time of enrollment, he or she did not represent to the school, either orally or in writing, that he or she had a high school diploma. The commenters believed that this evidentiary requirement would help deter frivolous false certification claims.

Some commenters observed that, pursuant to proposed § 685.215(a)(l)(ii), a borrower would be eligible for a false certification loan discharge if the school the borrower attended certified the eligibility of a student who is not a high school graduate based on ''[a] high school diploma falsified by the school or a third party to which the school referred the borrower.'' The commenters recommended that the regulation be revised to clarify that a school is only penalized if it referred a student to a third party for the purpose of having the third party falsify the high school diploma. These commenters believed that it is not uncommon for a school to refer a student to a third-party servicer to verify the diploma, particularly in the case of students who graduated from foreign high schools. The commenters believed that institutions should not be penalized if a third-party verification entity falsified the legitimacy of the foreign credential without the school's knowledge.

Discussion: We thank the commenters who are supportive of the proposed revisions of the false certification of high school graduation status regulatory provisions. However, we do not agree that the regulations need further modification to address situations in which a borrower who is not a high school graduate states on the FAFSA that the borrower is a high school graduate. If a borrower falsely stated on the FAFSA that they were a high school graduate, but also reported to the school that they were not a high school graduate, and the school certified the eligibility of the borrower based on the FAFSA, the school would still have falsely certified the eligibility of the borrower. In this situation, the borrower would qualify for a false certification discharge—assuming the borrower did not meet the alternative to high school graduation status in effect at the time—regardless of the information on the student's FAFSA. The same would hold true whether the FAFSA was actually completed by the borrower, or completed by the school. We note that, while a school may assist a student in completing a FAFSA, a school may never complete a FAFSA for a student. Conversely, if a borrower falsified the FAFSA on their own initiative, did not inform the school that they were not a high school graduate, and the school did not receive any discrepant information indicating that the borrower was not a high school graduate, the borrower would not qualify for a false certification discharge. Borrowers who deliberately provide misleading or false information in order to obtain Federal student loans do not qualify for false certification discharges based on the false or misleading information that the borrower provided to the school.

We agree with the commenters who noted a discrepancy between the language in proposed § 685.215(a)(l) and proposed § 685.215(c)(l). Section 685.215(a)(l) provides the basic eligibility criteria for a false certification discharge based on false certification of a borrower's high school graduation status. Section 685.215(c)(1) describes how a borrower qualifies for a discharge. The two sections are intended to mirror each other, not to establish slightly different standards for the discharge. If a borrower, in applying for the discharge, is only required to state that the borrower ''did not have a valid high school diploma at the time the loan was certified,'' the question of whether the borrower ''reported not having a high school diploma or its equivalent'' would not be addressed.

We also agree that the standards under which the Department may seek recovery for losses under § 685.215(a)(1) should not be different from the standards under which a borrower may receive a false certification discharge under § 685.215(c)(1).

The commenter who recommended that schools be able to rely on a high school's accreditation status by a ''reputable accrediting agency'' did not specify what criteria would be used to determine if an agency accrediting a high school is reputable, and does not suggest a process for making such determinations. Moreover, even if it were feasible for the Department to provide a list of acceptable high schools for title IV student financial assistance purposes or guidance regarding acceptable schools, there is no guarantee that a diploma purporting to come from such a school is legitimate.

We do not share the concern of commenters that the proposed regulations may penalize a school for relying on the independent actions of a third party. If a school is relying on a third party to verify the high school graduation status of a borrower, it is incumbent on the school to ensure that the third-party is providing legitimate verifications. We note that high school graduation status, or its approved equivalent, is a fundamental borrower eligibility criterion for title IV federal student assistance. Any school that wishes to participate in the title IV, HEA programs and outsources the determination of high school graduation status to a third party without ensuring that the third party is trustworthy, is acting irresponsibly.

We also note, in response to this comment, that the Department is not proposing revisions to the regulations governing false certification discharges due to unauthorized payment.

We also disagree with the comment recommending that a school should only be penalized if it referred a student to a third-party ''for the purpose of having the third party falsify the high-school diploma.'' This commenter raised this issue in particular with regard to students who graduated from foreign high schools. The commenter stated that schools often use third parties to verify the legitimacy of a foreign credential. We do not believe that the Department must demonstrate intent on the part of a school when assessing liabilities against a school due to false certification of borrower eligibility. We do not believe that a school that routinely certifies eligibility of borrowers who graduated from foreign high schools can credibly claim to be ignorant of the legitimacy of a third-party verification entity that the school uses for verification purposes.

We agree with the comment that the false certification loan discharge application should include a certification from the borrower that the borrower did not report to the school that the borrower had a high school diploma. The current form, *Loan Discharge Application: False Certification (Ability to Benefit),* expires on August 31, 2017. After these final regulations are published, we will revise the form to make it consistent with these final regulations. The revised version of the form will go through two public comment periods, with the intent of being finalized by the time these regulations become effective on July 1, 2017.

Changes: We have revised § 685.215(c)(1) to clarify that the borrower must have reported to the school that the borrower did not have a high school diploma or its equivalent.

Disqualifying Condition

Comments: Current regulations under § 685.215(a)(1)(iii) provide for a discharge if a school certified the eligibility of a borrower who would not meet requirements for employment in the occupation for which the training program supported by the loan was intended. The proposed regulations would modify this provision to clarify that the relevant ''requirements for employment'' are ''State requirements for employment'' in the student's State of residence at the time the loan was originated.

A group of commenters sought confirmation that, while a borrower may be eligible for a false certification discharge due to a condition that disqualified them for employment in the field for which postsecondary education was pursued, the postsecondary institution would not be financially liable for the discharged loan. These commenters believed that this is the Department's intent because the remedial action provision at proposed § 685.308 does not list the disqualifying condition discharge provision at proposed § 685.215(a)(l)(iv) as a basis for institutional liability. These commenters observed that the current version of § 685.308 states the Department may seek recoupment if the loan certification resulted in whole or in part from the school's violation of a Federal statute or regulation or from the school's negligent or willful false certification.

These commenters averred that anti-discrimination laws limit schools' ability to deny admission to a prospective student, even when the individual would be disqualified for employment in the career field for which the program prepares students. The commenters recommended that the Department state explicitly in the preamble to the final regulations that disqualifying condition discharges will not result in institutional liabilities.

Another commenter asserted that it would be administratively burdensome for institutions to maintain the knowledge necessary to determine what conditions would disqualify a prospective student for employment in a specific field. This commenter suggested that this would be particularly challenging for distance education programs that serve students remotely, since these institutions would only be aware of potentially disqualifying conditions that the student discloses.

A group of commenters echoed this concern, stating that it would be administratively burdensome for distance education programs to comply with proposed § 685.215(c)(2). In these commenters' view, a primarily distance education institution may not have occasion to become aware of a student's disqualifying physical or mental condition unless and until the student voluntarily discloses such information. In addition, for institutions that operate in numerous States, the commenters stated that it would be administratively burdensome and near impossible for an institution to remain constantly vigilant about potential changes to State statutes, State regulations, or other limitations established by the States that may affect a student's eligibility for employment.

Since institutions must comply with various anti-discrimination laws when admitting students, several commenters argued that institutions should not be held liable for discharges based on disqualifying conditions unless it can be shown that the institution engaged in substantial misrepresentation. Another commenter stated that there are legitimate reasons why institutions—including, but not limited to, distance education institutions—may not be aware of a student's disqualifying physical or mental condition or criminal record. The commenter claimed that, under applicable Department regulations, an institution may not make a preadmission inquiry as to whether an applicant has a disability. The commenter cited regulations at 34 CFR 104.42(b)(2) limiting schools' ability to determine whether applicants have a disability.

Another commenter referenced the Department's publication *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals,* which encourages alternatives to inquiring about criminal histories during college admissions and provides recommendations to support a holistic review of applicants.

A commenter asked why the regulation does not specify that the institution knew about or could be expected to have known about the disqualifying condition. The commenter questioned whether a student who intentionally concealed a disqualifying condition should obtain a discharge. The commenter also raised the issue of a borrower whose disqualifying impairment occurs after the fact, but does not qualify for a disability discharge. In such situations, the commenter recommended that the Department clearly state that the school would not be subject to any penalty under § 685.308.

Another group of commenters recommended that the Department expand the regulation pertaining to disqualifying conditions to include certifications not provided by the State, such as those referenced in the Gainful Employment regulations such as professional licensure and certification requirements, including meeting the requirements to sit for any required licensure or certification exam.

A group of commenters noted their opposition to the Department's proposal which, in their view, narrows discharge eligibility for students whose schools falsely certify that they meet the requirements for employment in the occupations for which their programs are intended to train. These commenters asserted that some schools frequently recruit students they know will be barred from employment in their field after program completion.

These commenters objected to the proposed regulatory language, which addresses requirements imposed by the State, not by the profession. To the extent that this discharge provision is intended to provide relief to students whose schools recruit and enroll them despite the fact that they cannot benefit from the program, the commenters believed that the Department should not limit the scope of this protection. The commenters observed that while most professional licensing is found in State law and regulation, others—such as those from trade-specific entities—are not. In the commenters' view, the proposed change would unnecessarily restrict relief to students who are unemployable because they are ineligible for certifications not provided by a State.

The commenters also believed that this change would be inconsistent with the Department's Gainful Employment regulations, which requires schools to certify that each of their career education programs ''satisfies the applicable educational prerequisites for professional licensure or certification requirements in that State so that the student who completes the program and seeks employment in that State qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter.'' 34 CFR 668.414(d)(3). As the Department noted in the preamble to the NPRM for the Gainful Employment regulations, a student's enrollment in a program intended to prepare them for a career for which they cannot be certified ''can have grave consequences for students' ability to find jobs and repay their loans after graduation.'' 79 FR 16478.

The commenters believed that the consequences are equally grave for students who are unwittingly enrolled in programs that they personally can never benefit from, though their classmates might. In the view of these commenters, it is therefore unnecessary and unfair to narrow this standard for relief.

Discussion: The proposed regulations were not intended to absolve schools of financial liability in the case of false certification due to a disqualifying condition. The commenters point to proposed § 685.308, which inadvertently omitted a cross-reference to § 685.215(a)(1)(iv) in identifying provisions under which the Secretary ''collects from the school the amount of the losses the Secretary incurs and determines that the institution is liable to repay.'' We note that the proposed regulations include cross-references to the provisions covering false certification due to high school graduation status and unauthorized signature. We believe that discharge due to false certification of disqualifying status should be treated the same as the other types of false certification discharges, as it is under current regulations in § 685.308(a)(2).

The commenter who suggested that it would be administratively burdensome for schools to maintain the knowledge necessary to determine what conditions would disqualify a prospective student from employment in a specific field appears to be unaware of the current regulatory requirements. Under current § 685.215(a)(1)(iii), the Department considers a school to have falsely certified a borrower's eligibility for a title IV loan if the school ''certified the eligibility of a student who, because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary would not meet the requirements for employment (in the student's State of residence when loan was originated) in the occupation for which the training program supported by the loan was intended.'' The final regulations revise this provision to refer to ''State requirements,'' but make no additional changes to this provision. The change is consistent with our interpretation set forth in Dear Colleague Letter (DCL) GEN–95–42, dated September 1995. In that DCL, we clarified that for a borrower to qualify for a false certification discharge due to a disqualifying condition, a borrower must provide evidence that the borrower had a disqualifying condition at the time of enrollment and of ''a *State prohibition* (in that student's State of residence) against employment'' in that occupation based on the borrower's status.

We note in response to the commenters who were concerned about the administrative burden associated with compliance for distance education programs that these schools have been subject to this regulatory requirement for over 20 years. Neither the proposed regulations nor these final regulations would change the basic requirements regarding false certification due to a disqualifying condition.

The regulation at 34 CFR 104.42 refers to general postsecondary education admission procedures, not eligibility for title IV student financial assistance. While the requirements in § 685.215 do not apply to a school's evaluation of whether to admit a student to a particular program, they do apply to its certification of that student's eligibility for title IV student financial assistance for that program. Therefore, we do not believe that the further limitation suggested by the commenter is necessary.

The Department of Education *Beyond The Box* publication cited by commenters specifically addresses career-training programs. Further, the publication does not advise schools to ignore disqualifying characteristics, but rather not to be overbroad in their preclusion of otherwise eligible applicants:

> Tailor questions about CJI [''Criminal Justice Information''] to avoid unnecessarily precluding applicants from entering training programs, and thus employment, for which they might be eligible. For career-oriented training programs, institutions should limit CJI inquiries to criminal convictions that pose barriers to certification and licensing. For example, if a State teacher's board will not grant a license to anyone with a felony conviction for sexual assault or rape, the teaching program could specifically ask, ''Have you ever been convicted of felony sexual assault or rape?'' instead of broadly asking, ''Have you ever been convicted of a crime?'' This specificity would enable the institution to adequately assess whether a student could face occupational licensing and credentialing barriers (*Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals,* p. 25).

As stated in the *Beyond the Box* publication, we expect schools to be aware of disqualifying conditions for employment in the fields for which the schools are providing training. Schools that offer career-training programs need to be proactive in determining whether borrowers who are training for fields that have such employment restrictions do not have a disqualifying condition for that career.

In response to the comment regarding a student intentionally misleading a school, if the school could demonstrate that a student intentionally misled the school about a disqualifying condition, we would take that into account in determining the amount that the school is liable to repay under § 685.308(a). However, in our view, it seems unlikely that a borrower would knowingly go through the time, effort, and expense of enrolling in an education program that trains the borrower for an occupation for which the borrower is unemployable. A far more common scenario is unscrupulous schools recruiting students with disqualifying conditions who cannot possibly benefit from the training programs that the school offers.

With regard to borrowers who do not have a disqualifying condition at the time of enrollment, the regulations specify that a borrower qualifies for the discharge only if the borrower had a disqualifying condition that ''would have'' disqualified the borrower from employment in the occupation, and that the borrower ''did not meet'' State requirements for employment in the career. A condition that arose after the borrower was no longer enrolled at the school would not qualify the borrower for a false certification discharge due to a disqualifying condition.

We addressed the question of expanding the scope of this provision to include non-State requirements for employment in certain fields, such as employment standards established by professional associations during the negotiated rulemaking sessions and in the NPRM. As we noted earlier, employment standards established by professional associations could vary, and it would not be practical to require schools to determine which professional association standards to use. The reference to the Gainful Employment requirements is inapplicable here, as the Gainful Employment requirements relate to the quality of a school's program.

Changes: We have revised § 685.308(a) to clarify that Department assesses liabilities to schools for false certification due to disqualifying condition or identity theft.

Satisfactory Academic Progress

Comments: A group of commenters supported the proposed regulation that would provide automatic false certification loan discharges for students whose satisfactory academic progress (SAP) was falsified by an institution. While the regulation specifies that these loan discharges are initiated by the Department, these commenters requested that borrowers be permitted to submit an application for false certification loan discharge due to the falsification of satisfactory academic progress by an institution.

The commenters urged the Department to clarify that students may also apply for a discharge on this basis, rather than wait for the Department to grant discharges without applications. The commenters observed that there are often False Claims Act and government cases involving false certification of SAP, and that many students also know when their academic progress was falsified by schools, but are not covered by such cases.

The commenters suggested that information provided by students in discharge applications would also allow the Department to identify bad-acting schools and prevent abuse of title IV, HEA funding. These commenters recommended that the Department revise the proposed rules to provide a means for students to individually apply for discharge when their SAP is falsely certified by their school.

Discussion: We continue to believe that allowing individual borrowers to apply for false certification discharges due to falsification of SAP is not practical. As we discussed in the NPRM, schools have a great deal of flexibility both in determining and in implementing SAP standards. There are a number of exceptions under which a borrower who fails to meet SAP can continue to receive title IV loans. Borrowers who are in danger of losing title IV eligibility due to a failure to meet SAP standards often request reconsideration of the SAP determination. Schools often work with borrowers in good faith efforts to attempt to resolve the situation without cutting off the borrower's access to title IV assistance.

We do not believe that a school should be penalized for legitimate attempts to help a student who is not meeting SAP standards, nor do we believe a student who has successfully appealed a SAP determination should be able to use that initial SAP determination to obtain a false certification discharge on his or her student loans. In addition, we continue to believe that it would be very difficult for an individual borrower to sufficiently demonstrate that a school violated its own SAP procedures.

Given these considerations, the final regulations continue to limit false certification discharges based on falsification of SAP to discharges based on information in the Secretary's possession.

Changes: None.

Ability To Benefit

Comments: A group of commenters requested that the Department reconsider the evidentiary standard for false certification of a borrower's ability to benefit. In these commenters' view, the requirement for additional corroborating evidence beyond the self-certification of the borrower is unreasonable. The commenters suggested that borrowers who are unable to obtain corroborating evidence should be able to submit a sworn statement in support of their false certification application.

These commenters referenced two DCLs the Department issued in connection with false certification of ability to benefit: DCL GEN–95–42 (dated September 1995) and DCL FP–07–09 (dated September 2009). The commenters characterized the DCLs as establishing a presumption that students who claim ability to benefit fraud are not telling the truth unless they submit independent corroborating evidence to support their discharge application. To support this claim, these commenters quoted the statement in DCL GEN–95–42 that the absence of findings of improper ability to benefit practices by authorities with oversight powers ''raises an inference that no improper practices were reported because none were taking place.''

The commenters asserted that many borrowers cannot provide proof of Federal or State investigations of particular schools because enforcement has been lenient in this area. They asserted that, in 1992, Congress provided for the false certification discharge and overhauled the student loan system because oversight of schools was inadequate.

A group of commenters criticized the Department's current approach, and noted that statements that a borrower makes on the current Loan Discharge Application: False Certification (Ability to Benefit) are made under penalty of perjury. According to commenters, if a borrower is unable to provide investigative findings supporting the borrower's claim, the Department or the guaranty agency will deny the discharge unless the borrower submits additional corroborating evidence (such as statements by school officials or statements made in other borrower claims for discharge relief).

The commenters noted that DCL FP–07–09 discusses guaranty agencies' consideration of ''the incidence of discharge applications filed regarding that school by students who attended the school during the same time frame as the applicant,'' and suggested that students have no way of knowing whether a guaranty agency has done so in evaluating their applications.

The commenters asserted that students do not have access to school employee statements and do not know whether other borrowers have filed similar claims for relief. When borrowers are able to find attorneys to help them, attorneys are often unable to obtain the required evidence through Freedom of Information Act requests. The commenters also asserted that the Department does not have possession of all false certification discharge applications and does not ensure that copies are retained when guaranty agencies go out of business or retain all potentially corroborating evidence. In addition, if the student has carried the debt for years before learning of their right to a false certification discharge, the school may have closed. At that point, key documents and corroborating evidence may no longer be available.

The commenters recommended that the Department revise its proposed regulations to specify that a student may establish a right to a false certification discharge through a ''preponderance of the evidence,'' as it has proposed for borrower defense claims. In addition, the commenters recommended that borrowers be presumptively eligible for discharge after application in the following circumstances:

- The school's academic and financial aid files do not include a copy of test answers and results showing that the borrower obtained a passing score on an ability-to-benefit test approved by the Secretary;
- No testing agency has registered a passing score on an ability-to-benefit test approved by the Secretary for the borrower; or
- The school directed the borrower to take an online test to obtain a high school degree, the borrower believed the test to be legitimate, and the high school diploma is invalid.

Discussion: In the NPRM, we removed the references to ''ability to benefit'' from the Direct Loan false certification regulatory language and replaced it with a cross-reference to section 484(d) of the HEA, and have retained that change in the final regulations. Section 484(d) establishes the current borrower eligibility requirements for students who are not high school graduates. The current alternative to graduation from high school requirements are substantially different from the earlier ability to benefit requirements. We have provided guidance describing the current alternative to high school graduation requirements in DCL GEN–16–09.

We disagree with the recommendation to revise the regulations pertaining to the evidentiary standards for false certification of ability to benefit. Any modifications to these regulations could only be applied prospectively. Schools can be held liable for false certification discharges, and we cannot impose retroactive requirements on schools.

We also disagree with the commenters' characterization of the guidance in DCL GEN–95–42 and DCL FP–07–09. DCL FP–07–09 does not require a borrower to provide additional corroborating evidence if the borrower is unable to do so. That DCL provides examples of ''credible evidence'' that would provide a guaranty agency with ''an adequate basis for granting a discharge application'' when there is no borrower-specific evidence that the borrower qualifies for a discharge due to false certification of ability to benefit.

We believe the two DCLs still provide an accurate description of the legal requirements for false certification, so we do not have plans to update them in the near future.

Changes: None.

Interest Capitalization (Sections 682.202(b)(1), 682.405, and 682.410(b)(4))

Comments: Several commenters supported the proposed changes in §§ 682.202(b)(1), 682.405, and 682.410(b)(4), providing that a guaranty agency may not capitalize unpaid interest after a defaulted FFEL Loan has been rehabilitated, and that a lender may not capitalize unpaid interest when purchasing a rehabilitated FFEL Loan.

A group of commenters noted that in the preamble to the NPRM, the Department characterized these changes as clarifications of existing regulations. The commenters disagreed with this characterization, stating that during the negotiated rulemaking sessions, negotiators representing guaranty agencies, lenders, and servicers did not agree that current regulations prohibit the capitalization of interest following loan rehabilitation. The commenters further stated that the negotiating committee agreed to add this issue to the negotiating agenda after an agreement was reached with the Department that the proposed changes represented a change in policy for prospective implementation. The commenters added that when the Department was asked by another member of the negotiating committee whether the proposed changes would have any retroactive impact, the Department responded that retroactive application was not the issue being negotiated. The commenter requested that the Department clarify in the final regulations that the changes to the FFEL Program regulations prohibiting the capitalization of interest following loan rehabilitation are amendments to the current rules, consistent with the commenters' understanding of what was agreed to during the negotiations. Based on that understanding, the commenters stated that FFEL Program guarantors, lenders, and servicers are planning to implement the changes for loans that go into default on or after the effective date of the regulations and are subsequently rehabilitated.

Discussion: We thank the commenters for their support of the changes to prohibit interest capitalization following loan rehabilitation. In response to the group of commenters who requested confirmation that the changes in §§ 682.202(b)(1), 682.405, and 682.410(b)(4) represent amendments to the current regulations and are to be applied only prospectively, we confirm that this is the intent.

Changes: None.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, it must be determined whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action will have an annual effect on the economy of more than $100 million because regulations would have annual federal budget impacts of approximately $1.9 billion in the low impact scenario to $3.5 billion in the high impact scenario at 3 percent discounting and $1.8 billion and $3.4 billion at 7 percent discounting, additional transfers from affected institutions to student borrowers via reimbursements to the Federal government, and annual quantified costs of $9.8 million related to paperwork burden. Therefore, this final action is ''economically significant'' and subject to review by OMB under section 3(f)(1) of Executive Order 12866. Notwithstanding this determination, we have assessed the potential costs and benefits, both quantitative and qualitative, of this final regulatory action and have determined that the benefits justify the costs.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these final regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

In accordance with both Executive Orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

In this Regulatory Impact Analysis (RIA) we discuss the need for regulatory action, the comments about the NPRM analysis and significant changes from the NPRM, the potential costs and benefits, net budget impacts, assumptions, limitations, and data sources, as well as regulatory alternatives we considered. Although the majority of the costs related to information collection are discussed within this RIA, elsewhere in this notice under *Paperwork Reduction Act of 1995,* we also identify and further explain burdens specifically associated with information collection requirements.

1. Need for Regulatory Action

These final regulations address several topics related to the administration of title IV, HEA student aid programs and benefits and options for borrowers.

As detailed in the NPRM, the Department last revised the borrower defense regulations over two decades ago, and until recently, use of borrower defense has been very limited. The lack of clarity in the current regulations has led to much confusion among borrowers regarding what protections and actions for recourse are available to them when dealing with cases of wrongdoing by their institutions. The Department received comments addressing this lack of clarity during the public comment period.

The need for a clearer and more efficient process was also highlighted when the collapse of Corinthian generated an unprecedented level of borrower defense claims activity. As detailed extensively in the NPRM, Corinthian, a publicly traded for-profit higher education company that in 2014 enrolled over 70,000 students at more than 100 campuses nationwide, filed for bankruptcy in 2015 after being the subject of multiple investigations and actions by Federal and State governments. The Department committed itself to ensuring that students harmed by Corinthian's misrepresentations receive the relief to which they are entitled, and realized that the existing regulations made this process burdensome, both for borrowers and for the Department. Under the current process, the Department would be required to devote significant resources to reviewing individual State laws to determine which law to apply to each borrower's claim. The Department appointed a Special Master in June of 2015 to create and oversee the process of providing debt relief for these Corinthian students. As of October 2016, approximately 3,787 borrower defense discharges totaling $73.1 million had been completed and another 7,858 closed school discharges totaling approximately $103.1 million have been processed. Moreover, the Department has received thousands more claims—both from former Corinthian students and from students at a number of other institutions—that are pending a full review, and expects to receive more as the Department continues to conduct outreach to potentially affected students.

The Department remains committed to ensuring that borrowers with a valid defense to repayment are able to benefit from this option. Research has shown that large sums of student debt can reduce levels of participation in the economy, especially if borrowers are unable to obtain adequate income to repay their debts.[96] If the borrower is harmed such as by being provided with educational credentials worth significantly less than an institution's misrepresentation has led him or her to believe, the borrower may be entitled to some relief from the loans associated with such education. The changes to the borrower defense provisions in these final regulations will update the process and standard for determining relief and allow the Department to effectively address claims that arise in the modern postsecondary educational system.

The landscape of higher education has changed significantly over the past 20 years, including a substantial increase in the number of students enrolled in distance education. Because distance education allows students to enroll in courses and programs based in other States and jurisdictions, it has created additional challenges as it relates to the Department's current borrower defense regulations.

The current regulations require an analysis of State law to determine the validity of a borrower defense claim. This approach creates complexities in determining which State law applies and may give rise to potential inequities, as students in one State may receive different relief than students in another State, despite common underlying facts and claims.

The expansion of distance education has also impacted the Department's ability to apply its borrower defense regulations. The current borrower defense regulations do not identify which State's law is considered the ''applicable'' State law on which the borrower's claim can be based.[97] Generally, the regulation was assumed to refer to the laws of the State in which the institution was located; we did not have much occasion to address differences in protection for borrowers in States that offer little protection from school misconduct or borrowers who reside in one State but are enrolled via distance education in a program based in another State. Some States have extended their rules to protect these students, while others have not.

The final regulations give students access to consistent, clear, fair, and transparent processes to seek debt relief. The new Federal standard will allow a borrower to assert a borrower defense on the basis of a substantial misrepresentation, a breach of contract, or a favorable, nondefault contested judgment against the school for its act or omission relating to the making of the borrower's Direct Loan or the provision of educational services for which the loan was provided. Additionally, the final regulations separately address predispute arbitration clauses, another possible obstacle to borrowers pursuing a borrower defense claim. These final regulations also prohibit a school participating in the Direct Loan Program from obtaining, through the use of contractual provisions or other agreements, a predispute agreement for arbitration to resolve claims brought by a borrower against the school that could also form the basis of a borrower defense under the Department's

[96] The Economics of Student Loan Borrowing and Repayment, Wen Li, Federal Reserve Bank of Philadelphia, available at *https://philadelphiafed.org/-/media/research-and-data/publications/business-review/2013/q3/brq313_economics-of-student-loan-borrowing-and-repayment.pdf.*

[97] In the few instances prior to 2015 in which claims have been recognized under current regulations, borrowers and the school were typically located in the same State.

regulations. The final regulations also prohibit a school participating in the Direct Loan Program from obtaining an agreement, either in an arbitration agreement or in another form, that a borrower waive his or her right to initiate or participate in a class action lawsuit regarding such claims and from requiring students to engage in internal dispute processes before contacting accrediting or government agencies with authority over the school regarding such claims. In addition, the final regulations establish the conditions or events upon which an institution is or may be required to provide to the Department financial protection, such as a letter of credit, to help protect students, the Federal government, and taxpayers against potential institutional liabilities.

Additionally, to enhance and clarify other existing protections for students, these regulations update the basis for obtaining a false certification discharge, clarify the processes for false certification and closed school discharges, require institutions to provide applications and explain the benefits and consequences of a closed school discharge, and establish a process for a closed school discharge without an application for students who do not re-enroll in a title IV-participating institution within three years of an institution's closure. These regulations also codify the Department's practice that a discharge based on school closure, false certification, unpaid refund, or defense to repayment will result in the elimination or recalculation of the subsidized usage period associated with the loan discharged.

These regulations also amend the regulations governing the consolidation of Nursing Student Loans and Nurse Faculty Loans so that they align with the statutory requirements of section 428C(a)(4)(E) of the HEA; clarify rules regulating the capitalization of interest on defaulted FFEL Loans; require that proprietary schools at which the median borrower has not repaid in full, or paid down the balance of, the borrower's loans include a warning in advertising and promotional materials about those repayment rate outcomes; require that a school disclose on its Web site and to prospective and enrolled students about events for which it is required to provide financial protection to the Department; clarify the treatment of spousal income in the PAYE and REPAYE plans; and make other changes that we do not expect to have a significant economic impact.

2. Summary of Comments and Changes From the NPRM

A number of commenters expressed that the RIA in the NPRM was inadequate and did not support proceeding with the regulations without further study. Commenters noted that the accuracy of several of the Department's past budget estimates had been questioned by Congressional committees and other outside reviewers. Several commenters pointed out that the wide range in the estimate, from $646 million up to $41.3 billion over the 2017 to 2026 loan cohorts, indicated that the Department does not know the potential budget impact of the regulation. Other commenters noted that if the impact is at the higher end of the range, the analysis does not quantify benefits greater than the costs to justify the decision to proceed with the regulations.

Another set of comments focused on the impact of the regulations on higher education, the costs to institutions, and the potential for institutional closures. A number of commenters expressed concern that institutional closures related to the regulations, especially the financial responsibility provisions, will reduce access to higher education for low-income and minority students. Materials included with the comments analyzed National Postsecondary Student Aid Study 2012 (NPSAS 2012) data to demonstrate that students at for-profit institutions are, on average, more likely to be older, racial minorities, veterans, part-time, financially independent, responsible for dependents, and Pell Grant recipients. A number of commenters suggested that the costs of providing financial protection would result in increased costs for students and potentially limit access to higher education. Other commenters were concerned with a lack of analysis about the costs of the financial protection or the possibility that schools would be unable to obtain a letter of credit and would lose access to title IV, HEA funding and be forced to close. Several commenters suggested that the regulations would open the floodgates to frivolous claims that would overwhelm the Department and institutions, exacerbating the harmful effects on higher education.

One commenter argued that the proposed regulations would result in a large number of disappointed borrowers filing borrower defense claims without merit. Several commenters were concerned that the projected net budget impact referred to in the NPRM of as much as $42.698 billion during the coming decade would undermine the integrity of the Direct Loan Program and that neither American taxpayers, nor schools that have successfully educated students, could cover these costs if thousands of students or graduates start requesting discharges of their loans. The commenters argued that the regulations lack any quality control measure to ensure that the Department would not be hit with an influx of fraudulent claims. They cited a recent lawsuit in which a former law student unsuccessfully sued her law school for false advertising.

Finally, a number of commenters suggested the high cost estimate was overstated because schools would change their practices and limit behavior that would result in valid borrower defense claims. Another commenter questioned the characterization of the net budget impact as a cost based on the idea that the Department should not collect on loans established fraudulently. Several commenters noted that the potential fiscal impact should not factor into decisions about whether borrowers are eligible for relief.

We appreciate the comments about the RIA in the NPRM. As discussed in the NPRM, given the limited history of borrower defense claims and the limitations of available data, there is uncertainty about the potential impact of the regulations. Per OMB Circular A–4, in some cases, uncertainty may be addressed by presenting discrete alternative scenarios without addressing the likelihood of each scenario quantitatively. The uncertainty about borrower defense was acknowledged and reflected in the wide range of scenario estimates in the NPRM. The Department presented the range of scenarios and discussion of sources of uncertainty in the estimates in order to be transparent and encourage comments that might aid the Department in refining the estimates for the final regulations.

We do not agree that the analysis was inadequate to support proceeding with the regulations. Under Executive Orders 12866 and 13563, the Department must adopt a regulation only upon a reasoned determination that its benefits justify its cost. The Executive Orders recognize that some benefits and costs are difficult to quantify, and provide that costs and benefits include both quantifiable measures—to the fullest extent that they can be usefully estimated—as well as qualitative measures of costs and benefits that are difficult to quantify but ''essential to consider.'' OMB Circular A–4 provides that in cases where benefit and cost estimates are uncertain, benefit and cost estimates that reflect the full probability distribution of potential consequences should be reported. Where possible, the analysis should present probability distributions of benefits and costs and include the upper and lower bound estimates as complements to central tendency and other estimates. If a lack of knowledge prevents construction of a scientifically defensible probability distribution, the Department should describe benefits or costs under plausible scenarios and characterize the evidence and assumptions underlying each alternative scenario. The Department took this approach in the NPRM and presents the analysis with relevant revisions for the final regulations.

OMB Circular A–4 suggests that in some instances when uncertainty has significant effects on the final conclusion about net benefits, the agency should consider additional research prior to rulemaking. For example, when the uncertainty is due to a lack of data, the agency might consider deferring rulemaking, pending further study to obtain sufficient data. Delaying a decision will also have costs, as will further efforts at data gathering and analysis. The Department has weighed the benefits of delay against these costs in making the decision to proceed with the regulation. With respect to borrower defense, if the Department did not proceed with the final regulations, the existing borrower defense provisions would remain in effect and some of the costs associated with potential claims would be incurred whether or not the final regulations go into effect. The final regulations build in more clarity and add accountability and transparency provisions that are designed to shift risk from the taxpayers to institutions. Moreover, if the Department were to delay implementation of the final regulations to obtain further information about the scope of institutional behavior that could give rise to claims, it is not clear when a significant amount of relevant data would become available. Borrower responses in absence of the process established in the final regulations do not necessarily reflect the level of claims that will be processed under the final regulations. Delaying the regulations would delay the improved clarity and accountability from the regulations without developing additional data within a definite timeframe, and we do not believe the benefits of such a delay outweigh the costs. As with any regulation, additional data that becomes available will be taken into account in the ongoing re-estimates of the title IV, HEA aid programs.

We have considered the other comments received. Revisions to the analysis in response to those comments and our internal review of the analysis are incorporated into the *Discussion of Costs, Benefits, and Transfers* and *Net Budget Impacts* sections of this RIA as applicable. Table 1 summarizes significant changes made from the NPRM in response to comments and the Department's ongoing development of the final regulations.

TABLE 1—SUMMARY OF KEY CHANGES IN THE FINAL REGULATIONS

Reg section	Description of change
Financial Responsibility Triggers:	
§ 668.171(c)(1)	As detailed in Table 2, eliminates the $750,000 or 10 percent of current assets materiality threshold. Instead, losses from all of the automatic triggers except 90/10, cohort default rate (CDR), SEC delisting, and SEC warning, are used to recalculate the composite score. If the recalculated score is less than 1.0, the school is not financially responsible and must provide financial protection.
	Removes Form 8–K trigger from proposed § 668.171(c)(10)(vii).
	Eliminates discretionary trigger based on bond or credit ratings from proposed § 668.171(c)(10)(iv).
§ 668.171(h)	Reclassifies proposed automatic triggers including those related to accreditor probation and show-cause actions, pending borrower defense claims, and violations of loan agreements as discretionary triggers.
	Specifies that in its notice reporting a triggering event, an institution may demonstrate mitigating factors about the event, including that the reported action or event no longer exists or has been resolved or the institution has insurance that will cover part or all of the debts and liabilities that arise at any time from that action or event.
Financial Protection Disclosures:	
§ 668.41(i)	Revised to clarify that the Secretary will conduct consumer testing prior to establishing the actions and triggering events that require financial disclosures.
	Further clarifies the requirements for testing with consumers before publishing the content of the disclosure, as well as the disclosure delivery requirements to prospective and enrolled students.
Financial Responsibility:	
§ 668.175(f)(5)	Clarifies how long an institution must maintain the financial protection associated with a triggering event in § 668.171.
§ 668.175(f)(2)(i)	Provides that the Secretary may identify other acceptable forms of financial protection.
§ 668.175(h)	Provides that the Secretary will release any funds held under a set-aside if the institution subsequently provides cash, the letter of credit, or other financial protection required under the zone or provisional certification alternatives in § 668.175(d) or (f).
Repayment Rate:	
§ 668.41(h)(3)	Clarifies that the Secretary will calculate a repayment rate based on the proportion of students who have repaid at least one dollar in outstanding balance, measured in the third year after entering repayment, using data reported and validated through the Gainful Employment program-level repayment rate calculation.
	Removes the requirement that repayment rate warnings be delivered individually to all prospective and enrolled students. Enhances the requirement as to how repayment rate warnings must be presented in advertising and promotional materials.

TABLE 1—SUMMARY OF KEY CHANGES IN THE FINAL REGULATIONS—Continued

Reg section	Description of change
	Closed School Discharge:
§ 682.402(d)(7)(ii)	Requires a lender to provide a borrower another closed school discharge application upon resuming collection.
§§ 674.33(g)(3), 682.402(d)(8), and 685.214(c)(2).	Revised to clearly delineate the circumstances under which a closed school discharge is discretionary, as opposed to required.
§ 682.402(d)(6)(ii)(F)	Revised to stipulate that a guaranty agency that denies a borrower's closed school discharge request must notify the borrower of the reasons for the denial.
§ 682.402(d)	Updates wording in FFEL closed school discharge regulations to refer to application instead of sworn statement or written request.
	False Certification Discharge:
§ 685.215(c)(1)	Clarifies that a borrower must have reported to the school that the borrower did not have a high school diploma or its equivalent.
§ 685.308(a)	Clarifies that the Department assesses liabilities to schools for false certification due to disqualifying condition or identity theft.
	Predispute Agreements
§ 685.300	Eliminates the use of predispute arbitration agreements, whether or not they are mandatory, to resolve claims brought by a borrower against the school that could also form the basis of a borrower defense or to prevent a student who has obtained or benefited from a Direct Loan from participating in a class action suit related to borrower defense claim.

3. Discussion of Costs, Benefits, and Transfers

In developing the final regulations, the Department made some changes to address concerns expressed by commenters and to achieve the objectives of the regulations while acknowledging the potential costs of the provisions to institutions and taxpayers. As noted in the NPRM, the primary potential benefits of these regulations are: (1) An updated and clarified process and a Federal standard to improve the borrower defense process and usage of the borrower defense process to increase protections for students; (2) increased financial protections for taxpayers and the Federal government; (3) additional information to help students, prospective students, and their families make educated decisions based on information about an institution's financial soundness and its borrowers' loan repayment outcomes; (4) improved conduct of schools by holding individual institutions accountable and thereby deterring misconduct by other schools; (5) improved awareness and usage, where appropriate, of closed school and false certification discharges; and (6) technical changes to improve the administration of the title IV, HEA programs. Costs associated with the regulations will fall on a number of affected entities including institutions, guaranty agencies, the Federal government, and taxpayers. These costs include changes to business practices, review of marketing materials, additional employee training, and unreimbursed claims covered by taxpayers. The largest quantified impact of the regulations is the transfer of funds from the Federal government to borrowers who succeed in a borrower defense claim, a significant share of which will be offset by the recovery of funds from institutions whose conduct gave rise to the claims.

We have considered and determined the primary costs and benefits of these regulations for the following groups or entities that we expect to be impacted by the proposed regulations:

- Students and borrowers
- Institutions
- Guaranty agencies and loan servicers
- Federal, State, and local government

Borrower Defense, Closed School Discharges, and False Certification Discharges

Students and Borrowers

The fundamental underlying right of borrowers to assert a defense to repayment and obligation of institutions to reimburse the Federal government for such claims that are valid exist under the current borrower defense regulations. These final regulations aim to establish processes that enable more borrowers to pursue valid claims and increase their likelihood of discharging their loans as a result of institutional actions generating such claims. As detailed in the NPRM, borrowers will be the primary beneficiaries of these regulations as greater awareness of borrower defense, a common Federal standard, and a better defined process may encourage borrowers who may have been unaware of the process, or intimidated by its complexity in the past, to file claims.

Furthermore, these changes could reduce the number of borrowers who are struggling to meet their student loan obligations. During the public comment periods of the negotiated rulemaking sessions, many public commenters who were borrowers mentioned that they felt that they had been defrauded by their institutions of higher education and were unable to pay their student loans, understand the borrower defense process, or obtain debt relief for their FFEL Loans under the current regulations. We received many comments on the NPRM echoing this sentiment.

Through the financial responsibility provisions, these final regulations introduce far stronger incentives for schools to avoid committing acts or making omissions that could lead to a valid borrower defense claim than currently exist. In addition, through clarification of circumstances that could lead to a valid claim, institutions may better avoid behavior that could result in a valid claim and future borrowers may be less likely to face such behavior.

Providing an automatic forbearance with an option for the borrower to decline the temporary relief and continue making payments will reduce the potential burden on borrowers pursuing borrower defenses. These borrowers will be able to focus on supplying the information needed to process their borrower defense claims without the pressure of continuing to make payments on loans for which they are currently seeking relief. When claims are successful, there will be a transfer between the Federal government and affected student borrowers as balances are forgiven and some past payments are returned. In the scenarios described in the Net Budget Impacts section of this analysis, those transfers range from $1.7 billion for the minimum budget estimate to $3.3 billion in the maximum impact estimate annually, with the primary budget estimate at $2.5 billion annually.

Borrowers who ultimately have their loans discharged will be relieved of debts they may not have been able to repay, and that debt relief can ultimately allow them to become bigger participants in the economy, possibly buying a home, saving for retirement, or paying for other expenses. Recent literature related to student loans suggests that high levels of student debt may decrease the long-term probability of marriage,[98] increase the probability of bankruptcy,[99] reduce home ownership rates,[100] and increase credit constraints, especially for students who drop out.[101] Further, when borrowers default on their loans, everyday activities like signing up for utilities, obtaining insurance, or renting an apartment can become a challenge.[102] Borrowers who default might also be denied a job due to poor credit, struggle to pay fees necessary to maintain professional licenses, or be unable open a new checking account.[103] While difficult to quantify because of the multitude of different potential borrowing profiles and nature of the claims of those who will seek relief through borrower defense and the possibility of partial relief, the discharge of loans for which borrowers have valid borrower defenses could have significant positive consequences for affected borrowers and associated spillover economic benefits.

Affected borrowers also will be able to return into the higher education marketplace and pursue credentials they need for career advancement. To the extent borrowers have subsidized loans, the elimination or recalculation of the borrowers' subsidized usage period could relieve them of their responsibility for accrued interest and make them eligible for additional subsidized loans, which could make returning to higher education a more acceptable option.

These regulations will also give borrowers more information with which they can make informed decisions about the institutions they choose to attend. An institution will be required to provide a disclosure for certain actions and triggering events, to be determined through consumer testing, for which it was required to obtain a letter of credit. Recent events involving closure of several large proprietary institutions have shown the need for lawmakers, regulatory bodies, State authorizers, taxpayers, and students to be more broadly aware of circumstances that could affect the continued existence of an institution. This disclosure, the content of which will be prescribed by the Secretary in a notice published in the **Federal Register**, will allow borrowers to receive early warning signs about an institution's risk for students, and therefore borrowers may be able to select a different college, or withdraw or transfer to an institution in better standing in lieu of continuing to work towards earning credentials that may have limited value.

Proprietary institutions will also be required to provide a warning through advertising and promotional materials if their loan repayment rate, based on the proportion of students who have repaid at least one dollar in outstanding balance and measured in the third year after entering repayment, using data reported and validated through the Gainful Employment repayment rate calculation, shows that the median borrower has not paid down his balance by at least one dollar. To estimate the effect of the repayment rate warning on institutions, the Department analyzed program-level repayment rate data prepared for the Gainful Employment regulation[104] and aggregated the proprietary institutions data to the 6-digit OPEID level and found that 972 of 1,345 institutions in the 2012 Gainful Employment data had a repayment rate that showed the median borrower had not paid down the balance of the borrower's loans by at least one dollar.

A number of commenters pointed to the Department's failure to quantify the benefits of the proposed regulations in the NPRM as an indication that the analysis did not support the implementation of the final regulations. As mentioned throughout the RIA, the extent of the private and public benefit from the regulations is difficult to quantify. We have limited experience with borrower defense claims to draw upon in generating a profile of those likely to make successful claims. There are different potential profiles of student loan borrowers in terms of loan amounts, loan type composition, likelihood of default, fields of employment, degree level, and other factors. We do not have a basis in the data from existing claims to know how borrower profiles and the distribution and nature of claims will intersect. The economic and psychological benefits of debt relief may vary for a graduate student with high income potential receiving partial relief on a high level of debt and a student who dropped out of a certificate program with a lower level of debt and lower earnings potential from that program of education. While we do not quantify the amount, we expect the benefits associated with the substantial transfers to students from successful borrower defense claims will be significant. Several commenters noted that students may face costs or other negative impacts from these final regulations. In particular, commenters expressed concern that the closure of institutions, especially proprietary institutions that serve many low-income, minority, first-generation, and non-traditional students, will hurt access to higher education, especially for those groups. The Department acknowledges that some institutions may close if their actions mean that they are required to provide a substantial amount of financial protection, or that a large number of successful claims are made against them. However, as the regulation comes into effect and examples of conduct that generates claims are better understood, we expect institutions will limit such behavior and compete for students without such conduct, and that closures will be reduced over time. The Department also believes that institutions that do not face significant claims will be able to provide opportunities for students in

[98] Gicheva, D. "In Debt and Alone? Examining the Causal Link between Student Loans and Marriage." Working Paper (2013).

[99] Gicheva, D., and U. N. C. Greensboro. "The Effects of Student Loans on Long-Term Household Financial Stability." Working Paper (2014).

[100] Shand, J. M. (2007). "The Impact of Early-Life Debt on the Homeownership Rates of Young Households: An Empirical Investigation." Federal Deposit Insurance Corporation Center for Financial Research.

[101] Id.

[102] *https://studentaid.ed.gov/repay-loans/default.*

[103] *www.asa.org/in-default/consequences/.*

[104] A privacy-protected version of the data is available at *http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/2013-repayment-rate-data.xls.* The Department aggregated all program numerators and denominators to each unique six-digit OPEID and calculated how many institutions had aggregate rates under the negative amortization threshold and at least 10 borrowers in the denominator. Note that these data reflect students who entered repayment in 2007 and 2008; analysis of later cohorts (those who entered repayment in 2011 and 2012) published through the College Scorecard, which calculate a similar repayment rate, showed 501 institutions with repayment rates below the negative amortization threshold.

the event of closures of other institutions that do.

Another possible impact on students mentioned by some commenters is that the costs of financial protection or other compliance measures will be passed on to students in tuition and fee increases. We believe potential tuition increases will be constrained by loan limits and other initiatives, such as the Department's Gainful Employment regulations, where institutions would be negatively affected by such increases.

Institutions

Institutions will bear many of this regulation's costs, which fall into three categories: Paperwork costs associated with compliance with the regulations; other compliance costs that may be incurred as institutions adapt their business practices and training to ensure compliance with the regulations; and costs associated with obtaining letters of credit or suitable equivalents if required by the institution's performance under a variety of triggers. Additionally, there may be a potentially significant amount of funds transferred between institutions and the Federal government as reimbursement for successful claims. Some institutions may close some or all of their programs if their activities generate large numbers of borrower defense claims.

A key consideration in evaluating the effect on institutions is the distribution of the impact. While all institutions participating in title IV loan programs are subject to the possibility of borrower defense, closed school, and false certification claims and the reporting requirements in these final regulations, the Department expects that fewer institutions will engage in conduct that generates borrower defense claims. Over time, the Department expects the number of schools that would face the most significant costs to come into compliance, the amount of transfers to reimburse the government for successful claims, costs to obtain required letters of credit, and disclosure of borrower defense claims against the schools to be reduced as some offenders are eliminated and other institutions adjust their practices. In the primary budget scenario described in the Net Budget Impacts section of this analysis, the annual transfers from institutions to students, via the Federal government, as reimbursement for successful claims are estimated at $994 million. On the other hand, it is possible that high-quality, compliant institutions, especially in the for-profit sector, will see benefits if the overall reputation of the sector improves as a result of (1) more trust that enforcement against bad actors will be effective, and (2) the removal of bad schools from the higher education marketplace, freeing up market share for the remaining schools.

The accountability framework in the regulations requiring institutions to provide financial protection in response to various triggers would generate costs for institutions. Some of the triggering provisions would affect institutions differently depending upon their type and control, as, for example, only publicly traded institutions are subject to delisting or SEC suspension of trading, only proprietary institutions are subject to the 90/10 rule, and public institutions are not subject to the financial protection requirements. To the extent data were available, we evaluated the financial protection triggers to analyze the expected impact on institutions. Several of the triggers are based on existing performance measures and are aimed at identifying institutions that may face sanctions and experience difficulty meeting their financial obligations. The triggers and, where available, data about their potential impact are discussed in Table 2. The consequences of an institution being found to be not financially responsible are set out in § 668.175 and include providing financial protection through a letter of credit, a set-aside of title IV, HEA funds, or other forms of financial protection specified by the Secretary in a notice published in the **Federal Register**. Alternatively, an institution that can prove it has insurance that covers the triggering risk is not considered to be not financially responsible and does not need to provide financial protection to the Department.

The Department will review the triggering events before determining whether to require separate financial protection for a triggering event that occurs with other triggering events. Another change from the NPRM concerns those triggers that include a materiality threshold. Instead of being evaluated separately, lawsuits, borrower protection repayments to the Secretary, losses from gainful employment and campus closures, withdrawal of owner's equity, and other triggers with a materiality threshold will be evaluated by their effect on the institution's most recent composite score, which will allow the cumulative effect of violation of multiple triggers to be taken into account. If the recalculated composite score is a failing score, institutions would be required to provide financial protection. For the triggers evaluated through the revised composite score approach, the required financial protection is 10 percent or more, as determined by the Secretary, of the total amount of title IV, HEA program received by the institution during its most recently completed fiscal year. For the other triggers, the amount of financial protection required remains 10 percent or more, as determined by the Secretary, of the total amount of title IV, HEA program received by the institution during its most recently completed fiscal year, unless the Department determines that based on the facts of that particular case, the potential losses are greater.

TABLE 2—FINANCIAL RESPONSIBILITY TRIGGERS

Description	Impact
Automatic Triggers Evaluated through Revised Composite Score Calculation	
Institution found to be not financially responsible under § 668.171 and must qualify under an alternative standard if the addition of the triggering liability to the institution's most recently calculated composite score causes it to fail the composite score. Triggering liabilities that occur during the period between the fiscal year for which the Secretary last calculated the institution's composite score under § 668.172 and the next following fiscal year for which the Secretary calculates a composite score are evaluated. Requires financial protection of no less than 10 percent of prior year's title IV, HEA aid and such additional amount as the Secretary demonstrates is needed to protect from other losses that may arise within the next 18 months.	

TABLE 2—FINANCIAL RESPONSIBILITY TRIGGERS—Continued

Description	Impact
Lawsuits and Other Actions: § 668.171(c)(1)(i) and (ii)	
Triggered if an institution is required to pay any debt or incur any liability arising from a final judgment in a judicial proceeding, or from an administrative proceeding or determination, or from a settlement. Triggered if the institution is being sued in an action brought on or after July 1, 2017 by a Federal or State authority for financial relief on claims related to the making of the Direct Loan for enrollment at the school or the provision of educational services and the suit has been pending for 120 days. Triggered if the institution is being sued in a lawsuit other than by a Federal or State authority related to the making of a Direct Loan or provision of educational services which has survived a motion for summary judgment or the time for such motion has passed. If claims do not state a dollar amount and no amount has been set in a court ruling: (1) For Federal and State borrower defense-related action, the Department will calculate loss by considering claim to seek the amount set by a court ruling, or if no ruling has been issued, in a written demand or settlement offer by the agency, or the amount of all tuition and fees for the period in the suit, for the program or location described in the allegations. Institution allowed to show suit is limited to a smaller portion of the school and that tuition and fees for that portion should be used; and (2) For all other suits the potential loss (if none is stated in the complaint or in a court ruling) is the amount in a written demand pre-suit, the amount offered by the plaintiff to settle, or the amount stated in discovery leading up to a trial.	Since 2010, at least 25 institutions have been investigated or reached settlements with State AGs, with some being involved in actions by multiple States. Federal agencies, including the Department, DOJ, FTC, CFPB, and the SEC have been involved in actions against at least 20 institutions, with multiple actions against some schools.
Accreditor Actions: (Teach-Outs) § 668.171(c)(1)(iii)	
Triggered if institution required by its accrediting agency to submit a teach-out plan that covers the closing of the institution or any of its branches or additional locations. The amount of title IV, HEA aid allocated in the previous year to the closed locations will be used to recalculate the composite score.	
Gainful Employment: § 668.171(c)(1)(iv)	
Triggered if the potential loss from the closure of programs that are one year away from losing their eligibility for title IV, HEA program funds causes the recalculated composite score to fall below 1.0. The amount of title IV, HEA aid allocated in the previous year to programs that could lose eligibility in the next year will be used to recalculate the composite score.	
Withdrawal of Owner's Equity: § 668.171(c)(1)(v)	
The amount of equity withdrawn will be used to recalculate the composite score. Applies only to proprietary institutions and provides that funds transferred between institutions in a group that have a common composite score are not considered withdrawals of owner's equity.	
Automatic Triggers Not Evaluated through Revised Composite Score Calculation	
Institution found to be not financially responsible under § 668.171 and must qualify under an alternative standard if the triggering events occur.	
Non-Title IV Revenue: § 668.171(d)	
If an institution fails the 90/10 revenue test in its most recently completed fiscal year. Applies to proprietary institutions only.	In the most recent 90/10 report, 14 institutions received 90 percent or more of their revenues from title IV, HEA funds. The total title IV, HEA funding for those institutions in award year (AY) 2013–14 was $56.4 million.
Publicly Traded Institutions—SEC or Exchange Actions: § 668.171(e)	
The SEC warns the institution that it may suspend trading on the institution's stock. The institution failed to file a required annual or quarterly report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b–25.	

TABLE 2—FINANCIAL RESPONSIBILITY TRIGGERS—Continued

Description	Impact
The exchange on which the institution's stock is traded notifies the institution that it is not in compliance with exchange requirements, or its stock is delisted.	
Cohort Default Rates: § 668.171(f)	
Triggered if institution's two most recent official cohort default rates are 30 percent or above after any challenges or appeals.	From the most recently released official CDR rates, for FY2013 and FY2012, 20 of 3,058 non-public institutions that had CDR rates in both years were over 30 percent in both years. Title IV, HEA aid received by these institutions in AY2015–16 totaled $12.8 million.
Discretionary Triggers	
Institution found to be not financially responsible under § 668.171 and must qualify under an alternative standard if the Secretary determines that there is an event or condition that is reasonably likely to have a material adverse effect on the financial condition, business, or results of operations of the institution.	
§ 668.171(g)(1): Significant fluctuations in title IV, HEA program funds ..	The Department looked at fluctuations in Direct Loan amounts and found that 1,113 of 3,534 non-public institutions had an absolute change in Direct Loan volume of 25 percent or more between the 2014–15 and 2015–16 award years and 350 had a change of 50 percent or more.
§ 668.171(g)(2): Citation for failing State licensing or authorizing agency requirements.	
§ 668.171(g)(3): Failing financial stress test developed or adopted by the Secretary.	
§ 668.171(g)(4): High annual dropout rates, as calculated by the Secretary.	The Department analyzed College Scorecard data to develop a withdrawal rate within six years. Of 928 proprietary institutions with data, 482 had rates from 0 to 20 percent, 415 from 20 to 40 percent, 30 from 40 to 60 percent, and 1 from 60 to 80 percent. Of 1,058 private not-for-profit institutions with data, 679 had rates from 0 to 20 percent, 328 from 20 to 40 percent, 51 from 40 to 60 percent, and none above 60 percent. Of 1,476 public institutions with data, 857 had rates from 0 to 20 percent, 587 from 20 to 40 percent, 32 from 40 to 60 percent, and none above 60 percent.
§ 668.171(g)(5): The institution was placed on probation or issued a show-cause order or a status that poses equivalent or greater risk to accreditation.	In the March 2015 accreditation report available at *http://ope.ed.gov/accreditation/GetDownLoadFile.aspx,* 278 of 33,956 programs were on probation and 5 were in the resigned under show cause status. Of the 283 programs in those statuses in the March 2015 accreditation report, 9 were closed by institutions or had their accreditation terminated and 147 remained in the same status for at least 6 consecutive months.
§ 668.171(g)(6): Institution violates a provision or requirement in a loan agreement that enables a creditor to require an increase in collateral, a change in contractual obligations, an increase in interest rates or payments, or other sanctions, penalties, or fees.	
§ 668.171(g)(7): The institution has pending claims borrower relief discharge under § 685.206 or § 685.222.	
§ 668.171(g)(8): The Secretary expects to receive a significant number of claims for borrower relief discharge under § 685.206 or § 685.222 as a result of a lawsuit, settlement, judgement, or finding from a State or Federal administrative proceeding.	

In addition to any resources institutions would devote to training or changes in business practices to improve compliance with the final regulations, institutions would incur costs associated with the reporting and disclosure requirements of the final regulations. This additional workload is discussed in more detail under *Paperwork Reduction Act of 1995.* In total, the final regulations are estimated to increase burden on institutions participating in the title IV, HEA programs by 251,049 hours. The monetized cost of this burden on institutions, using wage data developed using BLS data available at *www.bls.gov/ncs/ect/sp/ecsuphst.pdf,* is $9,175,841. This cost was based on an hourly rate of $36.55.

Guaranty Agencies and Loan Servicers

Several provisions may impose a cost on guaranty agencies or lenders, particularly the limits on interest capitalization. Loan servicers may have to update their process to accept electronic death certificates, but increased use of electronic documents should be more efficient over the long term. As indicated in the Paperwork Reduction Act of 1995 section of this preamble, the final regulations are estimated to increase burden on guaranty agencies and loan servicers by 7,622 hours related to the mandatory forbearance for FFEL borrowers considering consolidation for a borrower defense claim and reviews of denied closed school claims. The monetized cost of this burden on guaranty agencies and loan servicers, using wage data developed using BLS data available at *www.bls.gov/ncs/ect/*

sp/ecsuphst.pdf, is $278,584. This cost was based on an hourly rate of $36.55.

Federal, State, and Local Governments

In addition to the costs detailed in the *Net Budget Impacts* section of this analysis, the final regulations will affect the Federal government's administration of the title IV, HEA programs. The borrower defense process in the final regulations will provide a framework for handling claims in the event of significant institutional wrongdoing. The Department may incur some administrative costs or shifting of resources from other activities if the number of applications increases significantly and a large number of claims require hearings. Additionally, to the extent borrower defense claims are not reimbursed by institutions, Federal government resources that could have been used for other purposes will be transferred to affected borrowers. Taxpayers will bear the burden of these unreimbursed claims. In the scenarios presented in the *Net Budget Impacts* section of this analysis, annualized unreimbursed claims range from $923 million to $2.1 billion.

The accountability framework and financial protection triggers will provide some protection for taxpayers as well as potential direction for the Department and other Federal and State investigatory agencies to focus their enforcement efforts. The financial protection triggers may potentially assist the Department as it seeks to identify, and take action regarding, material actions and events that are likely to have an adverse impact on the financial condition or operations of an institution. In addition to the current process where, for the most part, the Department determines annually whether an institution is financially responsible based on its audited financial statements, under these final regulations the Department may determine at the time a material action or event occurs that the institution is not financially responsible.

Other Provisions

The technical corrections and additional changes in the final regulations will benefit student borrowers and the Federal government's administration of the title IV, HEA programs. Updates to the acceptable forms of certification for a death discharge will be more convenient for borrowers' families or estates and the Department. The provision for consolidation of Nurse Faculty Loans reflects current practice and gives those borrowers a way to combine the servicing of all their loans. Many of these technical corrections and changes involve relationships between the student borrowers and the Federal government, such as the clarification in the REPAYE treatment of spousal income and debt, and they are not expected to significantly impact institutions.

4. Net Budget Impacts

The final regulations are estimated to have a net budget impact in costs over the 2017–2026 loan cohorts of $16.6 billion in the primary estimate scenario, including a $381 million modification to cohorts 2014–2016 for the 3-year automatic closed school discharge. A cohort reflects all loans originated in a given fiscal year. Consistent with the requirements of the Credit Reform Act of 1990, budget cost estimates for the student loan programs reflect the estimated net present value of all future non-administrative Federal costs associated with a cohort of loans.

As noted by many commenters, in the NPRM we presented a number of scenarios that generated a wide range of potential budget impacts from $1.997 billion in the lowest impact scenario to $42.698 billion in the highest impact scenario. As described in the NPRM, this range reflected the uncertainty related to the borrower defense provisions in the regulations and our intent to be transparent about the estimates to generate discussion and information that could help to refine the estimates. In response to comments and our own internal review, we have made a number of revisions to the borrower defense budget impact estimate that are described in the discussion of the impact of those provisions.

The provisions with the greatest impact on the net budget impact of the regulations are those related to the discharge of borrowers' loans, especially the changes to borrower defense and closed school discharges. As noted in the NPRM, borrowers may pursue closed school, false certification, or borrower defense discharges depending on the circumstances of the institution's conduct and the borrower's claim. If the institution does not close, the borrower cannot or does not pursue closed school or false certification discharges, or the Secretary determines the borrower's claim is better suited to a borrower defense group process, the borrower may pursue a borrower defense claim. The precise split among the types of claims will depend on the borrower's eligibility and ease of pursuing the different claims. While we recognize that some claims may be fluid in classification between borrower defense and the other discharges, in this analysis any estimated effect from borrower defense related claims are described in that estimate, and the net budget impact in the closed school estimate focuses on the process changes and disclosures related to that discharge.

Borrower Defense Discharges

As the Department will eventually have to incorporate the borrower defense provisions of these final regulations into its ongoing budget estimates, we have moved closer to that goal in refining the estimated impact of the regulations to reflect a primary scenario. The uncertainty inherent in the borrower defense estimate given the limited history of borrower defense claims and other factors described in the NPRM is reflected in the additional sensitivity runs that demonstrate the effect of changes in the specific assumption being tested. Another change from the NPRM is the specification of an estimated baseline scenario for the impact of borrower defense claims if these final regulations did not go into effect and borrowers had to pursue claims under the existing borrower defense regulation. Similar to the NPRM, the estimated net budget impact of $14.9 billion attributes all borrower defense activity for the 2017 to 2026 cohorts to these final regulations, but with the baseline scenario, we present an estimate of the subset of those costs that could be incurred under the existing borrower defense regulation.

These final regulations establish a Federal standard for borrower defense claims related to loans first disbursed on or after July 1, 2017, as well as describe the process for the assertion and resolution of all borrower defense claims—both those made for Direct Loans first disbursed prior to July 1, 2017, and for those made under the regulations after that date. As indicated in this preamble, while regulations governing borrower defense claims have existed since 1995, those regulations have rarely been used. Therefore, we have used the limited data available on borrower defense claims, especially information about the results of the collapse of Corinthian, projected loan volumes, Departmental expertise, the discussions at negotiated rulemaking, comments on the NPRM analysis, and information about past investigations into the type of institutional acts or omissions that would give rise to borrower defense claims to refine the primary estimate and sensitivity scenarios that we believe will capture the range of net budget impacts associated with the borrower defense regulations.

While we have refined the assumptions used to estimate the impact of the borrower defense provisions, the ultimate method of estimating the impact remains entering a level of net borrower defense claims into the student loan model (SLM) by risk group, loan type, and cohort. The net present value of the reduced stream of cash flows compared to what the Department would have expected from a particular cohort, risk group, and loan type generates the expected cost of the regulations. Similar to the NPRM, we applied an assumed level of school misconduct, borrower claims success, and recoveries from institutions (respectively labeled as Conduct Percent, Borrower Percent, and Recovery Percent in Tables 3–A and 3–B) to the President's Budget 2017 (PB2017) loan volume estimates to generate the estimated net borrower defense claims for each cohort, loan type, and sector.

The limited history of borrower defense claims and other factors that lead the Department to the range of scenarios described in the NPRM are still in effect. These factors include the level of school misconduct that could give rise to claims and institutions' reaction to the regulation to cut back on such activities, borrowers' response to the regulations including the consolidation of FFEL and Perkins borrowers to access the Direct Loan borrower defense process, the level of group versus individual claims, and the extent of full or partial relief applied to claims. Additionally, other regulatory and enforcement initiatives such as the Gainful Employment regulations, creation of the Student Aid Enforcement Unit, and greater rigor in the Department's review of accrediting agencies may have overlapping effects and may affect loan volumes and potential exposure to borrower defense claims at some institutions. To demonstrate the effect of the uncertainty about these factors, we estimated several scenarios to test the sensitivity of the various assumptions.

In refining our approach and estimating a primary scenario with several sensitivity runs, we also changed the assumptions from the NPRM in response to comments and our own review. The development of the estimated baseline scenario described in Table 3–B is one of the changes. Another major change is the incorporation of a deterrent effect of the borrower defense provisions on institutional behavior. In the NPRM, there was no change across cohorts in the level of school misconduct giving rise to claims. Upon review, we believe it is more likely that the borrower defense provision will have an impact like that of other title IV policies such as the cohort default rate or 90/10 in that institutions will make efforts to comply as the rule comes into effect and the precedents for what constitutes behavior resulting in successful claims are developed. In the past, when provisions targeting specific institutional activities or performance have been introduced, there has generally been a period of several years while the worst performers are removed from the system and while other institutions adapt to the new requirements and a lower steady state is established. We expect a similar pattern to develop with respect to borrower defense, as reflected in the Conduct Percent in Table 3–A. Another change reflected by the Conduct Percent is an increase in maximum level of claims from public and private non-profit institutions to 3 percent. Many commenters expressed concern about the effect of the regulations on these sectors or questions about the type of misconduct leading to claims that exist in those sectors. A number of commenters pointed to graduate programs, especially law programs, as a potential source of claims. Graduate students took out approximately 36 percent of all Direct Loans in 2015–16.[105] Given the history of court decisions related to law school debt, the presumed greater sophistication of graduate borrowers, and the possibility of partial relief due to the value of the education received, we still do not expect many successful claims to come from these sectors but did increase the level to account for the possibility. The other major change is the introduction of a ramp-up in the Borrower Percent and the Recovery Percent to reflect an increase in borrower awareness and the effectiveness of the financial responsibility protections over time.

There are a number of other potential mitigating factors that we did not explicitly adjust in our estimates in order to avoid underestimating the potential cost of the borrower defense provisions. Several commenters expressed concern about the effect of the regulations on access to higher education, especially for low-income, minority, or first-generation students. It is possible that the mix of financial aid received by students could shift if they attend different institutions than they would if the rule were not in place, but we believe that students whose choice of schools may have been affected by an institution's wrongdoing will find an alternative and receive similar amounts of title IV, HEA aid. Some students who may not have pursued higher education without the institution's act or omission may not enter the system, reducing the amount of Pell Grants or loans taken out, but we do not expect this to be a substantial portion of affected student borrowers. In the case of Pell Grants in particular, we do not want to estimate savings from potential reductions in aid related to borrower defense until such an effect is demonstrated in relevant data. Similarly, default discharges may decrease as borrowers seek discharge under the borrower defense provisions of these final regulations. If borrowers with valid borrower defense claims differ in their payment profile from the overall portfolio, the effect on the level of defaults, especially in some risk groups, could be substantial.

Table 3–A presents the assumptions for the primary budget estimate with the budget estimate for each scenario presented in Table 4. As in the NPRM, we also estimated the impact if the Department received no recoveries from institutions, the results of which are discussed after Table 4. As in the NPRM, we do not specify how many institutions are represented in the estimate, as the scenario could represent a substantial number of institutions engaging in acts giving rise to borrower defense claims or could represent a small number of institutions with significant loan volume subject to a large number of claims. According to Federal Student Aid data center loan volume reports, the five largest proprietary institutions in loan volume received 26 percent of Direct Loans disbursed in the proprietary sector in award year 2014–15 and the 50 largest represent 69 percent.[106]

As was done in the NPRM, the PB2017 loan volumes by sector were multiplied by the Conduct Percent that represents the share of loan volume estimated to be affected by institutional behavior that results in a borrower defense claim and the Borrower Percent that captures the percent of loan volume associated with potentially eligible borrowers who successfully pursue a claim to generate gross claims. The

[105] Federal Student Aid, *Student Aid Data: Title IV Program Volume by School,* available at *https://studentaid.ed.gov/sa/about/data-center/student/title-iv.*

[106] Federal Student Aid, *Student Aid Data: Title IV Program Volume by School Direct Loan Program AY2015–16, Q4,* available at *https://studentaid.ed.gov/sa/about/data-center/student/title-iv* accessed August 22, 2016. *https://studentaid.ed.gov/sa/about/data-center/student/title-iv* accessed August 22, 2016.

Recovery Percent was then applied to the gross claims to calculate the net claims that were processed in the Student Loan Model as increased discharges. The numbers in Tables 3–A and 3–B are the percentages applied for the primary estimate and baseline scenarios for each assumption.

TABLE 3–A—ASSUMPTIONS FOR PRIMARY BUDGET ESTIMATE

Cohort	2Yr pub	2Yr priv	2Yr prop	4Yr pub	4Yr priv	4Yr prop
Conduct Percent						
2017	3.0	3.0	20	3.0	3.0	20
2018	2.4	2.4	16	2.4	2.4	16
2019	2.0	2.0	13.6	2.0	2.0	13.6
2020	1.7	1.7	11.6	1.7	1.7	11.6
2021	1.5	1.5	9.8	1.5	1.5	9.8
2022	1.4	1.4	8.8	1.4	1.4	8.8
2023	1.3	1.3	8.4	1.3	1.3	8.4
2024	1.2	1.2	8	1.2	1.2	8
2025	1.2	1.2	7.8	1.2	1.2	7.8
2026	1.1	1.1	7.7	1.1	1.1	7.7
Borrower Percent						
2017	35	35	45	35	35	45
2018	36.8	36.8	47.3	36.8	36.8	47.3
2019	38.6	38.6	49.6	38.6	38.6	49.6
2020	42.4	42.4	54.6	42.4	42.4	54.6
2021	46.7	46.7	60	46.7	46.7	60
2022	50	50	63	50	50	63
2023	50	50	65	50	50	65
2024	50	50	65	50	50	65
2025	50	50	65	50	50	65
2026	50	50	65	50	50	65
Recovery Percent						
2017	75	23.8	23.8	75	23.8	23.8
2018	75	23.8	23.8	75	23.8	23.8
2019	75	26.18	26.18	75	26.18	26.18
2020	75	28.80	28.80	75	28.80	28.80
2021	75	31.68	31.68	75	31.68	31.68
2022	75	33.26	33.26	75	33.26	33.26
2023	75	34.93	34.93	75	34.93	34.93
2024	75	36.67	36.67	75	36.67	36.67
2025	75	37.4	37.4	75	37.4	37.4
2026	75	37.4	37.4	75	37.4	37.4

We also estimated a baseline scenario for the potential impact of borrower defense in recognition that many claims could be pursued under the existing State standards. The publicity and increased awareness of borrower defense could lead to increased activity under the existing regulations. In addition to the Corinthian claims, as of October 2016, the Department had received nearly 4,400 claims from borrowers of at least 20 institutions. The Federal standard in the final regulations will provide a unified standard across all States but is based on elements of relevant consumer protection law from the various States. We estimate that the final regulations could increase claims beyond those that could be pursued without it by an average of approximately 10 percent for the FY2017 cohort. This is based on our initial review of claims presented that does not reveal significant differences between the State and Federal standards, limiting the expected increase in claims from the adoption of the Federal standard. The baseline school conduct percentage does improve over time, but at a slower rate than occurs under the regulation. The borrower claim percentage for the baseline is based on the history of limited claims, informational sessions [107] during which during which 5 to 10 percent was presented as a reasonable rate when borrowers have to submit applications or otherwise initiate the process, and the level of effort used by the Department and advocates to get the Corinthian claims into the system. The recovery percentage reflects the fact that public institutions are not subject to the changes in the financial responsibility provisions because of their presumed backing by their respective States. Therefore, the baseline and primary recovery scenarios are the same for public institutions and set at a high level to reflect the Department's confidence in recovering the expected low level of claims against public institutions. Table 3–B presents the assumptions used to generate the share of the total net budget impact that we believe could have occurred even in the absence of these final regulations.

[107] Conference calls with the Department, non-Federal negotiators, and Professor Adam Zimmerman were held on March 9, 2016 and March 10, 2016 from 12:00 p.m. to 1:00 p.m.

TABLE 3–B—ASSUMPTIONS FOR ESTIMATED BASELINE SCENARIO

Cohort	All sectors	2Yr pub	2Yr priv	2Yr prop	4Yr pub	4Yr priv	4Yr prop
Conduct Percent							
2017		2.7	2.7	18.0	2.7	2.7	18.0
2018		2.6	2.6	17.1	2.6	2.6	17.1
2019		2.4	2.4	16.2	2.4	2.4	16.2
2020		2.3	2.3	15.4	2.3	2.3	15.4
2021		2.2	2.2	14.7	2.2	2.2	14.7
2022		2.1	2.1	13.9	2.1	2.1	13.9
2023		2.0	2.0	13.2	2.0	2.0	13.2
2024		1.9	1.9	12.6	1.9	1.9	12.6
2025		1.8	1.8	11.9	1.8	1.8	11.9
2026		1.7	1.7	11.3	1.7	1.7	11.3
Borrower Percent							
2017	8						
2018	8.4						
2019	8.8						
2020	9.3						
2021	9.7						
2022	10.2						
2023	10.7						
2024	11.3						
2025	11.8						
2026	12.4						
Recovery Pct							
2017		75	5	5	75	5	5
2018		75	5	5	75	5	5
2019		75	5	5	75	5	5
2020		75	5	5	75	5	5
2021		75	5	5	75	5	5
2022		75	5	5	75	5	5
2023		75	5	5	75	5	5
2024		75	5	5	75	5	5
2025		75	5	5	75	5	5
2026		75	5	5	75	5	5

As noted in the NPRM, and throughout this RIA, the Department recognizes the uncertainty associated with the factors contributing to the primary budget assumptions presented in Table 3–A. The baseline scenario defined by the assumptions in Table 3–B indicates the net costs of claims the Department assumes could occur in absence of these final regulations. The $4.9 billion estimated cost for the baseline scenario is provided for illustrative purposes and, as discussed above, is included in the $14.9 billion total estimated cost for the borrower defense provisions. To demonstrate the effect of a change in any of the assumptions, the Department designed the following scenarios to isolate each assumption and adjust it by 15 percent in the direction that would increase costs, increasing the Conduct or Borrower percentages and decreasing recoveries. As the gross claims are generated by multiplying the PB2017 estimated volumes by the Conduct Percent and the Borrower Percent, the Con15 scenario demonstrates the effect of the change in either assumption. The recovery percentage is applied to the gross claims to generate the net claims, so the REC15 scenario reduces recoveries by 15 percent to demonstrate the impact of that assumption. The final two runs adjust all the assumptions simultaneously to present a maximum and minimum expected budget impact. These sensitivity runs are identified as Con15, Rec15, All15, and Min15 respectively. The results of the various scenarios range from $14.9 billion to $21.2 billion and are presented in Table 4.

TABLE 4—BUDGET ESTIMATES FOR BORROWER DEFENSE SENSITIVITY RUNS

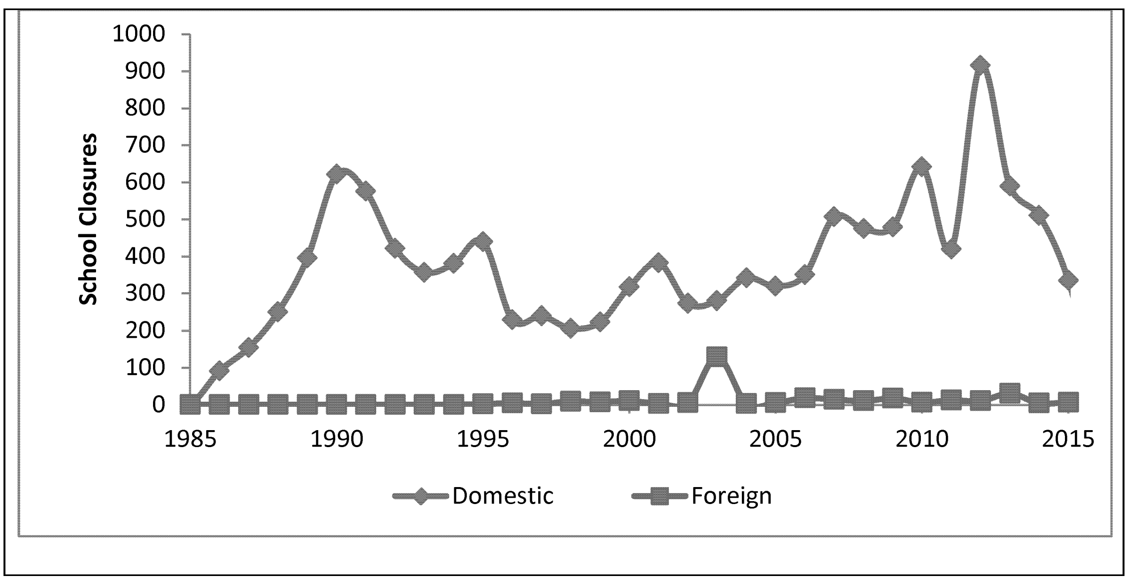
Scenario	Estimated costs for cohorts 2017–2026 (Budget Authority in $mns)	Annualized cost to Federal Gov't (3% discounting)	Annualized cost to Federal Gov't (7% discounting)
Primary Estimate	$14,867	$1,471	$1,452
Baseline Scenario Estimate	4,899	485	478
Con15	16,770	1,659	1,638
Rec15	16,092	1,592	1,571
All15	21,246	2,102	2,075
Min15	9,459	936	923

The transfers among the Federal government and affected borrowers and institutions associated with each scenario above are included in Table 5, with the difference in amounts transferred to borrowers and received from institutions generating the budget impact in Table 4. The amounts in Table 4 assume the Federal Government will recover some portion of claims from institutions. In the absence of any recovery from institutions, taxpayers would bear the full cost of successful claims from affected borrowers. At a 3 percent discount rate, the annualized costs with no recovery are approximately $2.465 billion for the primary budget estimate, $637 million for the baseline scenario, $2.758 billion for the Con15 scenario, $3.279 billion for the All15 scenario, and $1.666 billion for the Min15 scenario. At a 7 percent discount rate, the annualized costs with no recovery are approximately $2.414 billion for the primary budget estimate, $628 million for the baseline scenario, $2.699 billion for the Con15 scenario, $3.213 billion for the All15 scenario, and $1.627 billion for the Min15 scenario. This potential increase in costs demonstrates the significant effect that recoveries from institutions have on the net budget impact of the borrower defense provisions.

Closed School Discharge and False Certification Discharges

In addition to the provisions previously discussed, the final regulations also would make changes to the closed school discharge process, which are estimated to cost $1.732 billion, of which $381 million is a modification to cohorts 2014–2016 related to the extension of the automatic 3-year discharge and $1.351 billion is for cohorts 2017–2026. The final regulations include requirements to inform students of the consequences, benefits, requirements, and procedures of the closed school discharge option, including providing students with an application form, and establish a Secretary-led discharge process for borrowers who qualify but do not apply and, according to the Department's information, did not subsequently re-enroll in any title IV-eligible institution within three years from the date the school closed. The increased information about and automatic application of the closed school discharge option and possible increase in school closures related to the institutional accountability provisions in the proposed regulations are likely to increase closed school claims. Chart 1 provides the history of closed schools, which totals 12,666 schools or campus locations through September 2016.

Chart 1: History of School Closures



In order to estimate the effect of the changes to the discharge process that would grant relief without an application after a three-year period, the Department looked at all Direct Loan borrowers at schools that closed from 2008–2011 to see what percentage of them had not received a closed school discharge and had no NSLDS record of title-IV aided enrollment in the three years following their school's closure. Of 2,287 borrowers in the file, 47 percent had no record of a discharge or subsequent title IV, HEA aid. This does not necessarily mean they did not re-enroll at a title IV institution, so this assumption may overstate the potential effect of the three-year discharge provision. The Department used this information and the high end of closed school claims in recent years to estimate the effect of the final regulations related to closed school discharges. The resulting estimated cost to the Federal government of the closed school provisions is $1.732 billion, of which $381 million is a modification related to extending the 3-year automatic discharge to cohorts 2014 through 2016 and $1.351 billion relates to the 2017 to 2026 loan cohorts.

The final regulations will also change the false certification discharge process to include instances in which schools certified the eligibility of a borrower who is not a high school graduate (and does not meet applicable alternative to high school graduate requirements) where the borrower would qualify for a false certification discharge if the school falsified the borrower's high school graduation status; falsified the borrower's high school diploma; or referred the borrower to a third party to obtain a falsified high school diploma. Under existing regulations, false certification discharges represent a very low share of discharges granted to borrowers. The final regulations will replace the explicit reference to ability to benefit requirements in the false certification discharge regulations with a more general reference to requirements for admission without a high school diploma as applicable when the individual was admitted, and specify how an institution's certification of the eligibility of a borrower who is not a high school graduate (and does not meet applicable alternative to high school graduate requirements) could give rise to a false certification discharge claim. However, we do not expect an increase in false certification discharge claims to result in a significant budget impact from this change. We believe that schools that comply with the current ability to benefit assessment requirement and that honor the current high school graduation requirements will continue to comply in the manner they now do, and we have no basis to believe that changing the terminology or adding false certification of SAP as an example of a reason the Secretary may grant a false certification discharge without an application will lead to an increase in claims that will result in a significant net budget impact.

Other Provisions

As indicated in the NPRM, there are a number of additional provisions in these final regulations that are not expected to have a significant net budget impact. These provisions include a number of technical changes related to the PAYE and REPAYE repayment plans and the consolidation of Nurse Faculty Loans, updates to the regulations describing the Department's authority to compromise debt, and updates to the acceptable forms of verification of death for discharge of title IV loans or TEACH Grant obligations. The technical changes to the REPAYE and PAYE plans were already reflected in the Department's budget estimates for those regulations, so no additional budget effects are included here. Some borrowers may be eligible for additional subsidized loans and no longer be responsible for accrued interest on their subsidized loans as a result of their subsidized usage period being eliminated or recalculated because of a closed school, false certification, unpaid refund, or defense to repayment discharge. However, we believe the institutions primarily affected by the 150 percent subsidized usage regulation are not those expected to generate many of the applicable discharges, so this reflection of current practice is not expected to have a significant budget impact. Allowing death discharges based on death certificates submitted or verified through additional means is convenient for borrowers, but is not estimated to substantially change the amount of death discharges. These updates to the debt compromise limits reflect statutory changes and the Secretary's existing authority to compromise debt, so we do not estimate a significant change in current practices. Revising the regulations to expressly permit the consolidation of Nurse Faculty Loans is not expected to have a significant budget impact, as this technical change reflects current practices. According to Department of Health and Human Services budget documents, approximately $26.5 million [108] in grants are available annually for schools to make Nurse Faculty Loans, and borrowers would lose access to generous forgiveness terms if they choose to consolidate those loans. Therefore, we would expect the volume of consolidation to be very small, and do not anticipate any significant budget impact from this provision.

Assumptions, Limitations, and Data Sources

In developing these estimates, we used a wide range of data sources, including data from the NSLDS; operational and financial data from Department systems; and data from a range of surveys conducted by the National Center for Education Statistics such as the 2012 National Postsecondary Student Aid Survey. We also used data from other sources, such as the U.S. Census Bureau.

5. Accounting Statement

As required by OMB Circular A–4 (available at *www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf*), in the following table we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these final regulations. This table provides our best estimate of the changes in annual monetized costs, benefits, and transfers as a result of the final regulations based on the assumptions described in the *Net Budget Impacts* and *Paperwork Reduction Act* sections of this preamble.

TABLE 5—ACCOUNTING STATEMENT

Category	Benefits		
Updated and clarified borrower defense process and Federal standard to increase protection for student borrowers and taxpayers.	not quantified		
Improved awareness and usage of closed school and false certification discharges.	not quantified		
Improved consumer information about institutions' performance and practices.	not quantified		
Category	**Costs**		
		3%	7%
Costs of obtaining LOCs or equivalents	not quantified		
Costs of compliance with paperwork requirements		9.87	9.84
Category	**Transfers**		
		3%	7%
Borrower Defense claims from the Federal government to affected borrowers (partially borne by affected institutions, via reimbursements.	Primary	2,465	2,414
	Baseline	637	628

[108] Department of Health and Human Services, FY 2017 Health Resources and Services Administration Justification of Estimates for Appropriations Committees. Available at *www.hrsa.gov/about/budget/budgetjustification2017.pdf.*

TABLE 5—ACCOUNTING STATEMENT—Continued

	Con15	2,758	2,699
	REC15	2484	2,434
	ALL15	3,279	3,213
	MIN15	1,666	1,627
Reimbursements of borrower defense claims from affected institutions to affected student borrowers, via the Federal government.	Primary.		
	Baseline	152	150
	CON15	1,099	1,061
	REC15	891	862
	ALL15	1,176	1,138
	MIN15	730	704
Closed school discharges from the Federal government to affected students.		178	185

6. Regulatory Alternatives Considered

In response to comments received and the Department's further internal consideration of these final regulations, the Department reviewed and considered various changes to the proposed regulations detailed in the NPRM. The changes made in response to comments are described in the *Analysis of Comments and Changes* section of this preamble. We summarize below the major proposals that we considered but which we ultimately declined to implement in these regulations.

In particular, the Department extensively reviewed the financial responsibility provisions and related disclosures, the repayment rate warning, and the arbitration provisions of these final regulations. In developing these final regulations, the Department considered the budgetary impact, administrative burden, and effectiveness of the options it considered.

Final Regulatory Flexibility Analysis

Description of the Reasons That Action by the Agency Is Being Considered

The Secretary is amending the regulations governing the Direct Loan Program to establish a new Federal standard, limitation periods, and a process for determining whether a borrower has a borrower defense based on an act or omission of a school. We are also amending the Student Assistance General Provisions regulations to revise the financial responsibility standards and add disclosure requirements for schools. Finally, we are amending the discharge provisions in the Perkins Loan, Direct Loan, FFEL Program, and TEACH Grant programs. These changes will provide transparency, clarity, and ease of administration to current and new regulations and protect students, the Federal government, and taxpayers against potential school liabilities resulting from borrower defenses.

The U.S. Small Business Administration Size Standards define ''for-profit institutions'' as ''small businesses'' if they are independently owned and operated and not dominant in their field of operation with total annual revenue below $7,000,000. The standards define ''non-profit institutions'' as ''small organizations'' if they are independently owned and operated and not dominant in their field of operation, or as ''small entities'' if they are institutions controlled by governmental entities with populations below 50,000. Under these definitions, an estimated 4,365 institutions of higher education subject to the paperwork compliance provisions of the proposed regulations are small entities. Accordingly, we have prepared this final regulatory flexibility analysis to present an estimate of the effect of these regulations on small entities.

Succinct Statement of the Objectives of, and Legal Basis for, the Final Regulations

Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. Current regulations in § 685.206(c) governing defenses to repayment have been in place since 1995, but have rarely been used. Those regulations specify that a borrower may assert as a defense to repayment any ''act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.'' In response to the collapse of Corinthian, the Secretary announced in June of 2015 that the Department would develop new regulations to clarify and streamline the borrower defense process, in a manner that would protect borrowers and allow the Department to hold schools accountable for actions that result in loan discharges.

Description of and, Where Feasible, an Estimate of the Number of Small Entities To Which the Regulations Will Apply

These final regulations will affect institutions of higher education that participate in the Federal Direct Loan Program and borrowers. Approximately 60 percent of institutions of higher education qualify as small entities, even though the range of revenues at the non-profit institutions varies greatly. Using data from the Integrated Postsecondary Education Data System, the Department estimates that approximately 4,365 institutions of higher education qualify as small entities—1,891 are not-for-profit institutions, 2,196 are for-profit institutions with programs of two years or less, and 278 are for-profit institutions with four-year programs.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

Table 6 relates the estimated burden of each information collection requirement to the hours and costs estimated in the *Paperwork Reduction Act of 1995* section of the preamble. This additional workload is discussed in more detail under the *Paperwork Reduction Act of 1995* section of the preamble. Additional workload is expected to result in estimated costs associated with either the hiring of additional employees or opportunity costs related to the reassignment of existing staff from other activities. In total, these changes are estimated to increase burden on small entities participating in the title IV, HEA programs by 109,351 hours. The monetized cost of this additional burden on institutions, using wage data developed using BLS data available at *www.bls.gov/ncs/ect/sp/ecsuphst.pdf,* is

$3,996,777. This cost was based on an hourly rate of $36.55.

TABLE 6—PAPERWORK REDUCTION ACT FOR SMALL ENTITIES

	Reg section	OMB control No.	Hours	Cost
Program Participation Agreement—requires school to provide enrolled students a closed school discharge application and written disclosure of the benefits of consequences of the discharge as an alternative to completing their educational program through a teach-out.	668.14	OMB 1845–0022	985	$36,004
Advertising warning of repayment rate outcomes; and disclosure to prospective and enrolled students of actions and triggering events for financial protection.	668.41	OMB 1845–0004	2,138	78,159
Financial Responsibility—reporting of certain actions or triggering events in 668.171(c)–(g) no later than the time specified in 668.171(h).	668.171	OMB 1845–0022	1,617	59,094
Alternative Standards and Requirements—requires an institution to provide the Secretary financial protection, such as an irrevocable letter of credit, upon the occurrence of an action or triggering event described in § 668.171(c)–(g) if that event warrants protection as determined under § 668.175(f)(4).	668.175	OMB 1845–0022	32,336	1,181,881
Borrower defense process—provides a framework for the borrower defense process. Institutions could engage in fact-finding, provide evidence related to claims and appeal decisions.	685.222	OMB 1845–0142	530	19,372
Agreements between an eligible school and the Secretary for participation in the Direct Loan Program—prohibits predispute arbitration agreements for borrower defense claims, specifies required agreement and notification language, and requires schools to provide copies of arbitral and judicial filings to the Secretary.	685.300	OMB 1845–0143	71,745	2,622,268

Identification, to the Extent Practicable, of All Relevant Federal Regulations That May Duplicate, Overlap, or Conflict With the Regulations

The final regulations are unlikely to conflict with or duplicate existing Federal regulations.

Alternatives Considered

As described above, the Department participated in negotiated rulemaking and reviewed a large number of comments when developing the regulations, and considered a number of options for some of the provisions. We considered multiple issues, including the group discharge process for borrower defense claims, the limitation periods, the appropriate procedure for considering borrower defense claims including the role of State AGs, the Department, borrowers, and institutions, and the continued use of State standards for borrower defense claims. While no alternatives were aimed specifically at small entities, limiting repayment rate warnings to affected proprietary institutions will reduce the burden on the private not-for-profit institutions that are a significant portion of small entities that would be affected by the final regulations. The additional options to provide financial protection may also benefit small entities, even though the changes were not specifically directed at them.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: The public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Sections 668.14, 668.41, 668.171, 668.175, 682.211, 682.402, 685.222, and 685.300 contain information collection requirements. Under the PRA, the Department has submitted a copy of these sections and an Information Collections Request to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In these final regulations, we have displayed the control numbers assigned by OMB to any information collection requirements in this NPRM and adopted in the final regulations.

Discussion

Section 668.14—Program Participation Agreement

Requirements: Section 668.14(b)(32) of the final regulations will require, as part of the program participation agreement, a school to provide all enrolled students with a closed school discharge application and a written disclosure, describing the benefits and the consequences of a closed school discharge as an alternative to completing their educational program through a teach-out plan after the Department initiates any action to terminate the participation of the school in any title IV, HEA program or after the occurrence of any of the events specified in § 668.14(b)(31) that would require the institution to submit a teach-out plan.

Burden Calculation: From the Award Years 2011–12 to 2014–15 there were 182 institutions that closed (30 private, 150 proprietary, and two public). The number of students who were enrolled at the institutions at the time of the closure was 43,299 (5,322 at the private institutions, 37,959 at the proprietary institutions, and 18 at the public institutions). With these figures as a base, we estimate that there could be 46 schools closing in a given award year (182 institutions divided by 4 = 45.5) with an average 238 students per institution (43,299 divided by 182 = 237.9).

We estimate that an institution will require two hours to prepare the required written disclosure to be sent with a copy of the closed school discharge application and the necessary mailing list for currently enrolled students. We anticipate that most schools will provide this information electronically to their students, thus decreasing burden and cost.

On average, we estimate that it will take the estimated eight private institutions 16 hours to prepare the written disclosure information required (8 institutions × 2 hours).

On average, we estimate that it will take the estimated eight private institutions that will close a total of 324 hours (1,904 students × .17 (10 minutes)) to process the required written disclosure with a copy of the closed school discharge application based on the mailing list for the estimated 1,904 enrolled students.

The burden for this process for private institutions is 340 hours.

On average, we estimate that it will take the estimated 38 proprietary institutions 76 hours to prepare the written disclosure information required (38 institutions × 2 hours).

On average, we estimate that it will take the estimated 38 proprietary institutions that will close a total of 1,537 hours (9,044 students × .17 (10 minutes)) to process the required written disclosure with a copy of the closed school discharge application based on the mailing list for the estimated 9,044 enrolled students.

The burden for this process for proprietary institutions is 1,613 hours.

For § 668.14, the total increase in burden is 1,953 hours under OMB Control Number 1845–0022.

Section 668.41—Reporting and Disclosure of Information

Requirements: Section 668.41(h) of the final regulations *Loan repayment warning for proprietary institutions* will expand the disclosure requirements under § 668.41 to provide that, for any award year in which a proprietary institution's loan repayment rate as reported to it by the Secretary shows that the median borrower has not paid down the balance of the borrower's loans by at least $1, the institution must provide a loan repayment warning in advertising and promotional materials. An institution with fewer than 10 borrowers, or that demonstrates to the Secretary's satisfaction that it has borrowers in non-Gainful Employment programs who would increase the institution's repayment rate to meet the negative amortization threshold if included in the calculation, would not be required to provide the warning.

The process through which a proprietary institution will be informed of its repayment rate, and provided the opportunity to appeal that rate, is included in § 668.41(h)(2) of the final regulations. The Department notifies the institution of its repayment rate. Upon receipt of the rate the institution has 15 days to submit an appeal based on the two conditions in § 668.41(h)(2)(ii) to the Secretary.

Additionally, § 668.41(h)(3) of the final regulations stipulates the treatment of required disclosures in advertising and promotional materials. Under the provision, all advertising and promotional materials made available by or on behalf of an institution that identify the institution by name must include a warning about loan repayment outcomes as prescribed by the Secretary. The Secretary may conduct consumer testing to ensure meaningful and helpful language is provided to the students. All promotional materials, including printed materials, about an institution must be accurate and current at the time they are published, approved by a State agency, or broadcast. The warning must be prominent, clear and conspicuous, easily heard or read. The Secretary may require modifications to such materials if the warning does not meet the regulatory conditions.

Burden Calculation: There will be burden on schools to review the repayment rate identified in § 668.41(h)(1) and to submit an appeal to the accuracy of the information, as provided in § 668.41(h)(2). Additionally, there will be burden for those institutions that are required to include the necessary loan repayment warning in their promotional materials.

Based on an analysis of Departmental data, 972 of the 1,345 proprietary institutions with reported repayment rate data would not meet the negative amortization threshold for the repayment rate calculation.

We estimate that it will take the 972 institutions 30 minutes (.50 hours) or 486 hours to review the institutional repayment rate and determine if it meets one of the conditions to submit an appeal to the Secretary (972 institutions × .50 hours = 486 hours).

Of the 972 institutions that would not meet the negative amortization loan repayment threshold, we anticipate that one percent or 10 institutions could meet the appeal criteria identified in 668.41(h)(2)(ii)(A).

We estimate that it will take the 10 institutions another 2 hours to produce the required evidence to submit with the appeal (10 institutions × 2 hours = 20 hours). We estimate it will take the approximate 10 institutions an additional 30 minutes (.50 hours) to submit the appeal to the Secretary (10 institutions × .50 hours = 5 hours) for a total of 25 hours.

We estimate that 5 institutions will be successful in their appeal, leaving 967 institutions that are required to include the necessary loan repayment warning in their promotional materials.

We estimate it will take each of the approximate 967 proprietary institutions a total of 5 hours to update their promotional materials (967 institutions × 5 hours = 4,835 hours).

For § 668.41(h), the total increase in burden is 5,346 hours under OMB Control Number 1845–0004.

Requirements: Revised § 668.41(i) *Financial protection disclosures* clarified the disclosure requirements regarding triggering events to both enrolled and prospective students, as well as on the institution's Web site. The Secretary will conduct consumer testing to determine which actions and triggering events will require disclosures; and will publish the prescribed content of the disclosures in a **Federal Register** notice after conducting consumer testing to ensure that it is meaningful and helpful to students. Institutions must provide the required disclosures to enrolled and prospective students and post the disclosure to their Web sites within 30 days of notifying the Secretary of the relevant triggering event. Institutions may hand-deliver the disclosure notification, or may send the disclosure notification to the primary email address or other electronic communication method used by the institution for communicating with the enrolled or prospective student. In all cases, the institution must ensure that the disclosure notification is the only substantial content in the message. Prospective students must receive the disclosure before enrolling, registering, or entering into a financial obligation with the institution.

Burden Calculation: There will be burden on schools to deliver the disclosures required by the Secretary to enrolled and prospective students and post it on the institution's Web site under this final regulation. However, as § 668.41(i) commits to consumer testing of both the specific actions and events that will require a disclosure, and of the required disclosure itself, to be published by the Secretary in a **Federal Register** notice, burden will not be included here. Instead, the consumer testing procedures will follow information clearance review requirements. Prior to the implementation of the regulatory requirements under § 668.41(i) there will be an information clearance review package submitted to allow the public to comment.

The total increase in burden is 5,346 hours for OMB Control Number 1845–0004.

Section 668.171—Financial Responsibility—General

Requirements: We added a new paragraph 668.171(h) under which, in accordance with procedures to be established by the Secretary, an institution will notify the Secretary of any action or triggering event described in § 668.171(c) through (g) in the specified number of days after that action or event occurs.

In that notice, the institution may show that certain actions or events are not material or that those actions are resolved. Specifically the institution may demonstrate that:

- The amount claimed in a lawsuit by a State or Federal authority for financial relief on a claim related to the making of a Direct Loan for enrollment at the school or the provision of educational services exceeds the potential recovery.
- The withdrawal of owner's equity was used solely to meet tax liabilities of the institution or its owners.
- The creditor waived a violation of a loan agreement. If the creditor imposes additional constraints or requirements as a condition of waiving the violation and continuing with the loan, the institution must identify and describe those constraints or requirements but would be permitted to show why these actions would not have an adverse financial impact on the institution.
- The reportable action or event no longer exists, has been resolved, or there is insurance to cover the liabilities that arise from the action or event.

Burden Calculation: There will be burden on schools to provide the notice to the Secretary when one of the actions or triggering events identified in § 668.171(c)–(g) occurs. We estimate that an institution will take two hours per action or triggering event to prepare the appropriate notice and provide it to the Secretary. We estimate that 169 private institutions may have two events annually to report for a total burden of 676 hours (169 institutions × 2 events × 2 hours). We estimate that 392 proprietary institutions may have three events annually to report for total burden of 2,352 hours (392 institutions × 3 events × 2 hours). For § 668.171, the total increase in burden is 3,028 hours under OMB Control Number 1845–0022.

Section 668.175—Alternative Standards and Requirements

Requirements: Under the provisional certification alternative in § 668.175(f), we added a new paragraph (f)(4) that requires an institution to provide the Secretary financial protection, such as an irrevocable letter of credit, upon the occurrence of an action or triggering event described in § 668.171(c)–(g) if that event warrants protection as determined under § 668.175(f)(4).

Burden Calculation: There will be burden on schools to provide the required financial protection, such as a letter of credit, to the Secretary to utilize the provisional certifications alternatives. We estimate that an institution will take 40 hours per action or triggering event to obtain the required financial protections and provide it to the Secretary. We estimate that 169 private not-for-profit institutions may have two events annually to report for a total burden of 13,520 hours (169 institutions × 2 events × 40 hours). We estimate that 392 proprietary institutions may have three events annually to report for total burden of 47,040 hours (392 institutions × 3 events × 40 hours).

For § 668.175, the total increase in burden is 60,560 hours under OMB Control Number 1845–0022.

The combined total increase in burden for §§ 668.14, 668.171, and 668.175 is 65,541 hours under OMB Control Number 1845–0022.

Section 682.211—Mandatory Administrative Forbearance for FFEL Program Borrowers

Requirements: The final regulations add a new paragraph § 682.211(i)(7) that requires a lender to grant a mandatory administrative forbearance to a borrower upon being notified by the Secretary that the borrower has submitted an application for a borrower defense discharge related to a FFEL Loan that the borrower intends to pay off through a Direct Loan Program Consolidation Loan for the purpose of obtaining relief under § 685.212(k) of the final regulations. The administrative forbearance will be granted in yearly increments or for a period designated by the Secretary until the Secretary notifies the lender that the loan has been consolidated or that the forbearance should be discontinued. If the Secretary notifies the borrower that the borrower will qualify for a borrower defense discharge if the borrower were to consolidate, the borrower will then be able to consolidate the loan(s) to which the defense applies and, if the borrower were to do so, the Secretary will recognize the defense and discharge that portion of the Consolidation Loan that paid off the FFEL loan in question.

Burden Calculation: There will be burden for the current 1,446 FFEL lenders to track the required mandatory administrative forbearance when they are notified by the Secretary of the borrower's intention to enter their FFEL loans into a Direct Consolidation Loan to obtain relief under a borrower defenses claim. We estimate that it will take each lender approximately four hours to develop and program the needed tracking into their current systems. There will be an estimated burden of 5,480 hours on the 1,370 for-profit lenders (1,370 × 4 = 5,480 hours). There will be an estimated burden of 304 hours on the 76 not-for-profit lenders (76 × 4 = 304 hours).

For § 682.211, the total increase in burden is 5,784 hours under OMB Control Number 1845–0020.

Section 682.402—Closed School Discharges

Requirements: Section 682.402(d)(6)(ii)(F) of the final regulations provides a second level of Departmental review for denied closed school discharge claims in the FFEL program. The final regulations require a guaranty agency that denies a closed school discharge request to inform the borrower in writing of the reasons for the denial, the opportunity for a review of the guaranty agency's decision by the Secretary, and how the borrower may request such a review.

Section 682.402(d)(6)(ii)(I) of the final regulations requires the lender or guaranty agency, upon resuming collection, to provide a FFEL borrower with another closed school discharge application, and an explanation of the requirements and procedures for obtaining the discharge.

Section 682.402(d)(6)(ii)(K) of the final regulations describes the responsibilities of the guaranty agency if the borrower requests such a review.

Section 682.402(d)(8)(ii) of the final regulations authorizes the Department, or a guaranty agency with the Department's permission, to grant a closed school discharge to a FFEL borrower without a borrower application based on information in the Department's or guaranty agency's possession that the borrower did not subsequently re-enroll in any title IV-eligible institution within a period of three years after the school closed.

Burden Calculation: There will be burden on guaranty agencies to provide information to borrowers denied closed school discharge regarding the opportunity for further review of the discharge request by the Secretary. We estimate that it will take the 27 guaranty agencies 4 hours to update their notifications and establish a process for forwarding any requests for escalated reviews to the Secretary. There will be an estimated burden of 68 hours on the 17 public guaranty agencies (17 × 4 hours = 68 hours). There will be an estimated burden of 40 hours on the 10 not-for-profit guaranty agencies (10 × 4 hours = 40 hours).

There is an increase in burden of 108 hours under OMB Control Number 1845–0020.

There will be burden on guaranty agencies, upon receipt of the request for escalated review from the borrower, to forward to the Secretary the discharge form and any relevant documents. For the period between 2011 and 2015 there were 43,268 students attending closed schools, of which 9,606 students received a closed school discharge. It is estimated that 5 percent of the 43,268, or 2,163 closed school applications were denied. We estimate that 10 percent or 216 of those borrowers whose application was denied will request escalated review by the Secretary. We estimate that the process to forward the discharge request and any relevant documentation to the Secretary will take .5 hours (30 minutes) per request. There will be an estimated burden of 58 hours on the 17 public guaranty agencies based on an estimated 116 requests (116 × .5 hours = 58 hours). There will be an estimated burden of 50 hours on the 10 not-for-profit guaranty agencies (100 × .5 hours = 50 hours). There is an increase in burden of 108 hours under OMB Control Number 1845–0020.

The guaranty agencies will have burden assessed based on these final regulations to provide another discharge application to a borrower upon resuming collection activities with explanation of process and requirements for obtaining a discharge. We estimate that for the 2,163 closed school applications that were denied, it will take the guaranty agencies .5 hours (30 minutes) to provide the borrower with another discharge application and instructions for filing the application again. There will be an estimated burden of 582 hours on the 17 public guaranty agencies based on an estimated 1,163 borrowers (1,163 × .5 hours = 582 hours). There will be an estimated burden of 500 hours on the 10 not-for-profit guaranty agencies (1,000 × .5 hours = 500 hours). There is an increase in burden of 1,082 hours under OMB Control Number 1845–0020.

There will be burden on the guaranty agencies to determine the eligibility of a borrower for a closed school discharge without the borrower submitting such an application. This determination requires a review of those borrowers who attended a closed school but did not apply for a closed school discharge to determine if the borrower re-enrolled in any other institution within three years of the school closure. We estimate that 20 hours of programming will be necessary to enable a guaranty agency to establish a process to review its records for borrowers who attended a closed school and to determine if any of those borrowers reenrolled in a title IV eligible institution within three years. There will be an estimated burden of 340 hours on the 17 public guaranty agencies for this programming (17 × 20 hours = 340 hours). There will be an estimated burden of 200 hours on the not-for-profit guaranty agencies for this programming (10 × 20 hours = 200 hours). There is an increase in burden of 540 hours under OMB Control Number 1845–0020.

For § 682.402, the total increase in burden is 1,838 hours under OMB Control Number 1845–0020.

The combined total increase in burden for §§ 682.211 and 682.402 is 7,622 hours under OMB Control Number 1845–0020.

Section 685.222(e)—Process for Individual Borrowers

Requirements: Section 685.222(e)(1) of the final regulations describes the steps an individual borrower must take to initiate a borrower defense claim. First, an individual borrower will submit an application to the Secretary, on a form approved by the Secretary. In the application, the borrower will certify that he or she received the proceeds of a loan to attend a school; may provide evidence that supports the borrower defense; and will indicate whether he or she has made a claim with respect to the information underlying the borrower defense with any third party, and, if so, the amount of any payment received by the borrower or credited to the borrower's loan obligation. The borrower will also be required to provide any other information or supporting documentation reasonably requested by the Secretary.

While the decision of the Department official will be final as to the merits of the claim and any relief that may be warranted on the claim, if the borrower defense is denied in full or in part, the borrower will be permitted to request that the Secretary reconsider the borrower defense upon the identification of new evidence in support of the borrower's claim. ''New evidence'' will be defined as relevant evidence that the borrower did not previously provide and that was not identified by the Department official as evidence that was relied upon for the final decision.

Burden Calculation: There will be burden associated with the filing of the Departmental form by the borrower asserting a borrower defense claim. There is a separate information collection being processed to put the final form through the information collection review process to provide for public comment on the form as well as the estimated burden. A separate information collection review package will be published in the **Federal Register** and available through *Regulations.gov* for review and comment.

Additionally there will be burden on any borrower whose borrower defense claim is denied, if they elect to request reconsideration from the Secretary based on new evidence in support of the borrower's claim. We estimate that two percent of borrower defense claims received will be denied and those borrowers will then request reconsideration by presenting new evidence to support their claim. As of April 27, 2016, 18,688 borrower defense claims had been received. Of that number, we estimate that 467 borrowers including those that opted out of a successful Borrower Defense group relief would require .5 hours (30 minutes) to submit the request for reconsideration to the Secretary for a total of 234 burden hours (467 × .5 hours) under OMB Control Number 1845–0142.

Section 685.222(f)—Group Process for Borrower Defenses—General

Requirements: Section 685.222(f) of the final regulations provides a framework for the borrower defense group process, including descriptions of the circumstances under which group borrower defense claims could be considered, and the process the Department will follow for borrower defenses for a group.

Once a group of borrowers with common facts and claims has been identified, the Secretary will designate a Department official to present the group's common borrower defense in the fact-finding process, and will provide each identified member of the group with notice that allows the borrower to opt out of the proceeding.

Burden Calculation: There will be burden on any borrower who elects to opt out of the group process after the Secretary has identified them as a member of a group for purposes of borrower defense. We estimate that one percent of borrowers who are identified as part of a group process for borrower defense claims would opt out of the group claim process. As of April 27, 2016, 18,688 borrower defense claims had been received. Of that number, we estimate that 187 borrowers would require .08 hours (5 minutes) to submit the request to opt out of the group process to the Secretary for a total of 15 burden hours (187 × .08 hours) under OMB Control Number 1845–0142.

Section 685.222(g)—Group Process for Borrower Defense—Closed School

Requirements: Section 685.222(g) of the final regulations establishes a process for review and determination of a borrower defense for groups identified by the Secretary for which the borrower defense is made with respect to Direct Loans to attend a school that has closed and has provided no financial protection currently available to the Secretary from which to recover any losses based on borrower defense claims, and for which there is no appropriate entity from which the Secretary can otherwise practicably recover such losses.

Under § 685.222(g)(1) of the final regulations, a hearing official will review the Department official's basis for identifying the group and resolve the claim through a fact-finding process. As part of that process, the hearing official will consider any evidence and argument presented by the Department official on behalf of the group and on behalf of individual members of the group. The hearing official will consider any additional information the Department official considers necessary, including any Department records or response from the school or a person affiliated with the school as described § 668.174(b) as reported to the Department or as recorded in the Department's records if practicable.

Burden Calculation: There will be burden on any school that elects to provide records or response to the hearing official's fact finding. We anticipate that each group will represent a single institution. We estimate that there will be four potential groups involving closed schools. We estimate that the fact-finding process would require 50 hours from one private closed school or persons affiliated with that closed school (1 private institution × 50 hours). We estimate that the fact-finding process will require 150 hours from three proprietary closed schools or persons affiliated with that closed school (3 proprietary institutions × 50 hours). We estimate the burden to be 200 hours (4 institutions × 50 hours) under OMB Control Number 1845–0142.

Section 685.222(h)—Group Borrower for Defense—Open School

Requirements: Section 685.222(h) of the final regulations establishes the process for groups identified by the Secretary for which the borrower defense is asserted with respect to Direct Loans to attend an open school.

A hearing official will resolve the borrower defense and determine any liability of the school through a fact-finding process. As part of the process, the hearing official will consider any evidence and argument presented by the school and the Department official on behalf of the group and, as necessary, any evidence presented on behalf of individual group members.

The hearing official will issue a written decision. If the hearing official approves the borrower defense, that decision will describe the basis for the determination, notify the members of the group of the relief provided on the basis of the borrower defense, and notify the school of any liability to the Secretary for the amounts discharged and reimbursed.

If the hearing official denies the borrower defense in full or in part, the written decision will state the reasons for the denial, the evidence that was relied upon, the portion of the loans that are due and payable to the Secretary, and whether reimbursement of amounts previously collected is granted, and will inform the borrowers that their loans will return to their statuses prior to the group borrower defense process. It also will notify the school of any liability to the Secretary for any amounts discharged. The Secretary will provide copies of the written decision to the members of the group, the Department official and the school.

The hearing official's decision will become final as to the merits of the group borrower defense claim and any relief that may be granted within 30 days after the decision is issued and received by the Department official and the school unless, within that 30-day period, the school or the Department official appeals the decision to the Secretary. A decision of the hearing official will not take effect pending the appeal. The Secretary will render a final decision following consideration of any appeal.

After a final decision has been issued, if relief for the group has been denied in full or in part, a borrower may file an individual claim for relief for amounts not discharged in the group process. In addition, the Secretary may reopen a borrower defense application at any time to consider new evidence, as discussed above.

Burden Calculation: There will be burden on any school which provides evidence and responds to any argument made to the hearing official's fact finding and if the school elects to appeal the final decision of the hearing official regarding the group claim. We anticipate that each group will represent claims from a single institution. We estimate that there will be six potential groups involving open schools. We estimate that the fact-finding process will require 150 hours from the three open private institutions or persons affiliated with that school (3 institutions × 50 hours). We estimate that the fact-finding process will require 150 hours from the three open proprietary institutions or persons affiliated with that school (3 institutions × 50 hours). We estimate the burden to be 300 hours (6 institutions × 50 hours).

We further estimate that the appeal process will require 150 hours from the three open private institutions or persons affiliated with that school (3 institutions × 50 hours). We estimate that the appeal process will require 150 hours from the three open proprietary institutions or persons affiliated with that school (3 institutions × 50 hours). We estimate the burden to be 300 hours (6 institutions × 50 hours). The total estimated burden for this section will be 600 hours assessed under OMB Control Number 1845–0142.

Additionally, any borrower whose borrower defense claim is denied under the group claim may request reconsideration based on new evidence to support the individual claim. We believe that the estimate for the total universe of denied claims in § 685.222(e) includes these borrowers.

The combined total increase in burden for § 685.222 is 1,049 hours under OMB Control Number 1845–0142.

Section 685.300—Agreements Between an Eligible School and the Secretary for Participation in the Direct Loan Program

Requirements: Section 685.300(e) of the final regulations requires institutions who, after the effective date of the final regulations, incorporate a predispute arbitration agreement or any other predispute agreement addressing class actions in any agreements with Direct Loan program borrowers to include specific language regarding a borrower's right to file or be a member of a class action suit against the institution when the class action concerns acts or omissions surrounding the making of the Direct Loan or provision of educational services purchased with the Direct Loan. Additionally, institutions that incorporated a predispute arbitration agreement or any other predispute agreement addressing class actions in any agreements with Direct Loan program borrowers prior to the effective date of the final regulations must provide borrowers with agreements or notices containing specific language regarding their right to file or be a member of a class action suit against the institution when the class action concerns acts or omissions surrounding the making of the Direct Loan or provision of educational services purchased with the Direct Loan. Institutions must provide this notice to borrowers no later than the date of the loan exit counseling for current students or the date the school files an initial response to an arbitration demand or complaint suit from a student who has not received such notice.

Section 685.300(f) of the final regulations requires institutions who, after the effective date of the final regulations, incorporate predispute arbitration agreements with Direct Loan program borrowers to include specific language regarding a borrower's right to file a lawsuit against the institution when it concerns acts or omissions surrounding the making of the Direct Loan or provision of educational services purchased with the Direct Loan. Additionally, institutions that incorporated predispute arbitration agreements with Direct Loan program borrowers prior to the effective date of the final regulations must provide borrowers with agreements or notices containing specific language regarding a borrower's right to file a lawsuit against the institution when the class action concerns acts or omissions surrounding the making of the Direct Loan or provision of educational services purchased with the Direct. Institutions must provide this notice to such borrowers no later than the date of the loan exit counseling for current students or the date the school files an initial response to an arbitration demand or complaint suit from a student who hasn't received such notice.

Burden Calculation: There will be burden on any school that meets the conditions for supplying students with the changes to any agreements. Based on the Academic Year 2014–2015 Direct Loan information available, there were 1,528,714 Unsubsidized Direct Loan recipients at proprietary institutions. Assuming 66 percent of these students will continue to be enrolled at the time these regulations become effective, 1,008,951 students will be required to receive the agreements or notices required in § 685.300(e) or (f). We anticipate that it will take proprietary institutions .17 hours (10 minutes) per student to develop these agreements or notices, research who is required to receive them, and forward the information accordingly for an increase in burden of 171,522 hours (1,008,951 students × .17 hours) under OMB Control Number 1845–0143.

Requirements: Section 685.300(g) of the final regulations requires institutions to provide to the Secretary, copies of specified records connected to a claim filed in arbitration by or against the school regarding a borrower defense claim. The school must submit any records within 60 days of the filing by the school of such records to an arbitrator or upon receipt by the school of such records that were filed by someone other than the school, such as an arbitrator or student regarding a claim.

Section 685.300(h) of the final regulations requires institutions to provide to the Secretary, copies of specified records connected to a claim filed in lawsuit by the school by a student or any party against the school regarding a borrower defense claim. The school must submit any records within 30 days of the filing or receipt of the complaint by the school or upon receipt by the school of rulings on a dipositive motion or final judgement.

Burden Calculation: There will be burden on any school that meets the conditions for supplying students with the changes to any agreements. We estimate that 5 percent of the 1,959 proprietary schools, or 98 schools would be required to submit documentation to the Secretary to comply with the final regulations. We anticipate that each of the 98 schools will have an average of four filings there will be an average of four submissions for each filing. Because these are copies of documents required to be submitted to other parties we anticipate 5 burden hours to produce the copies and submit to the Secretary for an increase in burden of 7,840 hours (98 institutions × 4 filings × 4 submissions/filing × 5 hours) under OMB Control Number 1845–0143.

The combined total increase in burden for § 685.300 is 179,362 hours under OMB Control Number 1845–0143.

Consistent with the discussion above, the following chart describes the sections of the final regulations involving information collections, the information being collected, the collections that the Department will submit to OMB for approval and public comment under the PRA, and the estimated costs associated with the information collections. The monetized net costs of the increased burden on institutions, lenders, guaranty agencies, and borrowers, using wage data developed using BLS data, available at *www.bls.gov/ncs/ect/sp/ecsuphst.pdf,* is $9,458,484 as shown in the chart below. This cost was based on an hourly rate of $36.55 for institutions, lenders, and guaranty agencies and $16.30 for borrowers.

COLLECTION OF INFORMATION

Regulatory section	Information collection	OMB Control No. and estimated burden [change in burden]	Estimated costs
§ 668.14—Program participation agreement.	The final regulation requires, as part of the program participation agreement, a school to provide to all enrolled students with a closed school discharge application and a written disclosure, describing the benefits and the consequences of a closed school discharge as an alternative to completing their educational program through a teach-out plan after the Department initiates any action to terminate the participation of the school in any title IV, HEA program or after the occurrence of any of the events specified in § 668.14(b)(31) that require the institution to submit a teach-out plan.	1845–0022—This would be a revised collection. We estimate burden would increase by 1,953 hours.	$71,382

COLLECTION OF INFORMATION—Continued

Regulatory section	Information collection	OMB Control No. and estimated burden [change in burden]	Estimated costs
§ 668.41—Reporting and disclosure of information.	The final regulation clarifies in § 668.41(h) reporting and disclosure requirements to provide that, for any fiscal year in which the median borrower of a proprietary institution had not paid down the balance of the borrower's loans by at least one dollar, the institution must include a warning about that institution's repayment outcomes in advertising and promotional materials. Additionally, the final regulation clarifies that certain actions and triggering events for financial protection may, under § 668.41(i), require disclosure to prospective and enrolled students. Both the actions and triggering events and the disclosure language are subject to consumer testing.	1845–0004—This would be a revised collection. We estimate burden would increase by 5,346 hours.	195,396
§ 668.171—Financial responsibility—General.	The final regulations add a new paragraph 668.171(h) under which, in accordance with procedures to be established by the Secretary, an institution will notify the Secretary of any action or triggering event described in § 668.171(c) through (g) in the specified number of days after that action or event occurs.	1845–0022—This is a revised collection. We estimate burden will increase by 3,028 hours.	110,673
§ 668.175—Alternative standards and requirements.	The final regulations add a new paragraph (f)(4) that requires an institution to provide the Secretary financial protection, such as an irrevocable letter of credit, upon the occurrence of an action or triggering event described in § 668.171(c)–(g) if that event warrants protection as determined under § 668.175(f)(4).	1845–0022—This is a revised collection. We estimate burden would increase by 60,560 hours.	2,213,468
§ 682.211—Forbearance.	The final regulations add a new paragraph § 682.211(i)(7) that requires a lender to grant a mandatory administrative forbearance to a borrower upon being notified by the Secretary that the borrower has submitted an application for a borrower defense discharge related to a FFEL Loan that the borrower intends to pay off through a Direct Loan Program Consolidation Loan for the purpose of obtaining relief under § 685.212(k) of the final regulations.	1845–0020—This is a revised collection. We estimate burden will increase by 5,784 hours.	211,405
§ 682.402—Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.	The final regulations provide a second level of Departmental review for denied closed school discharge claims in the FFEL program. The final language requires a guaranty agency that denies a closed school discharge request to inform the borrower of the opportunity for a review of the guaranty agency's decision by the Department, and an explanation of how the borrower may request such a review. The final regulations require the guaranty agency or the Department, upon resuming collection, to provide a FFEL borrower with another closed school discharge application, and an explanation of the requirements and procedures for obtaining the discharge. The final regulations describe the responsibilities of the guaranty agency if the borrower requests such a review. The final regulations authorize the Department, or a guaranty agency with the Department's permission, to grant a closed school discharge to a FFEL borrower without a borrower application based on information in the Department's or guaranty agency's possession that the borrower did not subsequently re-enroll in any title IV-eligible institution within a period of three years after the school closed.	1845–0020—This is a revised collection. We estimate burden will increase by 1,838 hours.	67,179

COLLECTION OF INFORMATION—Continued

Regulatory section	Information collection	OMB Control No. and estimated burden [change in burden]	Estimated costs
§ 685.222—Borrower Defenses.	The final regulation describes the steps an individual borrower must take to initiate a borrower defense claim. The final regulations also provide a framework for the borrower defense group process, including descriptions of the circumstances under which group borrower defense claims could be considered, and the process the Department will follow for borrower defenses for a group. The final regulations establish a process for review and determination of a borrower defense for groups identified by the Secretary for which the borrower defense is made with respect to Direct Loans to attend a school that has closed and has provided no financial protection currently available to the Secretary from which to recover any losses based on borrower defense claims, and for which there is no appropriate entity from which the Secretary can otherwise practicably recover such losses. The final regulations establish the process for groups identified by the Secretary for which the borrower defense is asserted with respect to Direct Loans to attend an open school.	1845–0142—This is a new collection. We estimate burden will increase by 1,049 hours (249 Individual hours 800 Institutional hours).	33,299
§ 685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.	The final regulations require institutions, following the effective date of the regulations, to incorporate language into agreements allowing participation by Direct Loan students in class action lawsuits as well as predispute arbitration agreements. There is required agreement and notification language to be provided to affected students. Additionally, the final regulations require institutions to submit to the Secretary copies of arbitral records and judicial records within specified timeframes when the actions concern a borrower defense claim.	1845–0143—This is a new collection. We estimate burden will increase by 179,362 hours.	6,555,681

The total burden hours and change in burden hours associated with each OMB Control number affected by the final regulations follows:

Control No.	Total final burden hours	Final change in burden hours
1845–0004	24,016	+5,346
1845–0020	8,249,520	+7,622
1845–0022	2,281,511	+65,541
1845–0142	1,049	+1,049
1845–0143	179,362	+179,362
Total	10,735,458	+258,920

Assessment of Educational Impact

Under § 668.171(h) of the final regulations, institutions are required to report to the Department certain events or occurrences that they may also be required to report to the SEC. Under SEC rules and regulations, institutions are generally required to report information that would be material to stockholders, including certain specified information, whereas the Department has identified events and occurrences unique to institutions of higher education that it believes could threaten an institution's financial viability and for which it requires specific and perhaps more timely reporting. We believe this reporting is necessary to ensure that institutions provide financial protection, for the benefit of students and taxpayers, against actions or events that threaten an institution's ability to (1) meet its current and future financial obligations, (2) continue as a going concern or continue to participate in the title IV, HEA programs, and (3) continue to deliver educational services.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or 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.

List of Subjects

34 CFR Part 30

Claims, Income taxes.

34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

34 CFR Part 674

Loan programs—education, Reporting and recordkeeping, Student aid.

34 CFR Parts 682 and 685

Administrative practice and procedure, Colleges and universities, Loan programs—education, Reporting and recordkeeping requirements, Student aid, Vocational education.

34 CFR Parts 686

Administrative practice and procedure, Colleges and universities, Education, Elementary and Secondary education, Grant programs—education, Reporting and recordkeeping requirements, Student aid.

Dated: October 17, 2016.

John B. King, Jr.,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary of Education amends parts 30, 668, 674, 682, 685, and 686 of title 34 of the Code of Federal Regulations as follows:

PART 30—DEBT COLLECTION

■ 1. The authority citation for part 30 continues to read as follows:

Authority: 20 U.S.C. 1221e–3(a)(1), and 1226a–1, 31 U.S.C. 3711(e), 31 U.S.C. 3716(b) and 3720A, unless otherwise noted.

■ 2. Section 30.70 is revised to read as follows:

§ 30.70 How does the Secretary exercise discretion to compromise a debt or to suspend or terminate collection of a debt?

(a)(1) The Secretary uses the standards in the FCCS, 31 CFR part 902, to determine whether compromise of a debt is appropriate if the debt arises under a program administered by the Department, unless compromise of the debt is subject to paragraph (b) of this section.

(2) If the amount of the debt is more than $100,000, or such higher amount as the Department of Justice may prescribe, the Secretary refers a proposed compromise of the debt to the Department of Justice for approval, unless the compromise is subject to paragraph (b) of this section or the debt is one described in paragraph (e) of this section.

(b) Under the provisions in 34 CFR 81.36, the Secretary may enter into certain compromises of debts arising because a recipient of a grant or cooperative agreement under an applicable Department program has spent some of these funds in a manner that is not allowable. For purposes of this section, neither a program authorized under the Higher Education Act of 1965, as amended (HEA), nor the Impact Aid Program is an applicable Department program.

(c)(1) The Secretary uses the standards in the FCCS, 31 CFR part 903, to determine whether suspension or termination of collection action on a debt is appropriate.

(2) Except as provided in paragraph (e), the Secretary—

(i) Refers the debt to the Department of Justice to decide whether to suspend or terminate collection action if the amount of the debt outstanding at the time of the referral is more than $100,000 or such higher amount as the Department of Justice may prescribe; or

(ii) May suspend or terminate collection action if the amount of the debt outstanding at the time of the Secretary's determination that suspension or termination is warranted is less than or equal to $100,000 or such higher amount as the Department of Justice may prescribe.

(d) In determining the amount of a debt under paragraph (a), (b), or (c) of this section, the Secretary deducts any partial payments or recoveries already received, and excludes interest, penalties, and administrative costs.

(e)(1) Subject to paragraph (e)(2) of this section, under the provisions of 31 CFR part 902 or 903, the Secretary may compromise a debt in any amount, or suspend or terminate collection of a debt in any amount, if the debt arises under the Federal Family Education Loan Program authorized under title IV, part B, of the HEA, the William D. Ford Federal Direct Loan Program authorized under title IV, part D of the HEA, or the Perkins Loan Program authorized under title IV, part E, of the HEA.

(2) The Secretary refers a proposed compromise, or suspension or termination of collection, of a debt that exceeds $1,000,000 and that arises under a loan program described in paragraph (e)(1) of this section to the Department of Justice for review. The Secretary does not compromise, or suspend or terminate collection of, a debt referred to the Department of Justice for review until the Department of Justice has provided a response to that request.

(f) The Secretary refers a proposed resolution of a debt to the Government Accountability Office (GAO) for review and approval before referring the debt to the Department of Justice if—

(1) The debt arose from an audit exception taken by GAO to a payment made by the Department; and

(2) The GAO has not granted an exception from the GAO referral requirement.

(g) Nothing in this section precludes—

(1) A contracting officer from exercising his authority under applicable statutes, regulations, or common law to settle disputed claims relating to a contract; or

(2) The Secretary from redetermining a claim.

(h) Nothing in this section authorizes the Secretary to compromise, or suspend or terminate collection of, a debt—

(1) Based in whole or in part on conduct in violation of the antitrust laws; or

(2) Involving fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any party having an interest in the claim.

(Authority: 20 U.S.C. 1082(a) (5) and (6), 1087a, 1087hh, 1221e–3(a)(1), 1226a–1, and 1234a, 31 U.S.C. 3711)

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

■ 3. The authority citation for part 668 is revised to read as follows:

Authority: 20 U.S.C. 1001–1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, 1099c–1, 1221–3, and 1231a, unless otherwise noted.

■ 4. Section 668.14 is amended:

■ A. In paragraph (b)(30)(ii)(C), by removing the word "and".

■ B. In paragraph (b)(31)(v), by removing the period and adding in its place "; and".

■ C. By adding paragraph (b)(32).

The addition reads as follows:

§ 668.14 Program participation agreement.

* * * * *

(b) * * *

(32) The institution will provide all enrolled students with a closed school discharge application and a written disclosure, describing the benefits and consequences of a closed school discharge as an alternative to completing their educational program through a teach-out agreement, as defined in 34 CFR 602.3, immediately upon submitting a teach-out plan after the occurrence of any of the following events:

(i) The initiation by the Secretary of an action under 34 CFR 600.41 or subpart G of this part or the initiation of an emergency action under § 668.83, to terminate the participation of an institution in any title IV, HEA program.

(ii) The occurrence of any of the events in paragraph (b)(31)(ii) through (v) of this section.

* * * * *

■ 5. Section 668.41 is amended by adding paragraphs (h) and (i) and revising the authority citation to read as follows:

§ 668.41 Reporting and disclosure of information.

* * * * *

(h) *Loan repayment warning for proprietary institutions*—(1) *Calculation of loan repayment rate.* For each award year, the Secretary calculates a proprietary institution's loan repayment rate, for the cohort of borrowers who entered repayment on their FFEL or Direct Loans at any time during the two-year cohort period, using the methodology in § 668.413(b)(3), provided that, for the purpose of this paragraph (h)—

(i) The reference to ''program'' in § 668.413(b)(3)(vi) is read to refer to ''institution'';

(ii) ''Award year'' means the 12-month period that begins on July 1 of one year and ends on June 30 of the following year;

(iii) ''Borrower'' means a student who received a FFEL or Direct Loan for enrolling in a gainful employment program at the institution; and

(iv) ''Two-year cohort period'' is defined as set forth in § 668.402.

(2) *Issuing and appealing loan repayment rates.* (i) For each award year, the Secretary notifies an institution of its final loan repayment rate.

(ii) If an institution's final loan repayment rate shows that the median borrower has not either fully repaid all FFEL or Direct Loans received for enrollment in the institution or made loan payments sufficient to reduce by at least one dollar the outstanding balance of each of the borrower's FFEL or Direct Loans received for enrollment in the institution—

(A) Using the calculation described in paragraph (h)(4)(ii) of this section, the institution may submit an appeal to the Secretary within 15 days of receiving notification of its final loan repayment rate; and

(B) The Secretary will notify the institution if the appeal is—

(*1*) Granted and the institution qualifies for an exemption from the warning requirement under paragraph (h)(4) of this section; or

(*2*) Not granted, and the institution must comply with the warning requirement under paragraph (h)(3) of this section.

(3) *Loan repayment warning*—(i) *Promotional materials.* (A) Except as provided in paragraph (h)(4) of this section, for any award year in which the institution's loan repayment rate shows that the median borrower has not either fully repaid, or made loan payments sufficient to reduce by at least one dollar the outstanding balance of, each of the borrower's FFEL or Direct Loans received for enrollment in the institution, the institution must, in all promotional materials that are made available to prospective or enrolled students by or on behalf of the institution, include a loan repayment warning in a form, place, and manner prescribed by the Secretary in a notice published in the **Federal Register**. The warning language must read: ''U.S. Department of Education Warning: A majority of recent student loan borrowers at this school are not paying down their loans,'' unless stated otherwise by the Secretary in a notice published in the **Federal Register**. Before publishing that notice, the Secretary may conduct consumer testing to help ensure that the warning is meaningful and helpful to students.

(B) Promotional materials include, but are not limited to, an institution's Web site, catalogs, invitations, flyers, billboards, and advertising on or through radio, television, video, print media, social media, or the Internet.

(C) The institution must ensure that all promotional materials, including printed materials, about the institution are accurate and current at the time they are published, approved by a State agency, or broadcast.

(ii) *Clarity of warning.* The institution must ensure that the warning is prominent, clear, and conspicuous. The warning is not prominent, clear, and conspicuous if it is difficult to read or hear, or placed where it can be easily overlooked. In written materials, including email, Internet advertising and promotional materials, print media, and other advertising or hard-copy promotional materials, the warning must be included on the cover page or home page and any other pages with information on a program of study and any pages with information on costs and financial aid. For television and video materials, the warning must be both spoken and written simultaneously. The Secretary may require the institution to modify its promotional materials, including its Web site, if the warning is not prominent, clear, and conspicuous.

(4) *Exemptions.* An institution is not required to provide a warning under paragraph (h)(3) of this section based on a final loan repayment rate for that award year if—

(i) That rate is based on fewer than 10 borrowers in the cohort described in paragraph (h)(1) of this section; or

(ii) The institution demonstrates to the Secretary's satisfaction that not all of its programs constitute GE programs and that if the borrowers in the non-GE programs were included in the calculation of the loan repayment rate, the loan repayment rate would show that the median borrower has made loan payments sufficient to reduce by at least one dollar the outstanding balance of each of the borrower's FFEL or Direct Loans received for enrollment in the institution.

(i) *Financial protection disclosures*—(1) *General.* An institution must deliver a disclosure to enrolled and prospective students in the form and manner described in paragraph (i)(3), (4), and (5) of this section, and post that disclosure to its Web site as described in paragraph (i)(6) of this section, within 30 days of notifying the Secretary under § 668.171(h) of the occurrence of a triggering event or events identified pursuant to paragraph (i)(2) of this section. The requirements in this paragraph (i) apply for the 12-month period following the date the institution notifies the Secretary under § 668.171(h) of a triggering event or events identified under paragraph (i)(2).

(2) *Triggering events.* The Secretary will conduct consumer testing to inform the identification of events for which a disclosure is required. The Secretary will consumer test each of the events identified in § 668.171(c) through (g), as well as other events that result in an institution being required to provide financial protection to the Department, to determine which of these events are most meaningful to students in their educational decision-making. The Secretary will identify the triggering events for which a disclosure is required under paragraph (i)(1) in a document published in the **Federal Register**.

(3) *Form of disclosure.* The Secretary will conduct consumer testing to ensure the form of the disclosure is meaningful and helpful to students. The Secretary will specify the form and placement of the disclosure in a notice published in the **Federal Register** following the consumer testing.

(4) *Delivery to enrolled students.* An institution must deliver the disclosure required under this paragraph (i) to each enrolled student in writing by—

(i) Hand-delivering the disclosure as a separate document to the student individually or as part of a group presentation; or

(ii)(A) Sending the disclosure to the student's primary email address or delivering the disclosure through the electronic method used by the institution for communicating with the student about institutional matters; and

(B) Ensuring that the disclosure is the only substantive content in the message sent to the student under this paragraph unless the Secretary specifies additional, contextual language to be included in the message.

(5) *Delivery to prospective students.* An institution must deliver the disclosure required under this paragraph (i) to a prospective student before that student enrolls, registers, or enters into a financial obligation with the institution by—

(i) Hand-delivering the disclosure as a separate document to the student individually, or as part of a group presentation; or

(ii)(A) Sending the disclosure to the student's primary email address or delivering the disclosure through the electronic method used by the institution for communicating with prospective students about institutional matters; and

(B) Ensuring that the disclosure is the only substantive content in the message sent to the student under this paragraph unless the Secretary specifies additional, contextual language to be included in the message.

(6) *Institutional Web site.* An institution must prominently provide the disclosure required under this paragraph (i) in a simple and meaningful manner on the home page of the institution's Web site.

* * * * *

(Authority: 20 U.S.C. 1092, 1094, 1099c)

■ 6. Section 668.71 is amended in paragraph (c), in the second sentence of the definition of ''Misrepresentation'', by removing the word ''deceive'' and adding in its place the words ''mislead under the circumstances'' and by adding a fourth sentence.

The addition reads as follows:

§ 668.71 Scope and special definitions.

* * * * *

(c) * * *

Misrepresentation: * * * Misrepresentation includes any statement that omits information in such a way as to make the statement false, erroneous, or misleading.

* * * * *

■ 7. Section 668.90 is amended by revising paragraph (a)(3) to read as follows:

§ 668.90 Initial and final decisions.

(a) * * *

(3) Notwithstanding the provisions of paragraph (a)(2) of this section—

(i) If, in a termination action against an institution, the hearing official finds that the institution has violated the provisions of § 668.14(b)(18), the hearing official also finds that termination of the institution's participation is warranted;

(ii) If, in a termination action against a third-party servicer, the hearing official finds that the servicer has violated the provisions of § 668.82(d)(1), the hearing official also finds that termination of the institution's participation or servicer's eligibility, as applicable, is warranted;

(iii) In an action brought against an institution or third-party servicer that involves its failure to provide a letter of credit or other financial protection under § 668.15 or § 668.171(c) through (g), the hearing official finds that the amount of the letter of credit or other financial protection established by the Secretary under § 668.175(f)(4) is appropriate, unless the institution can demonstrate that the amount was not warranted because—

(A) For financial protection demanded based on events or conditions described in § 668.171(c) through (f), the events or conditions no longer exist or have been resolved or the institution demonstrates that it has insurance that will cover the debts and liabilities that arise from the triggering event or condition, or, for a condition or event described in § 668.171(c)(1)(iii) (teach out) or (iv) (gainful employment eligibility loss), the amount of educationally related expenses reasonably attributable to the programs or location is greater than the amount calculated in accordance with Appendix C of subpart L of this part. The institution can demonstrate that insurance covers risk by presenting the Department with a statement from the insurer that the institution is covered for the full or partial amount of the liability in question;

(B) For financial protection demanded based on a suit described in § 668.171(c)(1)(i) that does not state a specific amount of relief and on which the court has not ruled on the amount of relief, the institution demonstrates that, accepting the facts alleged as true, and assuming the claims asserted are fully successful, the action pertains to a period, program, or location for which the maximum potential relief is less than the amount claimed or the amount determined under § 668.171(c)(2)(ii);

(C) For financial protection demanded based on the ground identified in § 668.171(g), the factor or event does not and will not have a material adverse effect on the financial condition, business, or results of operations of the institution;

(D)(*1*) For financial protection demanded under § 668.175(f)(4)(i), the institution does not participate and has not participated for the prior fiscal year in a title IV, HEA loan program; and

(*2*) For any financial protection demanded of an institution described in paragraph (a)(3)(iii)(D)(*1*) of this section, and any portion of financial protection demanded of any other institution greater than 10 percent of the amount of title IV, HEA funds received by the institution in its most recently completed fiscal year—

(*i*) The risk of loss to the Secretary on the grounds demonstrated by the Secretary does not exist;

(*ii*) The loss as demonstrated by the Secretary is not reasonably likely to arise within the next 18 months; or

(*iii*) The amount is unnecessary to protect, or contrary to, the Federal interest;

(E) The institution has proffered alternative financial protection that provides students and the Department adequate protection against losses resulting from the risks identified by the Secretary. In the Secretary's discretion, adequate protection may consist of one or more of the following—

(*1*) An agreement with the Secretary that a portion of the funds due to the institution under a reimbursement or heightened cash monitoring funding arrangement will be temporarily withheld in such amounts as will meet, no later than the end of a nine-month period, the amount of the required financial protection demanded; or

(*2*) Other form of financial protection specified by the Secretary in a notice published in the **Federal Register**.

(iv) In a termination action taken against an institution or third-party servicer based on the grounds that the institution or servicer failed to comply with the requirements of § 668.23(c)(3), if the hearing official finds that the institution or servicer failed to meet those requirements, the hearing official finds that the termination is warranted;

(v)(A) In a termination action against an institution based on the grounds that the institution is not financially responsible under § 668.15(c)(1), the hearing official finds that the termination is warranted unless the institution demonstrates that all applicable conditions described in § 668.15(d)(4) have been met; and

(B) In a termination or limitation action against an institution based on the grounds that the institution is not financially responsible—

(*1*) Upon proof of the conditions in § 668.174(a), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all the conditions in § 668.175(f) have been met; and

(*2*) Upon proof of the conditions in § 668.174(b)(1), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all applicable conditions described in § 668.174(b)(2) or § 668.175(g) have been met.

* * * * *

■ 8. Section 668.93 is amended by redesignating paragraphs (h) and (i) as paragraphs (i) and (j), respectively, and adding a new paragraph (h) to read as follows:

§ 668.93 Limitation.

* * * * *

(h) A change in the participation status of the institution from fully certified to participate to provisionally certified to participate under § 668.13(c).

* * * * *

■ 9. Section 668.171 is revised to read as follows:

§ 668.171 General.

(a) *Purpose.* To begin and to continue to participate in any title IV, HEA program, an institution must demonstrate to the Secretary that it is financially responsible under the standards established in this subpart. As provided under section 498(c)(1) of the HEA, the Secretary determines whether an institution is financially responsible based on the institution's ability to—

(1) Provide the services described in its official publications and statements;

(2) Meet all of its financial obligations; and

(3) Provide the administrative resources necessary to comply with title IV, HEA program requirements.

(b) *General standards of financial responsibility.* Except as provided under paragraphs (e) and (f) of this section, the Secretary considers an institution to be financially responsible if the Secretary determines that—

(1) The institution's Equity, Primary Reserve, and Net Income ratios yield a composite score of at least 1.5, as provided under § 668.172 and appendices A and B to this subpart;

(2) The institution has sufficient cash reserves to make required returns of unearned title IV, HEA program funds, as provided under § 668.173;

(3) The institution is able to meet all of its financial obligations and otherwise provide the administrative resources necessary to comply with title IV, HEA program requirements. An institution may not be able to meet its financial or administrative obligations if it is subject to an action or event described in paragraph (c), (d), (e), (f), or (g) of this section. The Secretary considers those actions or events in determining whether the institution is financially responsible only if they occur on or after July 1, 2017; and

(4) The institution or persons affiliated with the institution are not subject to a condition of past performance under § 668.174(a) or (b).

(c) *Debts, liabilities, and losses.* (1) Except as provided under paragraph (h)(3) of this section, an institution is not able to meet its financial or administrative obligations under paragraph (b)(3) of this section if, after the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score, the institution is subject to one or more of the following actions or triggering events, and as a result of the actual or potential debts, liabilities, or losses that have stemmed or may stem from those actions or events, the institution's recalculated composite score is less than 1.0, as determined by the Secretary under paragraph (c)(2) of this section:

(i) *Debts and borrower defense-related lawsuits.* (A) The institution is required to pay any debt or incur any liability arising from a final judgment in a judicial proceeding or from an administrative proceeding or determination, or from a settlement; or

(B) The institution is being sued in an action brought on or after July 1, 2017 by a Federal or State authority for financial relief on claims related to the making of the Direct Loan for enrollment at the school or the provision of educational services and the suit has been pending for 120 days.

(ii) *Other litigation.* The institution is being sued in an action brought on or after July 1, 2017 that is not described in paragraph (c)(1)(i)(B) of this section and—

(A) The institution has filed a motion for summary judgment or summary disposition and that motion has been denied or the court has issued an order reserving judgment on the motion;

(B) The institution has not filed a motion for summary judgment or summary disposition by the deadline set for such motions by the court or agreement of the parties; or

(C) If the court did not set a deadline for filing a motion for summary judgment and the institution did not file such a motion, the court has set a pretrial conference date or trial date and the case is pending on the earlier of those two dates.

(iii) *Accrediting agency actions.* The institution was required by its accrediting agency to submit a teach-out plan, for a reason described in § 602.24(c)(1), that covers the closing of the institution or any of its branches or additional locations.

(iv) *Gainful employment.* As determined annually by the Secretary, the institution has gainful employment programs that, under § 668.403, could become ineligible based on their final D/E rates for the next award year.

(v) *Withdrawal of owner's equity.* For a proprietary institution whose composite score is less than 1.5, any withdrawal of owner's equity from the institution by any means, including by declaring a dividend, unless the transfer is to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated.

(2) *Recalculating the composite score*—(i) *General.* Unless the institution demonstrates to the satisfaction of the Secretary that the event or condition has had or will have no effect on the assets and liabilities of the institution under paragraph (g)(3)(iv) of this section, as specified in Appendix C of this subpart, the Secretary recognizes and accounts for the actual or potential losses associated with the actions or events under paragraph (c)(1) of this section and, based on that accounting, recalculates the institution's most recent composite score. The recalculation will occur regularly after associated actions or events are reported to the Secretary. The Secretary recalculates the composite score under this paragraph using the financial statements on which the institution's composite score has been calculated under § 668.172.

(ii) *Calculation of potential loss—debts and borrower defense-related lawsuits.* For a debt or a suit described in paragraph (c)(1)(i) of this section, the amount of loss is—

(A) The amount of debt;

(B) For a suit, the amount set by a court ruling, or, in the absence of a court ruling—

(*1*) The amount of relief claimed in the complaint;

(*2*) If the complaint demands no specific amount of relief, the amount stated in any final written demand issued by the agency to the institution prior to the suit or a lesser amount that the agency offers to accept in settlement of any financial demand in the suit; or

(*3*) If the agency stated no specific demand in the complaint, in a pre-filing demand, or in a written offer of settlement, the amount of tuition and fees received by the institution during the period, and for the program or location, described in the allegations in the complaint.

(iii) *Calculation of potential loss—other litigation.* For any suit described in paragraph (c)(1)(ii) of this section, the amount of loss is the amount set by a court ruling, or, in the absence of a court ruling—

(A) The amount of relief claimed in the complaint;

(B) If the complaint demands no specific amount of relief, the amount stated in any final written demand by the claimant to the institution prior to the suit or a lesser amount that the plaintiff offers to accept in settlement of any financial demand in the suit; or

(C) If the complainant stated no specific demand in the complaint, in a pre-filing demand, or in a written offer of settlement, the amount of the claim as stated in a response to a discovery request, including an expert witness report.

(iv) *Calculation of potential loss—other events.* (A) For a closed location or institution, or the potential loss of eligibility for gainful employment programs, as described in paragraph (c)(1)(iii) or (iv), the amount of loss is the amount of title IV, HEA program funds the institution received in its most recently completed fiscal year for that location or institution, or for those GE programs.

(B) For the withdrawal of owner's equity, described in paragraph (c)(1)(v) of this section, the amount of loss is the amount transferred to any entity other than the institution.

(d) *Non-title IV revenue.* Except as provided under paragraph (h)(3) of this section, a proprietary institution is not able to meet its financial or administrative obligations under paragraph (b)(3) of this section if, for its most recently completed fiscal year, the institution did not derive at least 10 percent of its revenue from sources other than title IV, HEA program funds, as provided under § 668.28(c).

(e) *Publicly traded institutions.* Except as provided under paragraph (h)(3) of this section, a publicly traded institution is not able to meet its financial or administrative obligations under paragraph (b)(3) of this section if the institution is currently subject to one or more of the following actions or events:

(1) *SEC actions.* The SEC warns the institution that it may suspend trading on the institution's stock.

(2) *SEC reports.* The institution failed to file a required annual or quarterly report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b–25.

(3) *Exchange actions.* The exchange on which the institution's stock is traded notifies the institution that it is not in compliance with exchange requirements, or its stock is delisted.

(f) *Cohort default rates.* Except as provided under paragraph (h)(3) of this section, an institution is not able to meet its financial or administrative obligations under paragraph (b)(3) of this section if the institution's two most recent official cohort default rates are 30 percent or greater, as determined under subpart N of this part, unless—

(1) The institution files a challenge, request for adjustment, or appeal under that subpart with respect to its rates for one or both of those fiscal years; and

(2) That challenge, request, or appeal remains pending, results in reducing below 30 percent the official cohort default rate for either or both years, or precludes the rates from either or both years from resulting in a loss of eligibility or provisional certification.

(g) *Discretionary factors or events.* Except as provided under paragraph (h)(3) of this section, an institution is not able to meet its financial or administrative obligations under paragraph (b)(3) of this section if the Secretary demonstrates that there is an event or condition that is reasonably likely to have a material adverse effect on the financial condition, business, or results of operations of the institution, including but not limited to whether—

(1) There is a significant fluctuation between consecutive award years, or a period of award years, in the amount of Direct Loan or Pell Grant funds, or a combination of those funds, received by the institution that cannot be accounted for by changes in those programs;

(2) The institution is cited by a State licensing or authorizing agency for failing State or agency requirements;

(3) The institution fails a financial stress test developed or adopted by the Secretary to evaluate whether the institution has sufficient capital to absorb losses that may be incurred as a result of adverse conditions and continue to meet its financial obligations to the Secretary and students;

(4) As calculated by the Secretary, the institution has high annual dropout rates;

(5) The institution is or was placed on probation or issued a show-cause order, or placed on an accreditation status that poses an equivalent or greater risk to its accreditation, by its accrediting agency for failing to meet one or more of the agency's standards;

(6)(i) The institution violated a provision or requirement in a loan agreement; and

(ii) As provided under the terms of a security or loan agreement between the institution and the creditor, a monetary or nonmonetary default or delinquency event occurs, or other events occur, that trigger, or enable the creditor to require or impose on the institution, an increase in collateral, a change in contractual obligations, an increase in interest rates or payments, or other sanctions, penalties, or fees;

(7) The institution has pending claims for borrower relief discharge under § 685.206 or § 685.222; or

(8) The Secretary expects to receive a significant number of claims for borrower relief discharge under § 685.206 or § 685.222 as a result of a lawsuit, settlement, judgement, or finding from a State or Federal administrative proceeding.

(h) *Reporting requirements.* (1) In accordance with procedures established by the Secretary, an institution must notify the Secretary of any of the following actions or events identified in paragraphs (c) through (g) of this section no later than—

(i) For lawsuits and for other actions or events described in paragraph (c)(1)(i) of this section—

(A) For lawsuits, 10 days after the institution is served with the complaint and 10 days after the suit has been pending for 120 days; and

(B) For debts arising from lawsuits and for other actions or events, 10 days after a payment was required or a liability was incurred.

(ii) For lawsuits described in paragraph (c)(1)(ii) of this section—

(A) Ten days after the institution is served with the complaint;

(B) Ten days after the court sets the dates for the earliest of the events described in paragraph (c)(1)(ii) of this section, provided that, if the deadline is set by procedural rules, notice of the applicable deadline must be included with notice of the service of the complaint; and

(C) Ten days after the earliest of the applicable events occurs;

(iii) For an accrediting agency action described in paragraph (c)(1)(iii) of this section, 10 days after the institution is notified by its accrediting agency that it must submit a teach-out plan;

(iv) For a withdrawal of owner's equity described in paragraph (c)(1)(v) of this section, 10 days after the withdrawal is made;

(v) For the non-title IV revenue provision in paragraph (d) of this section, 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(3);

(vi) For the SEC and stock exchange provisions for publicly traded institutions in paragraph (e), 10 days after the SEC or exchange warns, notifies, or takes an action against the institution, or 10 days after any extension granted by the SEC;

(vii) For State or agency actions in paragraph (g)(2) of this section, 10 days after the institution is cited for violating a State or agency requirement;

(viii) For probation or show cause actions under paragraph (g)(5) of this section, 10 days after the institution's accrediting agency places the institution on that status; or

(ix) For the loan agreement provisions in paragraph (g)(6) of this section, 10 days after a loan violation occurs, the creditor waives the violation, or the creditor imposes sanctions or penalties in exchange or as a result of the waiver.

(2) The Secretary may take an administrative action under paragraph (k) of this section against the institution if it fails to provide timely notice under this paragraph (h).

(3) In its notice to the Secretary, the institution may demonstrate that—

(i) For a suit by a Federal or State agency described in paragraph (c)(1)(i)(B) of this section, the amount claimed in the complaint or determined under paragraph (c)(2)(ii) of this section exceeds the potential recovery because the allegations in the complaint, if accepted as true, and the claims asserted, if fully successful, cannot produce relief in the amount claimed or, if no amount was claimed, the amount deemed under paragraph (c)(2)(ii) because they pertain to a period, program, or location for which the full recovery possible is a lesser amount;

(ii) The reported withdrawal of owner's equity under paragraph (c)(1)(v) of this section was used exclusively to meet tax liabilities of the institution or its owners for income derived from the institution;

(iii) The reported violation of a provision or requirement in a loan agreement under paragraph (g)(6) of this section was waived by the creditor. However, if the creditor imposes additional constraints or requirements as a condition of waiving the violation, or imposes penalties or requirements under paragraph (g)(6)(ii) of this section, the institution must identify and describe those penalties, constraints, or requirements and may demonstrate that complying with those actions will not adversely affect the institution's ability to meet its current and future financial obligations; or

(iv) The action or event reported under this paragraph (h) no longer exists or has been resolved or the institution has insurance that will cover part or all of the debts and liabilities that arise at any time from that action or event.

(i) *Public institutions.* (1) The Secretary considers a domestic public institution to be financially responsible if the institution—

(i)(A) Notifies the Secretary that it is designated as a public institution by the State, local, or municipal government entity, tribal authority, or other government entity that has the legal authority to make that designation; and

(B) Provides a letter from an official of that State or other government entity confirming that the institution is a public institution; and

(ii) Is not subject to a condition of past performance under § 668.174.

(2) The Secretary considers a foreign public institution to be financially responsible if the institution—

(i)(A) Notifies the Secretary that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and

(B) Provides documentation from an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity; and

(ii) Is not subject to a condition of past performance under § 668.174.

(j) *Audit opinions.* Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Secretary does not consider the institution to be financially responsible if, in the institution's audited financial statements, the opinion expressed by the auditor was an adverse, qualified, or disclaimed opinion, or the auditor expressed doubt about the continued existence of the institution as a going concern, unless the Secretary determines that a qualified or disclaimed opinion does not significantly bear on the institution's financial condition.

(k) *Administrative actions.* If the Secretary determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial and compliance audits by the date and in the manner required under § 668.23, the Secretary may—

(1) Initiate an action under subpart G of this part to fine the institution, or limit, suspend, or terminate the institution's participation in the title IV, HEA programs; or

(2) For an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d).

(Authority: 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109)

■ 10. Section 668.175 is amended by:
■ A. Revising paragraphs (c) and (d).
■ B. Removing and reserving paragraph (e).
■ C. Revising paragraph (f).
■ D. Adding paragraph (h).
■ E. Revising the authority citation.

The revisions and addition read as follows:

§ 668.175 Alternative standards and requirements.

* * * * *

(c) *Letter of credit alternative for participating institutions.* A participating institution that is not financially responsible either because it does not satisfy one or more of the standards of financial responsibility under § 668.171(b) through (g), or because of an audit opinion described under § 668.171(j), qualifies as a financially responsible institution by submitting an irrevocable letter of credit or other form of financial protection specified by the Secretary in a notice published in the **Federal Register**, that is acceptable and payable to the Secretary, for an amount determined by the Secretary that is not less than one-half of the title IV, HEA program funds received by the institution during its most recently completed fiscal year.

(d) *Zone alternative.* (1) A participating institution that is not financially responsible solely because the Secretary determines that its composite score under § 668.172 is less than 1.5 may participate in the title IV, HEA programs as a financially responsible institution for no more than three consecutive years, beginning with the year in which the Secretary determines that the institution qualifies under this alternative.

(i)(A) An institution qualifies initially under this alternative if, based on the institution's audited financial statement for its most recently completed fiscal year, the Secretary determines that its composite score is in the range from 1.0 to 1.4; and

(B) An institution continues to qualify under this alternative if, based on the institution's audited financial statement for each of its subsequent two fiscal years, the Secretary determines that the institution's composite score is in the range from 1.0 to 1.4.

(ii) An institution that qualified under this alternative for three consecutive years, or for one of those years, may not seek to qualify again under this alternative until the year after the institution achieves a composite score of at least 1.5, as determined by the Secretary.

(2) Under the zone alternative, the Secretary—

(i) Requires the institution to make disbursements to eligible students and parents, and to otherwise comply with the provisions, under either the heightened cash monitoring or reimbursement payment method described in § 668.162;

(ii) Requires the institution to provide timely information regarding any of the following oversight and financial events—

(A) Any event that causes the institution, or related entity as defined in Accounting Standards Codification (ASC) 850, to realize any liability that was noted as a contingent liability in the institution's or related entity's most recent audited financial statement; or

(B) Any losses that are unusual in nature or infrequently occur, or both, as defined in accordance with Accounting Standards Update (ASU) No. 2015–01 and ASC 225;

(iii) May require the institution to submit its financial statement and compliance audits earlier than the time specified under § 668.23(a)(4); and

(iv) May require the institution to provide information about its current operations and future plans.

(3) Under the zone alternative, the institution must—

(i) For any oversight or financial event described in paragraph (d)(2)(ii) of this section for which the institution is required to provide information, in accordance with procedures established by the Secretary, notify the Secretary no later than 10 days after that event occurs; and

(ii) As part of its compliance audit, require its auditor to express an opinion on the institution's compliance with the requirements under the zone alternative, including the institution's administration of the payment method under which the institution received and disbursed title IV, HEA program funds.

(4) If an institution fails to comply with the requirements under paragraph (d)(2) or (3) of this section, the Secretary may determine that the institution no longer qualifies under this alternative.

* * * * *

(f) *Provisional certification alternative.* (1) The Secretary may permit an institution that is not financially responsible to participate in the title IV, HEA programs under a provisional certification for no more than three consecutive years if, as determined annually by the Secretary—

(i) The institution is not financially responsible because it does not satisfy the general standards under § 668.171(b)(1) or (3), its recalculated composite score under § 668.171(c)(2) is less than 1.0, is subject to an action or event under § 668.171(d), (e), (f),or (g) or because of an audit opinion described in § 668.171(i); or

(ii) The institution is not financially responsible because of a condition of past performance, as provided under § 668.174(a), and the institution demonstrates to the Secretary that it has satisfied or resolved that condition.

(2) Under this alternative, the institution must—

(i) Provide to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary, agree to a set-aside under paragraph (h) of this section, or, at the Secretary's discretion, provide another form of financial protection specified by the Secretary in a notice published in the **Federal Register**, for an amount determined by the Secretary under paragraph (f)(4) of this section, except that this requirement does not apply to a public institution; and

(ii) Comply with the provisions under the zone alternative, as provided under paragraph (d)(2) and (3).

(3) If at the end of the period for which the Secretary provisionally certified the institution, the institution is still not financially responsible, the Secretary—

(i) May permit the institution to participate under a provisional certification, but—

(A) May require the institution, or one or more persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), or both, to provide to the Secretary financial protection for an amount determined by the Secretary under paragraph (f)(4) of this section; and

(B) May require one or more of the persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), to be jointly or severally liable for any liabilities that may arise from the institution's participation in the title IV, HEA programs; and

(ii) May permit the institution to continue to participate under a provisional certification but requires the institution to provide, or continue to provide, the financial protection resulting from an event described in § 668.171(c) through (g) until the institution meets the requirements of paragraph (f)(5) of this section.

(4)(i) The institution must provide to the Secretary the financial protection described under paragraph (f)(2)(i) in an amount that, together with the amount of any financial protection that the institution has already provided if that protection covers the period described in paragraph (f)(5) of this section, equals, for a composite score calculated under § 668.172, a composite score recalculated under § 668.171(c)(2), or for any other reason that the institution is not financially responsible—

(A) Ten percent of the total amount of title IV, HEA program funds received by the institution during its most recently completed fiscal year; and

(B) Any additional amount that the Secretary demonstrates is needed under paragraph (f)(4)(ii) of this section.

(ii) The Secretary determines the amount specified in paragraph (f)(4)(i)(B) of this section that must be provided by the institution in addition to the amount specified in paragraph (f)(4)(i)(A) of this section, and must ensure that the total amount of financial protection provided under paragraph (f)(4)(i) of this section is sufficient to fully cover any estimated losses. The Secretary may reduce the amount required under paragraph (f)(4)(i)(B) only if an institution demonstrates that this amount is unnecessary to protect, or is contrary to, the Federal interest.

(5) The Secretary maintains the full amount of the financial protection provided by the institution under paragraph (f)(4) of this section until the Secretary first determines that the institution has—

(i) A composite score of 1.0 or greater based on the review of the audited financial statements for the fiscal year in which all losses from any event described in § 668.171(c), (d), (e), (f), or (g) on which financial protection was required have been fully recognized; or

(ii) A recalculated composite score of 1.0 or greater, and any event or condition described in § 668.171(d), (e), (f), or (g) has ceased to exist.

* * * * *

(h) *Set-aside.* If an institution does not provide a letter of credit or financial protection acceptable to the Secretary for the amount required under paragraph (d) or (f) of this section within 45 days of the Secretary's request, the Secretary offsets the amount of title IV, HEA program funds that an institution is eligible to receive in a manner that ensures that, no later than the end of a nine-month period, the total amount offset equals the amount of financial protection the institution would otherwise provide. The Secretary uses the funds to satisfy the debt and liabilities owed to the Secretary that are not otherwise paid directly by the institution, and provides to the institution any funds not used for this purpose during the period for which the financial protection was required, or provides the institution any remaining funds if the institution subsequently submits the financial protection originally required under paragraph (d) or (f) of this section.

* * * * *

(Authority: 20 U.S.C. 1094 and 1099c)

■ 11. Section 668.176 is added to subpart L to read as follows:

§ 668.176 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice will not be affected thereby.

(Authority: 20 U.S.C. 1094, 1099c)

■ 12. Appendix C to subpart L of part 668 is added to read as follows:

Appendix C to Subpart L of Part 668 - Balance Sheet and Income Statement Adjustments for Recalculating Composite Score

Section 1: Proprietary Institutions

Event	Borrower-defense related lawsuits and other debts, §668.171(c)(1)(i)		Other Litigation, §668.171(c)(1)(ii)		Withdrawal of Owner's Equity, §668.171(c)(1)(v)		Accrediting Agency Requires Teach-out Plan for Closed Location, §668.171(c)(1)(iii)		Gainful Employment Programs, Loss of Eligiblity, §668.171(c)(1)(iv)	
Amount of Loss	Debt, relief claimed, or other amount as determined under §668.171(c)(2)(ii)		Relief claimed, or other amount as determined under §668.171(c)(2)(iii)		Total amount withdrawn, §668.171(c)(2)(iv)		Tilte IV funds received by the closed insitution or location during the most recently completed fiscal year, §668.171(c)(2)(iv)		Title IV funds received during the most recently completed fiscal year by GE programs in jeopardy of losing eligibility, §668.171(c)(2)(iv)	
Allowance for Expenses	Not applicable						Cost of Goods Sold (#28) / Operating Income (#25) multiplied by Amount of Loss			
	Entries for Loss Line item from Section 2, Appendix A						**Entries for Loss and Expenses** Line item from Section 2, Appendix A			
	Debit	Credit	Debit	Credit	Debit	Credit	Debit	Credit	Debit	Credit
Adjusting Entries	#32, Total Expenses		#32, Total Expenses		#23, Total Owners Equity		#27, Total Income		#27, Total Income	
		#13, Total Assets		#13, Total Assets		#13, Total Assets		#13, Total Assets		#13, Total Assets
	NA		NA		NA		#13, Total Assets (expense allowance)		#13, Total Assets (expense allowance)	
		NA		NA		NA		#32, Total Expenses (expense allowance)		#32, Total Expenses (expense allowance)

Note that based on the changes to #27 Total Income and Line #32 Total expenses, the following line items may be recalculated: #34 Net Income Before Taxes, #36 Net Income After Taxes, #38 Net Income, #22 Retained Earnings, #23 Total Owner's Equity, and #24 Total Liabilities and Owner's Equity

Section 2: Non-profit Institutions

Event	Borrower-defense related lawsuits and other debts, §668.171(c)(1)(i)		Other Litigation, §668.171(c)(1)(ii)		Accrediting Agency Requires Teach-out Plan for Closed Location, §668.171(c)(1)(iii)		Gainful Employment Programs, Loss of Eligiblity, §668.171(c)(1)(iv	
Amount of Loss	Debt, relief claimed, or other amount as determined under §668.171(c)(2)(ii)		Relief claimed, or other amount as determined under §668.171(c)(2)(iii)		Tilte IV funds received by the closed insitution or location during the most recently completed fiscal year, §668.171(c)(2)(iv)		Title IV funds received during the most recently completed fiscal year by GE programs in jeopardy of losing eligibility, §668.171(c)(2)(iv)	
Allowance for Expenses	Not applicable				Operating expenses (#32) / Tuition & Fees (#27) multiplied by Amount of Loss			
	Entries for Los s Line item from Section 2, Appendix B				**Entries for Loss and Expenses** Line item from Section 2, Appemdix B			
	Debit	Credit	Debit	Credit	Debit	Credit	Debit	Credit
Adjusting Entries	#38b, Total Expenses (Unrestricted)		#38b, Total Expenses (Unrestricted)		#31b, Total Revenue (Unrestricted)		#31b, Total Revenue (Unrestricted)	
		#12, Total Assets		#12, Total Assets		#12, Total Assets		#12, Total Assets
	NA		NA		#12, Total Assets (expense allowance)		#12, Total Assets (expense allowance)	
		NA		NA		#38b, Total Expenses (expense allowance)		#38b, Total Expenses (expense allowance)

Note that based on the changes to #31b Total Revenue (Unrestricted) and #38b Total Expenses (Unrestricted), the following items may be recalculated: #39b Change in (Unrestricted) Net Assets, #41b (Unrestricted) Net Assets at end of year (will be same as #20 Unrestricted Net Assets), #25 Total Net Assets, #26 Total Liabilitites & Net Assets.

PART 674—FEDERAL PERKINS LOAN PROGRAM

■ 13. The authority citation for part 674 continues to read as follows:

Authority: 20 U.S.C. 1070g, 1087aa—1087hh, unless otherwise noted.

■ 14. Section 674.33 is amended by:

■ A. Revising paragraph (g)(3).

■ B. Redesignating paragraphs (g)(8)(vi) through (ix) as paragraphs (g)(8)(vii) through (x), respectively.

■ C. Adding a new paragraph (g)(8)(vi).

The revision and addition read as follows:

§ 674.33 Repayment.

* * * * *

(g) * * *

(3) *Determination of borrower qualification for discharge by the Secretary.* (i) The Secretary may discharge the borrower's obligation to repay an NDSL or Federal Perkins Loan without an application if the Secretary determines that—

(A) The borrower qualified for and received a discharge on a loan pursuant to 34 CFR 682.402(d) (Federal Family Education Loan Program) or 34 CFR 685.214 (Federal Direct Loan Program), and was unable to receive a discharge on an NDSL or Federal Perkins Loan because the Secretary lacked the statutory authority to discharge the loan; or

(B) Based on information in the Secretary's possession, the borrower qualifies for a discharge.

(ii) With respect to schools that closed on or after November 1, 2013, the Secretary will discharge the borrower's obligation to repay an NDSL or Federal Perkins Loan without an application from the borrower if the Secretary determines that the borrower did not subsequently re-enroll in any title IV-eligible institution within a period of three years from the date the school closed.

* * * * *

(8) * * *

(vi) Upon resuming collection on any affected loan, the Secretary provides the borrower another discharge application and an explanation of the requirements and procedures for obtaining a discharge.

* * * * *

■ 15. Section 674.61 is amended by revising paragraph (a) to read as follows:

§ 674.61 Discharge for death or disability.

(a) *Death.* (1) An institution must discharge the unpaid balance of a borrower's Defense, NDSL, or Federal

Perkins loan, including interest, if the borrower dies. The institution must discharge the loan on the basis of—

(i) An original or certified copy of the death certificate;

(ii) An accurate and complete photocopy of the original or certified copy of the death certificate;

(iii) An accurate and complete original or certified copy of the death certificate that is scanned and submitted electronically or sent by facsimile transmission; or

(iv) Verification of the borrower's death through an authoritative Federal or State electronic database approved for use by the Secretary.

(2) Under exceptional circumstances and on a case-by-case basis, the chief financial officer of the institution may approve a discharge based upon other reliable documentation of the borrower's death.

* * * * *

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

■ 16. The authority citation for part 682 continues to read as follows:

Authority: 20 U.S.C. 1071–1087–4, unless otherwise noted.

§ 682.202 [Amended]

■ 17. Section 682.202 is amended in paragraph (b)(1) by removing the words ''A lender'' and adding in their place ''Except as provided in § 682.405(b)(4), a lender''.

■ 18. Section 682.211 is amended by adding paragraph (i)(7) to read as follows:

§ 682.211 Forbearance.

* * * * *

(i) * * *

(7) The lender must grant a mandatory administrative forbearance to a borrower upon being notified by the Secretary that the borrower has made a borrower defense claim related to a loan that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with § 685.212(k). The mandatory administrative forbearance shall be granted in yearly increments or for a period designated by the Secretary until the loan is consolidated or until the lender is notified by the Secretary to discontinue the forbearance.

* * * * *

■ 19. Section 682.402 is amended:

■ A. By revising paragraphs (b)(2) and (d)(3).

■ B. In paragraph (d)(6)(ii)(B)(*1*) and (*2*), by removing the words ''sworn statement (which may be combined)'' and adding in their place the word ''application''.

■ C. By revising paragraph (d)(6)(ii)(F) introductory text.

■ D. In paragraph (d)(6)(ii)(F)(*5*) removing the words ''and sworn statement''.

■ E. In paragraph (d)(6)(ii)(G) introductory text, by removing the words ''request and supporting sworn statement'' and adding, in their place, the words ''completed application''.

■ F. By revising paragraph (d)(6)(ii)(H).

■ G. By redesignating paragraph (d)(6)(ii)(I) as paragraph (d)(6)(ii)(J).

■ H. By adding new paragraph (d)(6)(ii)(I) and paragraph (d)(6)(ii)(K).

■ I. By revising paragraphs (d)(7)(ii) and (iii) and (d)(8).

■ J. In paragraph (e)(6)(iii), by removing the last sentence.

The revisions and additions read as follows:

§ 682.402 Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.

* * * * *

(b) * * *

(2)(i) A discharge of a loan based on the death of the borrower (or student in the case of a PLUS loan) must be based on—

(A) An original or certified copy of the death certificate;

(B) An accurate and complete photocopy of the original or certified copy of the death certificate;

(C) An accurate and complete original or certified copy of the death certificate that is scanned and submitted electronically or sent by facsimile transmission; or

(D) Verification of the borrower's or student's death through an authoritative Federal or State electronic database approved for use by the Secretary.

(ii) Under exceptional circumstances and on a case-by-case basis, the chief executive officer of the guaranty agency may approve a discharge based upon other reliable documentation of the borrower's or student's death.

* * * * *

(d) * * *

(3) *Borrower qualification for discharge.* Except as provided in paragraph (d)(8) of this section, in order to qualify for a discharge of a loan under paragraph (d) of this section, a borrower must submit a completed closed school discharge application on a form approved by the Secretary. By signing the application, the borrower certifies—

* * * * *

(6) * * *

(ii) * * *

(F) If the guaranty agency determines that a borrower identified in paragraph (d)(6)(ii)(C) or (D) of this section does not qualify for a discharge, the agency shall notify the borrower in writing of that determination and the reasons for it, the opportunity for review by the Secretary, and how to request such a review within 30 days after the date the agency—

* * * * *

(H) If a borrower described in paragraph (d)(6)(ii)(E) or (F) of this section fails to submit the completed application within 60 days of being notified of that option, the lender or guaranty agency shall resume collection.

(I) Upon resuming collection on any affected loan, the lender or guaranty agency provides the borrower another discharge application and an explanation of the requirements and procedures for obtaining a discharge.

* * * * *

(K)(*1*) Within 30 days after receiving the borrower's request for review under paragraph (d)(6)(ii)(F) of this section, the agency shall forward the borrower's discharge request and all relevant documentation to the Secretary for review.

(*2*) The Secretary notifies the agency and the borrower of the determination upon review. If the Secretary determines that the borrower is not eligible for a discharge under paragraph (d) of this section, within 30 days after being so informed, the agency shall take the actions described in paragraph (d)(6)(ii)(H) or (I) of this section, as applicable.

(*3*) If the Secretary determines that the borrower meets the requirements for a discharge under paragraph (d) of this section, the agency shall, within 30 days after being so informed, take actions required under paragraphs (d)(6)(ii)(E) and (d)(6)(ii)(G)(*1*) of this section, and the lender shall take the actions described in paragraph (d)(7)(iv) of this section, as applicable.

* * * * *

(7) * * *

(i) * * *

(ii) If the borrower fails to submit a completed application described in paragraph (d)(3) of this section within 60 days of being notified of that option, the lender shall resume collection and shall be deemed to have exercised forbearance of payment of principal and interest from the date the lender suspended collection activity. The lender may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period. Upon resuming collection, the lender provides the borrower with another discharge application and an explanation of the requirements and procedures for obtaining a discharge.

(iii) The lender shall file a closed school claim with the guaranty agency in accordance with § 682.402(g) no later than 60 days after the lender receives a completed application described in paragraph (d)(3) of this section from the borrower, or notification from the agency that the Secretary approved the borrower's appeal in accordance with paragraph (d)(6)(ii)(K)(*3*) of this section.

* * * * *

(8) *Discharge without an application.* (i) A borrower's obligation to repay a FFEL Program loan may be discharged without an application from the borrower if the—

(A) Borrower received a discharge on a loan pursuant to 34 CFR 674.33(g) under the Federal Perkins Loan Program, or 34 CFR 685.214 under the William D. Ford Federal Direct Loan Program; or

(B) Secretary or the guaranty agency, with the Secretary's permission, determines that the borrower qualifies for a discharge based on information in the Secretary or guaranty agency's possession.

(ii) With respect to schools that closed on or after November 1, 2013, a borrower's obligation to repay a FFEL Program loan will be discharged without an application from the borrower if the Secretary or guaranty agency determines that the borrower did not subsequently re-enroll in any title IV-eligible institution within a period of three years after the school closed.

* * * * *

■ 20. Section 682.405 is amended by redesignating paragraph (b)(4) as paragraph (b)(4)(i) and adding paragraph (b)(4)(ii).

The addition reads as follows:

§ 682.405 Loan rehabilitation agreement.

* * * * *

(b) * * *

(4) * * *

(ii) The lender must not consider the purchase of a rehabilitated loan as entry into repayment or resumption of repayment for the purposes of interest capitalization under § 682.202(b).

* * * * *

■ 21. Section 682.410 is amended:

■ A. In paragraph (b)(4) by adding, after the words ''to the lender'', the words and punctuation '', but shall not capitalize any unpaid interest thereafter''.

■ B. By adding paragraph (b)(6)(viii).

The addition reads as follows:

§ 682.410 Fiscal, administrative, and enforcement requirements.

* * * * *

(b) * * *

(6) * * *

(viii) Upon notification by the Secretary that the borrower has made a borrower defense claim related to a loan that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with § 685.212(k), the guaranty agency must suspend all collection activities on the affected loan for the period designated by the Secretary.

* * * * *

PART 685—WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM

■ 22. The authority citation for part 685 continues to read as follows:

Authority: 20 U.S.C. 1070g, 1087a, *et seq.,* unless otherwise noted.

■ 23. Section 685.200 is amended by adding paragraphs (f)(3)(v) and (f)(4)(iii) to read as follows:

§ 685.200 Borrower eligibility.

* * * * *

(f) * * *

(3) * * *

(v) A borrower who receives a closed school, false certification, unpaid refund, or defense to repayment discharge that results in a remaining eligibility period greater than zero is no longer responsible for the interest that accrues on a Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan unless the borrower once again becomes responsible for the interest that accrues on a previously received Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan, for the life of the loan, as described in paragraph (f)(3)(i) of this section.

(4) * * *

(iii) For a first-time borrower who receives a closed school, false certification, unpaid refund, or defense to repayment discharge on a Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan, the Subsidized Usage Period is reduced. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in full, the Subsidized Usage Period of those loans is zero years. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in part, the Subsidized Usage Period may be reduced if the discharge results in the inapplicability of paragraph (f)(4)(i) of this section.

* * * * *

■ 24. Section 685.205 is amended by revising paragraph (b)(6) to read as follows:

§ 685.205 Forbearance.

* * * * *

(b) * * *

(6) Periods necessary for the Secretary to determine the borrower's eligibility for discharge—

(i) Under § 685.206(c);

(ii) Under § 685.214;

(iii) Under § 685.215;

(iv) Under § 685.216;

(v) Under § 685.217;

(vi) Under § 685.222; or

(vii) Due to the borrower's or endorser's (if applicable) bankruptcy;

* * * * *

■ 25. Section 685.206 is amended by revising paragraph (c) to read as follows:

§ 685.206 Borrower responsibilities and defenses.

* * * * *

(c) *Borrower defenses.* (1) For loans first disbursed prior to July 1, 2017, the borrower may assert a borrower defense under this paragraph. A ''borrower defense'' refers to any act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that would give rise to a cause of action against the school under applicable State law, and includes one or both of the following:

(i) A defense to repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part.

(ii) A claim to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(2) The order of objections for defaulted Direct Loans are as described in § 685.222(a)(6). A borrower defense claim under this section must be asserted, and will be resolved, under the procedures in § 685.222(e) to (k).

(3) For an approved borrower defense under this section, except as provided in paragraph (c)(4) of this section, the Secretary may initiate an appropriate proceeding to collect from the school whose act or omission resulted in the borrower defense the amount of relief arising from the borrower defense, within the later of—

(i) Three years from the end of the last award year in which the student attended the institution; or

(ii) The limitation period that State law would apply to an action by the borrower to recover on the cause of action on which the borrower defense is based.

(4) The Secretary may initiate a proceeding to collect at any time if the

institution received notice of the claim before the end of the later of the periods described in paragraph (c)(3) of this section. For purposes of this paragraph, notice includes receipt of—

(i) Actual notice from the borrower, from a representative of the borrower, or from the Department;

(ii) A class action complaint asserting relief for a class that may include the borrower; and

(iii) Written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower.

* * * * *

§ 685.209 [Amended]

■ 26. Section 685.209 is amended:

■ A. In paragraph (a)(1)(ii), by adding '', for purposes of determining whether a borrower has a partial financial hardship in accordance with paragraph (a)(1)(v) of this section or adjusting a borrower's monthly payment amount in accordance with paragraph (a)(2)(ii) of this section,'' after the words ''*Eligible loan*''.

■ B. In paragraph (c)(1)(ii), by adding '', for purposes of adjusting a borrower's monthly payment amount in accordance with paragraph (c)(2)(ii) of this section,'' after the words ''*Eligible loan*''.

■ C. In paragraph (c)(2)(ii)(B) introductory text, by removing the word ''Both'' and adding in its place the words ''Except in the case of a married borrower filing separately whose spouse's income is excluded in accordance with paragraph (c)(1)(i)(A) or (B) of this section, both''.

■ D. In paragraph (c)(2)(v), by removing the words ''or the Secretary determines the borrower does not have a partial financial hardship''.

■ E. In paragraph (c)(4)(iii)(B), by removing the citations ''(c)(2)(iv), (c)(4)(v), and (c)(4)(vi)'' and adding, in their place, the citations ''(c)(2)(iv) and (c)(4)(v)''.

■ 27. Section 685.212 is amended by revising paragraphs (a)(1) and (2) and adding paragraph (k) to read as follows:

§ 685.212 Discharge of a loan obligation.

(a) *Death.* (1) If a borrower (or a student on whose behalf a parent borrowed a Direct PLUS Loan) dies, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan based on—

(i) An original or certified copy of the death certificate;

(ii) An accurate and complete photocopy of the original or certified copy of the death certificate;

(iii) An accurate and complete original or certified copy of the death certificate that is scanned and submitted electronically or sent by facsimile transmission; or

(iv) Verification of the borrower's or student's death through an authoritative Federal or State electronic database approved for use by the Secretary.

(2) Under exceptional circumstances and on a case-by-case basis, the Secretary discharges a loan based upon other reliable documentation of the borrower's or student's death that is acceptable to the Secretary.

* * * * *

(k) *Borrower defenses.* (1) If a borrower defense is approved under § 685.206(c) or § 685.222—

(i) The Secretary discharges the obligation of the borrower in whole or in part in accordance with the procedures in §§ 685.206(c) and 685.222, respectively; and

(ii) The Secretary returns to the borrower payments made by the borrower or otherwise recovered on the loan that exceed the amount owed on that portion of the loan not discharged, if the borrower asserted the claim not later than—

(A) For a claim subject to § 685.206(c), the limitation period under applicable law to the claim on which relief was granted; or

(B) For a claim subject to § 685.222, the limitation period in § 685.222(b), (c), or (d), as applicable.

(2) In the case of a Direct Consolidation Loan, a borrower may assert a borrower defense under § 685.206(c) or § 685.222 with respect to a Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act, Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act that was repaid by the Direct Consolidation Loan.

(i) The Secretary considers a borrower defense claim asserted on a Direct Consolidation Loan by determining—

(A) Whether the act or omission of the school with regard to the loan described in paragraph (k)(2) of this section, other than a Direct Subsidized, Unsubsidized, or PLUS Loan, constitutes a borrower defense under § 685.206(c), for a Direct Consolidation Loan made before July 1, 2017, or under § 685.222, for a Direct Consolidation Loan made on or after July 1, 2017; or

(B) Whether the act or omission of the school with regard to a Direct Subsidized, Unsubsidized, or PLUS Loan made on after July 1, 2017 that was paid off by the Direct Consolidation Loan, constitutes a borrower defense under § 685.222.

(ii) If the borrower defense is approved, the Secretary discharges the appropriate portion of the Direct Consolidation Loan.

(iii) The Secretary returns to the borrower payments made by the borrower or otherwise recovered on the Direct Consolidation Loan that exceed the amount owed on that portion of the Direct Consolidation Loan not discharged, if the borrower asserted the claim not later than—

(A) For a claim asserted under § 685.206(c), the limitation period under the law applicable to the claim on which relief was granted; or

(B) For a claim asserted under § 685.222, the limitation period in § 685.222(b), (c), or (d), as applicable.

(iv) The Secretary returns to the borrower a payment made by the borrower or otherwise recovered on the loan described in paragraph (k)(2) of this section only if—

(A) The payment was made directly to the Secretary on the loan; and

(B) The borrower proves that the loan to which the payment was credited was not legally enforceable under applicable law in the amount for which that payment was applied.

* * * * *

■ 28. Section 685.214 is amended by:

■ A. Revising paragraphs (c)(2) and (f)(4).

■ B. Redesignating paragraphs (f)(5) and (6) as paragraphs (f)(6) and (7), respectively.

■ C. Adding a new paragraph (f)(5).

The revisions and addition read as follows:

§ 685.214 Closed school discharge.

* * * * *

(c) * * *

(2) If the Secretary determines, based on information in the Secretary's possession, that the borrower qualifies for the discharge of a loan under this section, the Secretary—

(i) May discharge the loan without an application from the borrower; and

(ii) With respect to schools that closed on or after November 1, 2013, will discharge the loan without an application from the borrower if the borrower did not subsequently re-enroll in any title IV-eligible institution within a period of three years from the date the school closed.

* * * * *

(f) * * *

(4) If a borrower fails to submit the application described in paragraph (c) of this section within 60 days of the Secretary's providing the discharge application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

(5) Upon resuming collection on any affected loan, the Secretary provides the borrower another discharge application and an explanation of the requirements and procedures for obtaining a discharge.

* * * * *

■ 29. Section 685.215 is amended by:

■ A. Revising paragraph (a)(1).

■ B. Revising paragraph (c) introductory text.

■ C. Revising paragraph (c)(1).

■ D. Redesignating paragraphs (c)(2) through (7) as paragraphs (c)(3) through (8), respectively.

■ E. Adding a new paragraph (c)(2).

■ F. Revising redesignated paragraph (c)(8).

■ G. Revising paragraph (d).

The revisions and addition read as follows:

§ 685.215 Discharge for false certification of student eligibility or unauthorized payment.

(a) *Basis for discharge*—(1) *False certification.* The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if a school falsely certifies the eligibility of the borrower (or the student on whose behalf a parent borrowed) to receive the proceeds of a Direct Loan. The Secretary considers a student's eligibility to borrow to have been falsely certified by the school if the school—

(i) Certified the eligibility of a student who—

(A) Reported not having a high school diploma or its equivalent; and

(B) Did not satisfy the alternative to graduation from high school requirements under section 484(d) of the Act that were in effect at the time of certification;

(ii) Certified the eligibility of a student who is not a high school graduate based on—

(A) A high school graduation status falsified by the school; or

(B) A high school diploma falsified by the school or a third party to which the school referred the borrower;

(iii) Signed the borrower's name on the loan application or promissory note without the borrower's authorization;

(iv) Certified the eligibility of the student who, because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary, would not meet State requirements for employment (in the student's State of residence when the loan was originated) in the occupation for which the training program supported by the loan was intended; or

(v) Certified the eligibility of a student for a Direct Loan as a result of the crime of identity theft committed against the individual, as that crime is defined in paragraph (c)(5)(ii) of this section.

* * * * *

(c) *Borrower qualification for discharge.* To qualify for discharge under this section, the borrower must submit to the Secretary an application for discharge on a form approved by the Secretary. The application need not be notarized but must be made by the borrower under penalty of perjury; and in the application, the borrower's responses must demonstrate to the satisfaction of the Secretary that the requirements in paragraph (c)(1) through (7) of this section have been met. If the Secretary determines the application does not meet the requirements, the Secretary notifies the applicant and explains why the application does not meet the requirements.

(1) *High school diploma or equivalent.* In the case of a borrower requesting a discharge based on not having had a high school diploma and not having met the alternative to graduation from high school eligibility requirements under section 484(d) of the Act applicable at the time the loan was originated, and the school or a third party to which the school referred the borrower falsified the student's high school diploma, the borrower must state in the application that the borrower (or the student on whose behalf a parent received a PLUS loan)—

(i) Reported not having a valid high school diploma or its equivalent at the time the loan was certified; and

(ii) Did not satisfy the alternative to graduation from high school statutory or regulatory eligibility requirements identified on the application form and applicable at the time the institution certified the loan.

(2) *Disqualifying condition.* In the case of a borrower requesting a discharge based on a condition that would disqualify the borrower from employment in the occupation that the training program for which the borrower received the loan was intended, the borrower must state in the application that the borrower (or student for whom a parent received a PLUS loan)—

(i) Did not meet State requirements for employment (in the student's State of residence) in the occupation that the training program for which the borrower received the loan was intended because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary.

(ii) [Reserved]

* * * * *

(8) *Discharge without an application.* The Secretary discharges all or part of a loan as appropriate under this section without an application from the borrower if the Secretary determines, based on information in the Secretary's possession, that the borrower qualifies for a discharge. Such information includes, but is not limited to, evidence that the school has falsified the Satisfactory Academic Progress of its students, as described in § 668.34.

(d) *Discharge procedures.* (1) If the Secretary determines that a borrower's Direct Loan may be eligible for a discharge under this section, the Secretary provides the borrower an application and an explanation of the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(2) If the borrower fails to submit the application described in paragraph (c) of this section within 60 days of the Secretary's providing the application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

(3) If the borrower submits the application described in paragraph (c) of this section, the Secretary determines whether the available evidence supports the claim for discharge. Available evidence includes evidence provided by the borrower and any other relevant information from the Secretary's records and gathered by the Secretary from other sources, including guaranty agencies, other Federal agencies, State authorities, test publishers, independent test administrators, school records, and cognizant accrediting associations. The Secretary issues a decision that explains the reasons for any adverse determination on the application, describes the evidence on which the decision was made, and provides the borrower, upon request, copies of the evidence. The Secretary considers any response from the borrower and any additional information from the borrower, and notifies the borrower whether the determination is changed.

(4) If the Secretary determines that the borrower meets the applicable requirements for a discharge under paragraph (c) of this section, the Secretary notifies the borrower in writing of that determination.

(5) If the Secretary determines that the borrower does not qualify for a discharge, the Secretary notifies the borrower in writing of that determination and the reasons for the determination.

* * * * *

§ 685.220 [Amended]

■ 30. Section 685.220 is amended by:

■ A. Removing the words ''subpart II of part B'' from paragraph (b)(21) and adding in their place the words ''part E''.

■ B. Removing paragraph (d)(1)(i).

■ C. Redesignating paragraph (d)(1)(ii) and (iii) as paragraphs (d)(1)(i) and (ii).

■ 31. Section 685.222 is added to subpart B to read as follows:

§ 685.222 Borrower defenses.

(a) *General.* (1) For loans first disbursed prior to July 1, 2017, a borrower asserts and the Secretary considers a borrower defense in accordance with the provisions of § 685.206(c), unless otherwise noted in § 685.206(c).

(2) For loans first disbursed on or after July 1, 2017, a borrower asserts and the Secretary considers a borrower defense in accordance with this section. To establish a borrower defense under this section, a preponderance of the evidence must show that the borrower has a borrower defense that meets the requirements of this section.

(3) A violation by the school of an eligibility or compliance requirement in the Act or its implementing regulations is not a basis for a borrower defense under either this section or § 685.206(c) unless the violation would otherwise constitute a basis for a borrower defense under this section or § 685.206(c), as applicable.

(4) For the purposes of this section and § 685.206(c), ''borrower'' means—

(i) The borrower; and

(ii) In the case of a Direct PLUS Loan, any endorsers, and for a Direct PLUS Loan made to a parent, the student on whose behalf the parent borrowed.

(5) For the purposes of this section and § 685.206(c), a ''borrower defense'' refers to an act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided, and includes one or both of the following:

(i) A defense to repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part; and

(ii) A right to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(6) If the borrower asserts both a borrower defense and any other objection to an action of the Secretary with regard to that Direct Loan, the order in which the Secretary will consider objections, including a borrower defense, will be determined as appropriate under the circumstances.

(b) *Judgment against the school.* The borrower has a borrower defense if the borrower, whether as an individual or as a member of a class, or a governmental agency, has obtained against the school a nondefault, favorable contested judgment based on State or Federal law in a court or administrative tribunal of competent jurisdiction. A borrower may assert a borrower defense under this paragraph at any time.

(c) *Breach of contract by the school.* The borrower has a borrower defense if the school the borrower received the Direct Loan to attend failed to perform its obligations under the terms of a contract with the student. A borrower may assert a defense to repayment of amounts owed to the Secretary under this paragraph at any time after the breach by the school of its contract with the student. A borrower may assert a right to recover amounts previously collected by the Secretary under this paragraph not later than six years after the breach by the school of its contract with the student.

(d) *Substantial misrepresentation by the school.* (1) A borrower has a borrower defense if the school or any of its representatives, or any institution, organization, or person with whom the school has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services, made a substantial misrepresentation in accordance with 34 CFR part 668, subpart F, that the borrower reasonably relied on to the borrower's detriment when the borrower decided to attend, or to continue attending, the school or decided to take out a Direct Loan. A borrower may assert, at any time, a defense to repayment under this paragraph (d) of amounts owed to the Secretary. A borrower may assert a claim under this paragraph (d) to recover funds previously collected by the Secretary not later than six years after the borrower discovers, or reasonably could have discovered, the information constituting the substantial misrepresentation.

(2) For the purposes of this section, a designated Department official pursuant to paragraph (e) of this section or a hearing official pursuant to paragraph (f), (g), or (h) of this section may consider, as evidence supporting the reasonableness of a borrower's reliance on a misrepresentation, whether the school or any of the other parties described in paragraph (d)(1) engaged in conduct such as, but not limited to:

(i) Demanding that the borrower make enrollment or loan-related decisions immediately;

(ii) Placing an unreasonable emphasis on unfavorable consequences of delay;

(iii) Discouraging the borrower from consulting an adviser, a family member, or other resource;

(iv) Failing to respond to the borrower's requests for more information including about the cost of the program and the nature of any financial aid; or

(v) Otherwise unreasonably pressuring the borrower or taking advantage of the borrower's distress or lack of knowledge or sophistication.

(e) *Procedure for an individual borrower.* (1) To assert a borrower defense under this section, an individual borrower must—

(i) Submit an application to the Secretary, on a form approved by the Secretary—

(A) Certifying that the borrower received the proceeds of a loan, in whole or in part, to attend the named school;

(B) Providing evidence that supports the borrower defense; and

(C) Indicating whether the borrower has made a claim with respect to the information underlying the borrower defense with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower or credited to the borrower's loan obligation; and

(ii) Provide any other information or supporting documentation reasonably requested by the Secretary.

(2) Upon receipt of a borrower's application, the Secretary—

(i) If the borrower is not in default on the loan for which a borrower defense has been asserted, grants forbearance and—

(A) Notifies the borrower of the option to decline the forbearance and to continue making payments on the loan; and

(B) Provides the borrower with information about the availability of the income-contingent repayment plans under § 685.209 and the income-based repayment plan under § 685.221; or

(ii) If the borrower is in default on the loan for which a borrower defense has been asserted—

(A) Suspends collection activity on the loan until the Secretary issues a decision on the borrower's claim;

(B) Notifies the borrower of the suspension of collection activity and explains that collection activity will resume if the Secretary determines that the borrower does not qualify for a full discharge; and

(C) Notifies the borrower of the option to continue making payments under a rehabilitation agreement or other repayment agreement on the defaulted loan.

(3) The Secretary designates a Department official to review the borrower's application to determine whether the application states a basis for a borrower defense, and resolves the claim through a fact-finding process conducted by the Department official.

(i) As part of the fact-finding process, the Department official notifies the school of the borrower defense application and considers any evidence or argument presented by the borrower and also any additional information, including—

(A) Department records;

(B) Any response or submissions from the school; and

(C) Any additional information or argument that may be obtained by the Department official.

(ii) Upon the borrower's request, the Department official identifies to the borrower the records the Department official considers relevant to the borrower defense. The Secretary provides to the borrower any of the identified records upon reasonable request of the borrower.

(4) At the conclusion of the fact-finding process, the Department official issues a written decision as follows:

(i) If the Department official approves the borrower defense in full or in part, the Department official notifies the borrower in writing of that determination and of the relief provided as described in paragraph (i) of this section.

(ii) If the Department official denies the borrower defense in full or in part, the Department official notifies the borrower of the reasons for the denial, the evidence that was relied upon, any portion of the loan that is due and payable to the Secretary, and whether the Secretary will reimburse any amounts previously collected, and informs the borrower that if any balance remains on the loan, the loan will return to its status prior to the borrower's submission of the application. The Department official also informs the borrower of the opportunity to request reconsideration of the claim based on new evidence pursuant to paragraph (e)(5)(i) of this section.

(5) The decision of the Department official is final as to the merits of the claim and any relief that may be granted on the claim. Notwithstanding the foregoing—

(i) If the borrower defense is denied in full or in part, the borrower may request that the Secretary reconsider the borrower defense upon the identification of new evidence in support of the borrower's claim. ''New evidence'' is relevant evidence that the borrower did not previously provide and that was not identified in the final decision as evidence that was relied upon for the final decision. If accepted for reconsideration by the Secretary, the Secretary follows the procedure in paragraph (e)(2) of this section for granting forbearance and for defaulted loans; and

(ii) The Secretary may reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedure paragraph (e)(2) of this section for granting forbearance and for defaulted loans.

(6) The Secretary may consolidate applications filed under this paragraph (e) that have common facts and claims, and resolve the borrowers' borrower defense claims as provided in paragraphs (f), (g), and (h) of this section.

(7) The Secretary may initiate a proceeding to collect from the school the amount of relief resulting from a borrower defense under this section—

(i) Within the six-year period applicable to the borrower defense under paragraph (c) or (d) of this section;

(ii) At any time, for a borrower defense under paragraph (b) of this section; or

(iii) At any time if during the period described in paragraph (e)(7)(i) of this section, the institution received notice of the claim. For purposes of this paragraph, notice includes receipt of—

(A) Actual notice from the borrower, a representative of the borrower, or the Department of a claim, including notice of an application filed pursuant to this section or § 685.206(c);

(B) A class action complaint asserting relief for a class that may include the borrower for underlying facts that may form the basis of a claim under this section or § 685.206(c);

(C) Written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower, for underlying facts that may form the basis of a claim under this section or § 685.206(c).

(f) *Group process for borrower defense, generally.* (1) Upon consideration of factors including, but not limited to, common facts and claims, fiscal impact, and the promotion of compliance by the school or other title IV, HEA program participant, the Secretary may initiate a process to determine whether a group of borrowers, identified by the Secretary, has a borrower defense.

(i) The members of the group may be identified by the Secretary from individually filed applications pursuant to paragraph (e)(6) of this section or from any other source.

(ii) If the Secretary determines that there are common facts and claims that apply to borrowers who have not filed an application under paragraph (e) of this section, the Secretary may identify such borrowers as members of a group.

(2) Upon the identification of a group of borrowers under paragraph (f)(1) of this section, the Secretary—

(i) Designates a Department official to present the group's claim in the fact-finding process described in paragraph (g) or (h) of this section, as applicable;

(ii) Provides each identified member of the group with notice that allows the borrower to opt out of the proceeding;

(iii) If identified members of the group are borrowers who have not filed an application under paragraph (f)(1)(ii) of this section, follows the procedures in paragraph (e)(2) of this section for granting forbearance and for defaulted loans for such identified members of the group, unless an opt-out by such a member of the group is received; and

(iv) Notifies the school of the basis of the group's borrower defense, the initiation of the fact-finding process described in paragraph (g) or (h) of this section, and of any procedure by which the school may request records and respond. No notice will be provided if notice is impossible or irrelevant due to a school's closure.

(3) For a group of borrowers identified by the Secretary, for which the Secretary determines that there may be a borrower defense under paragraph (d) of this section based upon a substantial misrepresentation that has been widely disseminated, there is a rebuttable presumption that each member

reasonably relied on the misrepresentation.

(g) *Procedures for group process for borrower defenses with respect to loans made to attend a closed school.* For groups identified by the Secretary under paragraph (f) of this section, for which the borrower defense is asserted with respect to a Direct Loan to attend a school that has closed and has provided no financial protection currently available to the Secretary from which to recover any losses arising from borrower defenses, and for which there is no appropriate entity from which the Secretary can otherwise practicably recover such losses—

(1) A hearing official resolves the borrower defense through a fact-finding process. As part of the fact-finding process, the hearing official considers any evidence and argument presented by the Department official on behalf of the group and, as necessary to determine any claims at issue, on behalf of individual members of the group. The hearing official also considers any additional information the Department official considers necessary, including any Department records or response from the school or a person affiliated with the school as described in § 668.174(b), if practicable. The hearing official issues a written decision as follows:

(i) If the hearing official approves the borrower defense in full or in part, the written decision states that determination and the relief provided on the basis of that claim as determined under paragraph (i) of this section.

(ii) If the hearing official denies the borrower defense in full or in part, the written decision states the reasons for the denial, the evidence that was relied upon, the portion of the loans that are due and payable to the Secretary, and whether reimbursement of amounts previously collected is granted, and informs the borrowers that if any balance remains on the loan, the loan will return to its status prior to the group claim process.

(iii) The Secretary provides copies of the written decision to the members of the group and, as practicable, to the school.

(2) The decision of the hearing official is final as to the merits of the group borrower defense and any relief that may be granted on the group claim.

(3) After a final decision has been issued, if relief for the group has been denied in full or in part pursuant to paragraph (g)(1)(ii) of this section, an individual borrower may file a claim for relief pursuant to paragraph (e)(5)(i) of this section.

(4) The Secretary may reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedure in paragraph (e)(2) of this section for granting forbearance and for defaulted loans.

(h) *Procedures for group process for borrower defenses with respect to loans made to attend an open school.* For groups identified by the Secretary under paragraph (f) of this section, for which the borrower defense is asserted with respect to Direct Loans to attend a school that is not covered by paragraph (g) of this section, the claim is resolved in accordance with the procedures in this paragraph (h).

(1) A hearing official resolves the borrower defense and determines any liability of the school through a fact-finding process. As part of the fact-finding process, the hearing official considers any evidence and argument presented by the school and the Department official on behalf of the group and, as necessary to determine any claims at issue, on behalf of individual members of the group. The hearing official issues a written decision as follows:

(i) If the hearing official approves the borrower defense in full or in part, the written decision establishes the basis for the determination, notifies the members of the group of the relief as described in paragraph (i) of this section, and notifies the school of any liability to the Secretary for the amounts discharged and reimbursed.

(ii) If the hearing official denies the borrower defense for the group in full or in part, the written decision states the reasons for the denial, the evidence that was relied upon, the portion of the loans that are due and payable to the Secretary, and whether reimbursement of amounts previously collected is granted, and informs the borrowers that their loans will return to their statuses prior to the group borrower defense process. The decision notifies the school of any liability to the Secretary for any amounts discharged or reimbursed.

(iii) The Secretary provides copies of the written decision to the members of the group, the Department official, and the school.

(2) The decision of the hearing official becomes final as to the merits of the group borrower defense and any relief that may be granted on the group borrower defense within 30 days after the decision is issued and received by the Department official and the school unless, within that 30-day period, the school or the Department official appeals the decision to the Secretary. In the case of an appeal—

(i) The decision of the hearing official does not take effect pending the appeal; and

(ii) The Secretary renders a final decision.

(3) After a final decision has been issued, if relief for the group has been denied in full or in part pursuant to paragraph (h)(1)(ii) of this section, an individual borrower may file a claim for relief pursuant to paragraph (e)(5)(i) of this section.

(4) The Secretary may reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedure in paragraph (e)(2) of this section for granting forbearance and for defaulted loans.

(5)(i) The Secretary collects from the school any liability to the Secretary for any amounts discharged or reimbursed to borrowers under this paragraph (h).

(ii) For a borrower defense under paragraph (b) of this section, the Secretary may initiate a proceeding to collect at any time.

(iii) For a borrower defense under paragraph (c) or (d) of this section, the Secretary may initiate a proceeding to collect within the limitation period that would apply to the borrower defense, provided that the Secretary may bring an action to collect at any time if, within the limitation period, the school received notice of the borrower's borrower defense claim. For purposes of this paragraph, the school receives notice of the borrower's claim by receipt of—

(A) Actual notice of the claim from the borrower, a representative of the borrower, or the Department, including notice of an application filed pursuant to this section or § 685.206(c);

(B) A class action complaint asserting relief for a class that may include the borrower for underlying facts that may form the basis of a claim under this section or § 685.206(c); or

(C) Written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower, of underlying facts that may form the basis of a claim under this section or § 685.206(c).

(i) *Relief.* If a borrower defense is approved under the procedures in paragraph (e), (g), or (h) of this section, the following procedures apply:

(1) The Department official or the hearing official deciding the claim determines the appropriate amount of relief to award the borrower, which may be a discharge of all amounts owed to the Secretary on the loan at issue and may include the recovery of amounts previously collected by the Secretary on the loan, or some lesser amount.

(2) For a borrower defense brought on the basis of—

(i) A substantial misrepresentation, the Department official or the hearing official will factor the borrower's cost of attendance to attend the school, as well as the value of the education the borrower received, the value of the education that a reasonable borrower in the borrower's circumstances would have received, and/or the value of the education the borrower should have expected given the information provided by the institution, into the determination of appropriate relief. A borrower may be granted full, partial, or no relief. Value will be assessed in a manner that is reasonable and practicable. In addition, the Department official or the hearing official deciding the claim may consider any other relevant factors;

(ii) A judgment against the school—

(A) Where the judgment awards specific financial relief, relief will be the amount of the judgment that remains unsatisfied, subject to the limitation provided for in § 685.222(i)(8) and any other reasonable considerations; and

(B) Where the judgment does not award specific financial relief, the Department will rely on the holding of the case and applicable law to monetize the judgment; and

(iii) A breach of contract, relief will be determined according to the common law of contracts, subject to the limitation provided for in § 685.222(i)(8) and any other reasonable considerations.

(3) In a fact-finding process brought against an open school under paragraph (h) of this section on the basis of a substantial misrepresentation, the school has the burden of proof as to any value of the education.

(4) In determining the relief, the Department official or the hearing official deciding the claim may consider—

(i) Information derived from a sample of borrowers from the group when calculating relief for a group of borrowers; and

(ii) The examples in Appendix A to this subpart.

(5) In the written decision described in paragraphs (e), (g), and (h) of this section, the designated Department official or hearing official deciding the claim notifies the borrower of the relief provided and—

(i) Specifies the relief determination;

(ii) Advises that there may be tax implications; and

(iii) Advises the borrower of the requirements to file a request for reconsideration upon the identification of new evidence.

(6) Consistent with the determination of relief under paragraph (i)(1) of this section, the Secretary discharges the borrower's obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay and, if applicable, reimburses the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(7) The Department official or the hearing official deciding the case, or the Secretary as applicable, affords the borrower such further relief as appropriate under the circumstances. Such further relief includes, but is not limited to, one or both of the following:

(i) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(ii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(8) The total amount of relief granted with respect to a borrower defense cannot exceed the amount of the loan and any associated costs and fees and will be reduced by the amount of any refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by, or on behalf of, the borrower that was related to the borrower defense. The relief to the borrower may not include non-pecuniary damages such as inconvenience, aggravation, emotional distress, or punitive damages.

(j) *Cooperation by the borrower.* To obtain relief under this section, a borrower must reasonably cooperate with the Secretary in any proceeding under paragraph (e), (g), or (h) of this section. The Secretary may revoke any relief granted to a borrower who fails to satisfy his or her obligations under this paragraph (j).

(k) *Transfer to the Secretary of the borrower's right of recovery against third parties.* (1) Upon the granting of any relief under this section, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the contract for educational services for which the loan was received, against the school, its principals, its affiliates, and their successors, its sureties, and any private fund. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense and for the same loan for which the discharge was granted under this section.

(2) The provisions of this paragraph (k) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(3) Nothing in this paragraph (k) limits or forecloses the borrower's right to pursue legal and equitable relief against a party described in this paragraph (k) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

(Authority: 20 U.S.C. 1087a *et seq.;* 28 U.S.C. 2401; 31 U.S.C. 3702)

■ 32. Section 685.223 is added to subpart B to read as follows:

§ 685.223 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

(Authority: 20 U.S.C. 1087a *et seq.*)

■ 33. Appendix A to subpart B of part 685 is added to read as follows:

Appendix A to Subpart B of Part 685—Examples of Borrower Relief

The Department official or the hearing official deciding a borrower defense claim determines the amount of relief to award the borrower, which may be a discharge of all amounts owed to the Secretary on the loan at issue and may include the recovery of amounts previously collected by the Secretary on the loan, or some lesser amount. The following are some conceptual examples demonstrating relief. The actual relief awarded will be determined by the Department official or the hearing official deciding the claim, who shall not be bound by these examples.

1. A school represents to prospective students, in widely disseminated materials, that its educational program will lead to employment in an occupation that requires State licensure. The program does not in fact meet minimum education requirements to enable its graduates to sit for the exam necessary for them to obtain licensure. The claims are adjudicated in a group process.

Appropriate relief: Borrowers who enrolled in this program during the time that the misrepresentation was made should receive full relief. As a result of the schools' misrepresentation, the borrowers cannot work in the occupation in which they reasonably expected to work when they enrolled. Accordingly, borrowers received limited or no value from this educational program because they did not receive the value that they reasonably expected.

2. A school states to a prospective student that its medical assisting program has a faculty composed of skilled nurses and physicians and offers internships at a local hospital. The borrower enrolls in the school in reliance on that statement. In fact, none of the teachers at the school other than the Director is a nurse or physician. The school has no internship program. The teachers at the school are not qualified to teach medical assisting and the student is not qualified for medical assistant jobs based on the education received at the school.

Appropriate relief: This borrower should receive full relief. None of the teachers at the school are qualified to teach medical assisting, and there was no internship. In contrast to reasonable students' expectations, based on information provided by the school, the typical borrower received no value from the program.

3. An individual interested in becoming a registered nurse meets with a school's admissions counselor who explains that the school does not have a nursing program but that completion of a medical assisting program is a prerequisite for any nursing program. Based on this information, the borrower enrolls in the school's medical assisting program rather than searching for another nursing program, believing that completing a medical assisting program is a necessary step towards becoming a nurse. After one year in the program, the borrower realizes that it is not necessary to become a medical assistant before entering a nursing program. The borrower's credits are not transferrable to a nursing program.

Appropriate relief: This borrower should receive full relief. Because it is not necessary to become a medical assistant prior to entering a nursing program, she has made no progress towards the career she sought, and in fact has received an education that cannot be used for its intended purpose.

4. A school tells a prospective student, who is actively seeking an education, that the cost of the program will be $20,000. Relying on that statement, the borrower enrolls. The student later learns the cost for that year was $25,000. There is no evidence of any other misrepresentations in the enrollment process or of any deficiency in value in the school's education.

Appropriate relief: This borrower should receive partial relief of $5,000. The borrower received precisely the value that she expected. The school provides the education that the student was seeking but misrepresented the price.

5. A school represents in its marketing materials that three of its undergraduate faculty members in a particular program have received the highest award in their field. A borrower choosing among two comparable, selective programs enrolls in that program in reliance on the representation about its faculty. However, although the program otherwise remains the same, the school had failed to update the marketing materials to reflect the fact that the award-winning faculty had left the school.

Appropriate relief: Although the borrower reasonably relied on a misrepresentation about the faculty in deciding to enroll at this school, she still received the value that she expected. Therefore, no relief is appropriate.

6. An individual wishes to enroll in a selective, regionally accredited liberal arts school. The school gives inflated data to a well-regarded school ranking organization regarding the median grade point average of recent entrants and also includes that inflated data in its own marketing materials. This inflated data raises the place of the school in the organization's rankings in independent publications. The individual enrolls in the school and graduates. Soon after graduating, the individual learns from the news that the school falsified admissions data. Notwithstanding this issue, degrees from the school continue to serve as effective, well-regarded liberal arts credentials.

The Department also determines that the school violated the title IV requirement that it not make substantial misrepresentations pursuant to 34 CFR 668.71, which constitutes an enforceable violation separate and apart from any borrower defense relief.

Appropriate Relief: The borrower relied on the misrepresentation about the admissions data to his detriment, because the misrepresentation factored into the borrower's decision to choose the school over others. However, the borrower received a selective liberal arts education which represents the value that he could reasonably expect, and gets no relief.

■ 34. Section 685.300 is amended by:
■ A. Redesignating paragraph (b)(11) as paragraph (b)(12).
■ B. Adding a new paragraph (b)(11).
■ C. Adding paragraphs (d) through (i).

The additions read as follows:

§ 685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

* * * * *

(b) * * *

(11) Comply with the provisions of paragraphs (d) through (i) of this section regarding student claims and disputes.

* * * * *

(d) *Borrower defense claims in an internal dispute process.* The school will not compel any student to pursue a complaint based on a borrower defense claim through an internal dispute process before the student presents the complaint to an accrediting agency or government agency authorized to hear the complaint.

(e) *Class action bans.* (1) The school will not seek to rely in any way on a predispute arbitration agreement or on any other predispute agreement with a student who has obtained or benefited from a Direct Loan, with respect to any aspect of a class action that is related to a borrower defense claim, including to seek a stay or dismissal of particular claims or the entire action, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or the review has been resolved.

(2) Reliance on a predispute arbitration agreement, or on any other predispute agreement, with a student, with respect to any aspect of a class action includes, but is not limited to, any of the following:

(i) Seeking dismissal, deferral, or stay of any aspect of a class action.

(ii) Seeking to exclude a person or persons from a class in a class action.

(iii) Objecting to or seeking a protective order intended to avoid responding to discovery in a class action.

(iv) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action.

(v) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action after the trial court has denied a motion to certify the class but before an appellate court has ruled on an interlocutory appeal of that motion, if the time to seek such an appeal has not elapsed or the appeal has not been resolved.

(vi) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action after the trial court in that class action has granted a motion to dismiss the claim and, in doing so, the court noted that the consumer has leave to refile the claim on a class basis, if the time to refile the claim has not elapsed.

(3) *Required provisions and notices.* (i) The school must include the following provision in any agreements with a student recipient of a Direct Loan for attendance at the school, or, with respect to a Parent PLUS Loan, a student for whom the PLUS loan was obtained, that include any agreement regarding predispute arbitration or any other predispute agreement addressing class actions and that are entered into after the effective date of this regulation: "We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action lawsuit in

court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Direct Loan or the provision by us of educational services for which the Direct Loan was obtained. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.''

(ii) When a predispute arbitration agreement or any other predispute agreement addressing class actions has been entered into before the effective date of this regulation and does not contain a provision described in paragraph (e)(3)(i) of this section, the school must either ensure the agreement is amended to contain the provision specified in paragraph (e)(3)(iii)(A) of this section or provide the student to whom the agreement applies with the written notice specified in paragraph (e)(3)(iii)(B) of this section.

(iii) The school must ensure the agreement described in paragraph (e)(3)(ii) of this section is amended to contain the provision specified in paragraph (e)(3)(iii)(A) or must provide the notice specified in paragraph (e)(3)(iii)(B) to students no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment.

(A) *Agreement provision.* ''We agree that neither we nor anyone else who later becomes a party to this agreement will use it to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit in court even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.''

(B) *Notice provision.* ''We agree not to use any predispute agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.''

(f) *Predispute arbitration agreements.* (1)(i) The school will not enter into a predispute agreement to arbitrate a borrower defense claim, or rely in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim.

(ii) A student may enter into a voluntary post-dispute arbitration agreement with a school to arbitrate a borrower defense claim.

(2) Reliance on a predispute arbitration agreement with a student with respect to any aspect of a borrower defense claim includes, but is not limited to, any of the following:

(i) Seeking dismissal, deferral, or stay of any aspect of a judicial action filed by the student, including joinder with others in an action;

(ii) Objecting to or seeking a protective order intended to avoid responding to discovery in a judicial action filed by the student; and

(iii) Filing a claim in arbitration against a student who has filed a suit on the same claim.

(3) *Required provisions and notices.* (i) The school must include the following provision in any predispute arbitration agreements with a student recipient of a Direct Loan for attendance at the school, or, with respect to a Parent PLUS Loan, a student for whom the PLUS loan was obtained, that include any agreement regarding arbitration and that are entered into after the effective date of this regulation: ''We agree that neither we nor anyone else will use this agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to lawsuits concerning other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.''

(ii) When a predispute arbitration agreement has been entered into before the effective date of this regulation that did not contain the provision specified in paragraph (f)(3)(i) of this section, the school must either ensure the agreement is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or provide the student to whom the agreement applies with the written notice specified in paragraph (f)(3)(iii)(B) of this section.

(iii) The school must ensure the agreement described in paragraph (f)(3)(ii) of this section is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or must provide the notice specified in paragraph (f)(3)(iii)(B) of this section to students no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment.

(A) *Agreement provision.* ''We agree that neither we nor anyone else who later becomes a party to this predispute arbitration agreement will use it to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.''

(B) *Notice provision.* ''We agree not to use any predispute arbitration agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit regarding such a claim or you may be a member of a class action lawsuit regarding such a claim even if you do not file it. This provision does not apply to any other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Direct Loan or the provision of educational services for which the loan was obtained.''

(g) *Submission of arbitral records.* (1) A school must submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection with any claim filed in arbitration by or against the school concerning a borrower defense claim:

(i) The initial claim and any counterclaim.

(ii) The arbitration agreement filed with the arbitrator or arbitration administrator.

(iii) The judgment or award, if any, issued by the arbitrator or arbitration administrator.

(iv) If an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the school's failure to pay required filing or administrative fees, any communication the school receives from the arbitrator or arbitration administrator related to such a refusal.

(v) Any communication the school receives from an arbitrator or an arbitration administrator related to a determination that a predispute arbitration agreement regarding educational services provided by the school does not comply with the administrator's fairness principles, rules, or similar requirements, if such a determination occurs.

(2) A school must submit any record required pursuant to paragraph (g)(1) of this section within 60 days of filing by the school of any such record with the arbitrator or arbitration administrator and within 60 days of receipt by the school of any such record filed or sent by someone other than the school, such as the arbitrator, the arbitration administrator, or the student.

(h) *Submission of judicial records.* (1) A school must submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection with any claim concerning a borrower defense claim filed in a lawsuit by the school against the student or by any party, including a government agency, against the school:

(i) The complaint and any counterclaim.

(ii) Any dispositive motion filed by a party to the suit; and

(iii) The ruling on any dispositive motion and the judgment issued by the court.

(2) A school must submit any record required pursuant to paragraph (h)(1) of this section within 30 days of filing or receipt, as applicable, of the complaint, answer, or dispositive motion, and within 30 days of receipt of any ruling on a dispositive motion or a final judgment.

(i) *Definitions.* For the purposes of paragraphs (d) through (h) of this section, the term—

(1) ''Borrower defense claim'' means a claim that is or could be asserted as a borrower defense as defined in § 685.222(a)(5), including a claim other than one based on § 685.222(c) or (d) that may be asserted under § 685.222(b) if reduced to judgment;

(2) ''Class action'' means a lawsuit in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23;

(3) ''Dispositive motion'' means a motion asking for a court order that entirely disposes of one or more claims in favor of the party who files the motion without need for further court proceedings;

(4) ''Predispute arbitration agreement'' means any agreement, regardless of its form or structure, between a school or a party acting on behalf of a school and a student providing for arbitration of any future dispute between the parties.

* * * * *

■ 35. Section 685.308 is amended by revising paragraph (a) to read as follows:

§ 685.308 Remedial actions.

(a) The Secretary collects from the school the amount of the losses the Secretary incurs and determines that the institution is liable to repay under § 685.206, § 685.214, § 685.215(a)(1)(i), (ii), (iii), (iv) or (v), § 685.216, or § 685.222 or that were disbursed—

(1) To an individual, because of an act or omission of the school, in amounts that the individual was not eligible to receive; or

(2) Because of the school's violation of a Federal statute or regulation.

* * * * *

■ 36. Section 685.310 is added to subpart C to read as follows:

§ 685.310 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

(Authority: 20 U.S.C. 1087a *et seq.*)

PART 686—TEACHER EDUCATION ASSISTANCE FOR COLLEGE AND HIGHER EDUCATION (TEACH) GRANT PROGRAM

■ 37. The authority citation for part 686 continues to read as follows:

Authority: 20 U.S.C. 1070g, *et seq.*, unless otherwise noted.

■ 38. Section 686.42 is amended by revising paragraph (a) to read as follows:

§ 686.42 Discharge of an agreement to serve.

(a) *Death.* (1) If a grant recipient dies, the Secretary discharges the obligation to complete the agreement to serve based on—

(i) An original or certified copy of the death certificate;

(ii) An accurate and complete photocopy of the original or certified copy of the death certificate;

(iii) An accurate and complete original or certified copy of the death certificate that is scanned and submitted electronically or sent by facsimile transmission; or

(iv) Verification of the grant recipient's death through an authoritative Federal or State electronic database approved for use by the Secretary.

(2) Under exceptional circumstances and on a case-by-case basis, the Secretary discharges the obligation to complete the agreement to serve based on other reliable documentation of the grant recipient's death that is acceptable to the Secretary.

* * * * *

[FR Doc. 2016–25448 Filed 10–31–16; 8:45 am]

BILLING CODE 4000–01–P

FEDERAL REGISTER

Vol. 81 Tuesday,
No. 211 November 1, 2016

Part III

Postal Service

Change in Rates and Classes of General Applicability for Competitive Products; Notice

POSTAL SERVICE

Change in Rates and Classes of General Applicability for Competitive Products

AGENCY: Postal Service.

ACTION: Notice of a change in rates of general applicability for competitive products.

SUMMARY: This notice sets forth changes in rates of general applicability for competitive products.

DATES: *Effective date:* January 22, 2017.

FOR FURTHER INFORMATION CONTACT: Daniel J. Foucheaux, Jr., 202–268–2989.

SUPPLEMENTARY INFORMATION: On October 11, 2016, pursuant to their authority under 39 U.S.C. 3632, the Governors of the Postal Service established prices and classification changes for competitive products. The Governors' Decision and the record of proceedings in connection with such decision are reprinted below in accordance with section 3632(b)(2).

Stanley F. Mires,

Attorney, Federal Compliance.

DECISION OF THE GOVERNORS OF THE UNITED STATES POSTAL SERVICE ON CHANGES IN RATES OF GENERAL APPLICABILITY FOR COMPETITIVE PRODUCTS (GOVERNORS' DECISION NO. 16-7)

October 11, 2016

STATEMENT OF EXPLANATION AND JUSTIFICATION

Pursuant to authority under section 3632 of title 39, as amended by the Postal Accountability and Enhancement Act of 2006 ("PAEA"), I establish new prices of general applicability for the Postal Service's shipping services (competitive products), and such changes in classifications as are necessary to define the new prices. The changes are described generally below, with a detailed description of the changes in the attachment. The attachment includes the draft Mail Classification Schedule sections with classification changes in legislative format, and new prices displayed in the price charts.

As shown in the nonpublic annex being filed under seal herewith, the changes I establish should enable each competitive product to cover its attributable costs (39 U.S.C. 3633(a)(2)) and should result in competitive products as a whole complying with 39 U.S.C. 3633(a)(3), which, as implemented by 39 CFR 3015.7(c), requires competitive products collectively to contribute a minimum of 5.5 percent to the Postal Service's institutional costs. Accordingly, no issue of subsidization of competitive products by market dominant products should arise (39 U.S.C. 3633(a)(1)). I therefore find that the new prices are in accordance with 39 U.S.C. 3632-3633 and 39 CFR 3015.2.

I. Domestic Products

A. Priority Mail Express

Overall, the Priority Mail Express price change represents a 3.4 percent increase. The existing structure of zoned Retail, Commercial Base, and Commercial Plus price categories is maintained, with Commercial Base and Commercial Plus prices continuing to be set equal to each other.

Retail prices will increase an average of 3.7 percent. The price for the Retail Flat Rate Envelope, a significant portion of all Priority Mail Express volume, is increasing to $23.75. The prices for the Retail Flat Rate Envelope, Padded Flat Rate Envelope, and Legal Flat Rate Envelope will have differentiated prices for 2017.

The Commercial Base price category offers lower prices to customers who use online and other authorized postage payment methods. The Commercial Base prices will increase 2.4 percent on average. Commercial Base prices will be set at a flat 11.2 percent discount off of Retail prices.

The Commercial Plus price category has traditionally offered even lower prices to large-volume customers. However, recognizing that the Postal Service is at a competitive disadvantage in the marketplace by publishing these highly discounted prices that are viewable by all customers, Commercial Plus prices were matched to the Commercial Base prices in 2016 and will continue to be in 2017. For January, Commercial Plus prices as a whole will receive a 2.3 percent increase on average.

B. Priority Mail

On average, the Priority Mail prices will be increased by 3.9 percent. The existing structure of Priority Mail Retail, Commercial Base, and Commercial Plus price categories is maintained.

Retail prices will increase an average of 3.3 percent. Retail Flat Rate Box prices will be: Small, $7.15; Medium, $13.60; Large, $18.85 and Large APO/FPO/DPO, $17.35. Thus, the Large APO/FPO/DPO Flat Rate Box will be $1.50 less than the Large Flat Rate Box. The regular Flat Rate Envelope will be priced at $6.65, with the Legal Size and Padded Flat Rate Envelopes priced at $6.95 and $7.20, respectively.

The Commercial Base price category offers lower prices to customers using authorized postage payment methods. The Commercial Base prices will increase 4.1 percent on average. Commercial Base prices will, on average, reflect a 13.6 percent discount off of Retail prices.

The Commercial Plus price category has traditionally offered even lower prices to large-volume customers. For January, Commercial Plus prices as a whole will receive a 4.5 percent increase and will average 16.8 percent off Retail prices.

C. Parcel Select

On average, prices for destination-entered non-Lightweight Parcel Select, the Postal Service's bulk ground shipping product, will increase 4.9 percent. For destination delivery unit (DDU) entered parcels, the average price increase is 4.9 percent. For destination sectional center facility (DSCF) destination entered parcels, the average price increase is 4.8 percent. For destination network distribution center (DNDC) parcels, the average price increase is 5.0 percent. Prices for Parcel Select Lightweight will increase by 8.0 percent. Parcel Select Ground will see a 2.7 percent price increase.

D. Parcel Return Service

Parcel Return Service prices will have an overall price increase of 5.5 percent. Prices for parcels retrieved at a return Sectional Center Facility (RSCF) will increase by 5.8 percent, and prices for parcels picked up at a return delivery unit (RDU) will increase 5.2 percent.

E. First-Class Package Service

First-Class Package Service continues to be positioned as a lightweight (less than one pound) offering used by businesses for fulfillment purposes. Overall, First-Class Package Service prices will increase 4.1 percent.

F. Retail Ground

Retail Ground prices will increase 3.8 percent. Customers shipping in Zones 1-4 will continue to receive Priority Mail service and will only default to Retail Ground if the item contains hazardous material or is otherwise not permitted to travel by air transportation.

G. Domestic Extra Services

Premium Forwarding Service (PFS) prices will increase 3.8 percent in 2017. The retail counter enrollment fee will increase to $19.35. The online enrollment option, introduced in 2014, will now be available for $17.75. The weekly reshipment fee will increase to $19.35. New for 2017, for PFS Commercial, Priority Mail Express or Priority Mail shipments can be dispatched in bulk at a flat rate for full and half trays. Prices for Adult Signature service will increase to $5.90 for the basic service and $6.15 for the person-specific service. Address Enhancement Service prices will be increasing between 1.9 and 7.9 percent depending on the particular rate element, to ensure adequate cost coverage. Additionally, the TIGER/ZIP+4 price category will be retired because of low usage. Competitive Post Office Box prices will be increasing 6.5 percent on average, which is within the existing price ranges. Package Intercept Service will increase 3.2 percent, to $12.95. The Pickup On Demand fee, which has not increased since 2013, will increase to $22.00 for 2017.

II. International Products

A. Expedited Services

International expedited services include Global Express Guaranteed (GXG) and Priority Mail Express International (PMEI). Overall, GXG prices will rise by 4.9 percent, and there will be no changes in prices for PMEI. Commercial Plus prices will be equivalent to Commercial Base; however, deeper discounting may still be made available to customers through negotiated service agreements.

Customers would also benefit from a new classification change. Weight-rated items tendered at retail counters may be offered at prices equivalent to Priority Mail International (PMI) for certain destinations and weight steps, if all PMEI eligibility requirements are met and the Postal Service determines that service can be improved and/or the PMEI destination country delivery costs are lower than PMI destination country delivery costs.

B. Priority Mail International

There will be no changes in prices for Priority Mail International (PMI). Commercial Plus prices will be equivalent to Commercial Base; however, deeper discounting may still be made available to customers through negotiated service agreements.

This year, service features may change as PMI shipments bearing a designated barcode and dispatched to select destination countries will receive a scan upon delivery in lieu of a signature.

C. International Priority Airmail and International Surface Air Lift

Published prices for International Priority Airmail (IPA) and International Surface Air Lift (ISAL) will increase by 3.8 percent, and 3.9 percent for their associated M-Bags.

D. Airmail M-Bags

The published prices for Airmail M-Bags will increase by 4.9 percent.

E. First-Class Package International Service™

There will be no change in prices for First-Class Package International Service (FCPIS). Commercial Plus prices will be equivalent to Commercial Base; however, deeper discounting will still be made available to customers through negotiated service agreements.

F. International Ancillary Services and Special Services

Prices for several international ancillary services will be increased, with an overall increase of 10.6 percent. However, some services will be increased above average to ensure cost coverage, including International Postal Money Orders, which will increase by 73.7 percent, and Outbound International Registered Mail, which will increase by 7.2 percent.

ORDER

The changes in prices and classes set forth herein shall be effective at 12:01 A.M. on January 22, 2017. I direct the Secretary to have this decision published in the *Federal Register* in accordance with 39 U.S.C. 3632(b)(2), and direct management to file with the Postal Regulatory Commission appropriate notice of these changes.

By The Governors:

/s/

James H. Bilbray
Chairman, Temporary Emergency Committee of the Board of Governors

PART B

COMPETITIVE PRODUCTS

2000 COMPETITIVE PRODUCT LIST

DOMESTIC PRODUCTS*
Priority Mail Express
Priority Mail
Parcel Select
Parcel Return Service
First-Class Package Service
USPS Retail Ground

* * *

2100 Domestic Products

2100.1 Included Services

- Priority Mail Express (2105)
- Priority Mail (2110)
- Parcel Select (2115)
- Parcel Return Service (2120)
- First-Class Package Service (2125)
- USPS Retail Ground (2135)

2105 Priority Mail Express

* * *

2105.5 Optional Features

The following additional postal services may be available in conjunction with the product specified in this section:

- Pickup On Demand Service
- Sunday/Holiday Delivery
- 10:30 am Delivery
- Ancillary Services (1505)
  - Address Correction Service (1505.1)
  - ~~Collect On Delivery~~ COD Hold for Pickup (1505.7)
  - Priority Mail Express Insurance (1505.9)
  - Return Receipt (1505.13)
  - Special Handling (1505.18)
- Competitive Ancillary Services (2545)
  - Adult Signature (2545.1)
  - Package Intercept Service (2545.2)

2105.6 Prices

Retail Priority Mail Express Zone/Weight

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
0.5	23.75	23.75	24.55	26.65	28.50	30.25	32.30	39.40
1	23.75	24.80	29.85	33.45	34.60	36.75	37.90	46.20
2	23.75	26.45	32.55	36.45	37.95	40.15	41.55	50.70
3	23.85	27.80	36.75	42.95	44.80	47.45	48.80	59.50
4	23.85	29.65	39.20	48.60	50.50	53.45	54.90	67.00
5	24.95	33.30	41.80	52.00	56.75	59.45	61.05	74.45
6	28.55	38.10	48.45	59.10	62.15	65.35	67.35	82.15
7	31.30	41.75	55.55	64.60	67.50	71.40	73.95	90.20
8	34.35	45.80	60.15	69.50	73.30	77.50	79.60	97.10
9	35.70	47.65	62.40	74.30	79.00	83.50	85.70	104.60
10	37.60	49.65	64.80	77.65	83.05	87.80	90.00	109.80
11	39.75	55.55	72.40	81.40	85.40	90.15	92.45	112.80
12	41.85	59.45	76.90	85.70	89.25	94.30	96.55	117.85
13	44.30	63.30	80.45	89.60	93.00	98.20	102.20	124.65
14	46.35	67.20	83.60	93.10	96.90	102.30	106.40	129.80
15	47.85	70.95	87.15	97.05	100.85	106.40	110.65	135.00
16	49.90	75.00	90.60	100.80	105.20	110.95	114.35	139.50
17	51.85	78.90	94.00	104.45	108.75	114.60	117.55	143.40
18	53.90	82.65	97.35	108.15	112.55	118.65	121.80	148.55
19	55.85	86.55	100.65	111.80	116.45	122.65	125.85	153.50
20	57.10	88.70	103.65	115.00	118.65	125.00	128.95	157.30
21	58.40	94.25	106.90	118.65	123.90	130.45	133.75	163.20
22	60.60	98.15	111.60	123.80	127.80	134.50	138.90	169.45
23	62.35	101.95	114.85	127.40	131.75	138.60	142.95	174.40
24	64.65	105.90	118.60	131.45	135.70	142.75	146.10	178.25
25	67.25	109.80	121.45	134.50	139.40	146.55	150.70	183.85

Retail Priority Mail Express Zone/Weight (Continued)

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
26	68.75	113.75	124.95	138.35	143.30	150.65	155.00	189.10
27	70.75	117.45	128.20	141.90	147.10	154.60	159.05	194.05
28	72.15	121.40	132.30	146.35	150.90	158.55	163.25	199.15
29	74.40	125.20	136.65	151.05	154.85	162.55	167.25	204.00
30	76.50	129.10	140.95	155.75	159.25	167.25	172.55	210.50
31	78.40	132.95	145.20	160.45	164.30	172.45	178.00	217.15
32	80.50	137.00	149.60	165.10	169.10	177.45	183.30	223.65
33	83.00	140.75	153.85	169.80	174.05	182.55	188.55	230.00
34	85.35	144.55	158.30	174.60	178.85	187.55	193.80	236.45
35	87.55	148.45	162.45	179.05	183.65	192.45	199.10	242.90
36	89.80	152.40	166.85	183.85	188.70	197.70	204.45	249.45
37	91.75	156.15	171.15	188.50	193.70	202.85	209.80	255.95
38	93.90	160.15	175.50	193.25	198.50	207.85	215.00	262.35
39	96.25	164.00	179.90	197.90	203.15	212.60	220.35	268.85
40	98.30	167.75	184.25	202.65	208.10	217.70	225.75	275.40
41	100.20	171.70	188.55	207.25	213.15	222.95	231.00	281.75
42	102.00	175.65	192.90	211.90	218.15	228.05	236.25	288.20
43	104.35	179.40	197.10	216.50	222.95	233.00	241.60	294.75
44	106.25	183.35	201.50	221.20	227.75	238.00	246.85	301.15
45	108.25	187.25	205.70	225.75	232.65	243.05	252.25	307.75
46	110.40	191.00	210.25	230.55	237.50	248.00	257.50	314.15
47	112.70	194.90	214.50	235.15	242.40	253.05	262.80	320.65
48	114.65	198.90	218.75	239.65	247.30	258.05	268.10	327.10
49	116.70	202.60	223.15	244.30	252.35	263.25	273.45	333.65
50	119.20	206.60	227.50	249.10	257.05	268.05	278.70	340.00

Retail Priority Mail Express Zone/Weight (Continued)

Maximum Weight (pounds)	Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
51	121.30	210.55	231.80	253.60	261.90	273.00	283.30	345.65
52	123.35	214.20	236.05	258.15	266.95	278.15	289.45	353.10
53	125.35	218.20	240.45	262.80	271.85	283.20	294.75	359.55
54	127.60	222.10	244.70	267.35	276.75	288.20	300.00	366.00
55	130.15	227.20	249.20	272.10	281.55	293.10	305.25	372.40
56	132.85	231.20	253.40	276.55	286.40	298.10	310.60	378.95
57	135.15	235.05	257.75	281.20	291.25	303.10	315.85	385.30
58	137.45	238.80	262.05	285.70	296.20	308.10	321.15	391.80
59	139.35	242.65	266.30	290.30	301.20	313.15	326.45	398.25
60	141.20	246.55	270.65	294.90	306.05	318.10	331.75	404.75
61	143.20	250.50	275.20	299.70	310.95	323.05	337.05	411.20
62	145.45	254.30	279.40	304.05	315.75	327.95	342.45	417.80
63	147.85	258.10	283.70	308.65	320.70	333.05	347.80	424.30
64	149.85	262.00	288.00	313.15	325.65	338.05	353.10	430.80
65	152.40	265.85	292.30	317.70	330.50	342.85	358.35	437.15
66	155.25	269.85	296.70	322.35	335.40	347.85	363.60	443.55
67	157.05	273.60	301.10	326.95	340.10	352.65	368.95	450.10
68	159.10	277.50	305.40	331.40	345.20	357.85	374.40	456.75
69	161.60	281.40	309.65	335.95	349.95	362.65	379.45	462.95
70	164.60	285.30	314.05	340.50	354.90	367.60	384.80	469.45

Retail Flat Rate Envelope

	($)
Retail Regular Flat Rate Envelope, per piece	23.75
Retail Legal Flat Rate Envelope, per piece	23.95
Retail Padded Flat Rate Envelope, per piece	24.45

Retail Priority Mail Zone/Weight (Continued)

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
26	23.50	28.35	36.35	48.60	56.10	62.45	72.65	102.25
27	24.20	28.75	37.45	49.55	56.90	63.90	75.35	106.10
28	24.95	29.15	38.55	50.80	57.65	65.35	78.20	110.10
29	25.70	29.45	39.50	51.55	58.65	66.85	80.30	113.05
30	26.45	29.85	40.45	52.25	60.25	68.40	82.05	115.50
31	27.25	30.15	41.10	52.95	61.15	69.85	83.70	118.80
32	27.55	30.80	41.80	53.55	61.95	71.35	85.40	121.20
33	28.00	31.65	42.85	54.25	63.15	72.85	87.00	123.50
34	28.25	32.50	43.90	55.40	64.60	74.35	88.65	125.80
35	28.55	33.30	44.50	56.60	66.35	75.80	90.10	127.90
36	28.85	34.20	45.10	57.80	68.05	76.85	91.70	130.10
37	29.15	34.85	45.75	58.85	69.80	77.85	93.20	132.25
38	29.45	35.70	46.35	60.00	71.75	78.80	94.70	134.40
39	29.75	36.50	46.90	61.25	73.50	80.80	96.10	136.40
40	30.10	37.30	47.55	62.55	74.65	82.65	97.45	138.30
41	30.40	38.00	48.05	63.15	75.85	84.40	98.85	141.40
42	30.65	38.70	48.60	64.50	77.20	85.50	100.20	143.35
43	31.00	39.30	49.05	65.95	79.10	86.60	101.45	145.15
44	31.20	39.95	49.65	67.30	80.35	87.60	102.65	146.90
45	31.40	40.40	50.00	68.85	81.20	88.60	103.95	148.75
46	31.65	40.70	50.55	70.10	82.10	89.55	105.20	150.55
47	31.95	41.05	51.00	71.70	83.00	90.55	106.35	152.15
48	32.20	41.40	51.50	73.10	84.10	91.40	107.50	153.80
49	32.40	41.70	51.90	74.45	85.20	92.35	108.60	155.35
50	32.55	41.95	52.25	75.90	86.35	93.55	109.70	156.95

2110.6 Prices

Retail Priority Mail Zone/Weight

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
1	6.65	7.10	7.25	7.40	7.50	7.75	8.35	10.50
2	7.20	7.60	8.65	9.75	10.55	11.70	12.75	16.70
3	7.80	8.70	10.05	11.65	13.20	14.50	17.15	22.35
4	8.50	9.90	11.15	13.50	16.45	18.00	20.05	26.15
5	9.85	10.95	11.95	14.15	18.70	20.65	23.15	30.25
6	10.40	11.30	12.50	15.10	20.80	22.40	25.25	34.15
7	11.05	12.15	13.90	18.05	23.05	25.15	28.45	38.40
8	11.40	13.10	15.45	20.95	25.25	27.80	31.80	42.95
9	11.90	14.15	17.10	23.90	27.50	30.05	35.40	47.80
10	12.65	15.15	18.40	25.95	29.70	33.05	38.60	52.10
11	13.50	16.20	19.75	28.00	31.90	36.50	42.35	57.65
12	14.25	17.40	21.20	30.00	34.70	39.45	45.45	61.85
13	15.10	18.45	22.45	31.70	37.25	41.05	47.10	64.10
14	16.00	19.60	23.85	33.70	39.30	43.35	49.45	67.30
15	16.70	20.70	25.20	35.65	41.00	44.30	50.80	69.20
16	17.20	21.80	26.55	37.65	43.30	46.75	53.65	73.00
17	17.95	22.95	27.95	39.60	45.50	49.25	56.45	76.85
18	18.30	23.80	29.15	41.55	47.90	51.65	59.35	80.80
19	18.80	24.30	29.80	42.70	48.85	52.75	60.60	84.60
20	19.60	24.60	30.25	43.40	50.00	54.65	63.40	88.50
21	20.25	24.95	30.70	44.05	50.85	55.55	64.85	91.25
22	20.75	25.55	31.40	45.10	52.00	56.90	66.40	93.50
23	21.20	26.00	31.95	45.85	52.95	58.00	67.60	95.15
24	21.70	26.55	32.65	46.85	54.05	59.45	69.25	97.50
25	22.55	27.10	33.95	47.65	54.75	60.95	70.40	99.10

Commercial Base Zone/Weight (Continued)

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
51	108.08	187.62	206.58	226.03	233.39	243.30	252.48	308.02
52	109.95	190.89	210.34	230.07	237.89	247.88	257.93	314.70
53	111.72	194.44	214.30	234.21	242.25	252.39	262.66	320.42
54	113.72	197.94	218.07	238.25	246.61	256.84	267.34	326.15
55	115.99	202.48	222.07	242.48	250.93	261.21	272.02	331.88
56	118.40	206.03	225.85	246.48	255.25	265.66	276.79	337.69
57	120.44	209.48	229.70	250.61	259.57	270.11	281.48	343.38
58	122.49	212.80	233.52	254.61	263.97	274.57	286.20	349.15
59	124.17	216.25	237.34	258.70	268.43	279.06	290.93	354.92
60	125.86	219.71	241.21	262.79	272.75	283.48	295.66	360.69
61	127.62	223.25	245.25	267.06	277.11	287.88	300.38	366.47
62	129.62	226.61	248.98	270.97	281.39	292.24	305.20	372.33
63	131.76	230.03	252.84	275.06	285.79	296.79	309.97	378.14
64	133.53	233.48	256.66	279.06	290.20	301.24	314.70	383.92
65	135.80	236.94	260.48	283.11	294.52	305.57	319.33	389.60
66	138.35	240.48	264.43	287.29	298.88	310.02	324.02	395.28
67	139.95	243.84	268.34	291.39	303.11	314.29	328.79	401.10
68	141.80	247.30	272.15	295.33	307.66	318.93	333.65	407.05
69	144.04	250.79	275.97	299.38	311.88	323.20	338.15	412.55
70	146.67	254.25	279.88	303.42	316.29	327.60	342.93	418.37

Commercial Base Flat Rate Envelope

	($)
Commercial Base Regular Flat Rate Envelope, per piece	21.18
Commercial Base Legal Flat Rate Envelope, per piece	21.28
Commercial Base Padded Flat Rate Envelope, per piece	21.64

Commercial Plus Zone/Weight

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
0.5	21.18	21.18	21.86	23.76	25.42	26.99	28.78	35.11
1	21.18	22.10	26.62	29.80	30.86	32.75	33.76	41.19
2	21.18	23.58	29.02	32.47	33.81	35.79	37.04	45.20
3	21.18	24.68	32.62	37.36	38.98	41.29	42.44	51.75
4	21.18	26.29	34.78	42.25	43.91	46.49	47.74	58.26
5	22.14	29.52	37.08	45.20	49.35	51.71	53.10	64.76
6	25.33	33.81	42.99	51.38	54.06	56.83	58.58	71.45
7	27.77	37.04	49.26	56.18	58.72	62.08	64.30	78.46
8	30.49	40.64	53.37	60.42	63.74	67.39	69.24	84.46
9	31.69	42.25	55.35	64.63	68.69	72.60	74.54	90.96
10	33.35	44.05	57.47	67.53	72.23	76.34	78.28	95.48
11	34.72	48.54	63.27	71.13	74.63	78.81	80.81	98.59
12	36.59	51.95	67.23	74.90	77.99	82.41	84.41	102.99
13	38.72	55.32	70.32	78.32	81.26	85.81	89.31	108.95
14	40.50	58.72	73.08	81.36	84.68	89.41	92.99	113.44
15	41.81	61.99	76.17	84.81	88.13	92.99	96.72	117.99
16	43.63	65.54	79.17	88.08	91.95	96.99	99.95	121.95
17	45.32	68.95	82.17	91.31	95.04	100.17	102.77	125.35
18	47.14	72.23	85.08	94.54	98.35	103.72	106.44	129.86
19	48.81	75.63	87.99	97.72	101.77	107.22	109.99	134.17
20	50.90	79.04	92.35	102.49	105.72	111.40	114.90	140.17
21	52.05	83.99	95.26	105.72	110.40	116.26	119.22	145.44
22	53.99	87.50	99.44	110.31	113.90	119.86	123.81	151.04
23	55.59	90.86	102.35	113.53	117.40	123.53	127.40	155.44
24	57.63	94.35	105.68	117.13	120.95	127.22	130.22	158.85
25	59.95	97.86	108.22	119.86	124.22	130.62	134.31	163.85

Commercial Plus Zone/Weight (Continued)

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
26	61.27	101.35	111.35	123.31	127.71	134.26	138.13	168.53
27	63.04	104.68	114.26	126.44	131.08	137.76	141.76	172.94
28	64.32	108.17	117.90	130.44	134.49	141.31	145.49	177.49
29	66.32	111.58	121.77	134.62	137.99	144.85	149.04	181.80
30	68.18	115.04	125.62	138.80	141.95	149.04	153.76	187.58
31	69.86	118.49	129.40	142.99	146.44	153.67	158.62	193.53
32	71.72	122.08	133.31	147.13	150.71	158.13	163.35	199.30
33	73.95	125.44	137.13	151.31	155.13	162.67	168.03	204.98
34	76.08	128.81	141.08	155.62	159.40	167.12	172.71	210.71
35	78.04	132.31	144.76	159.58	163.67	171.53	177.44	216.48
36	80.04	135.80	148.71	163.85	168.17	176.16	182.21	222.30
37	81.77	139.17	152.53	167.98	172.62	180.76	186.98	228.12
38	83.68	142.71	156.40	172.22	176.89	185.21	191.62	233.79
39	85.77	146.17	160.31	176.35	181.03	189.49	196.39	239.61
40	87.59	149.49	164.22	180.62	185.44	194.03	201.16	245.43
41	89.31	153.04	168.03	184.71	189.94	198.71	205.85	251.12
42	90.90	156.53	171.89	188.85	194.39	203.25	210.52	256.84
43	92.99	159.89	175.67	192.94	198.71	207.67	215.30	262.66
44	94.68	163.40	179.58	197.12	202.98	212.12	219.98	268.39
45	96.50	166.89	183.30	201.16	207.34	216.61	224.80	274.25
46	98.40	170.22	187.40	205.48	211.67	221.03	229.48	279.97
47	100.44	173.71	191.16	209.58	216.03	225.52	234.21	285.75
48	102.17	177.26	194.94	213.57	220.39	229.98	238.94	291.52
49	103.99	180.58	198.85	217.71	224.89	234.61	243.70	297.33
50	106.22	184.12	202.76	221.98	229.07	238.89	248.39	303.02

Commercial Plus Zone/Weight (Continued)

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
51	108.08	187.62	206.58	226.03	233.39	243.30	252.48	308.02
52	109.95	190.89	210.34	230.07	237.89	247.88	257.93	314.70
53	111.72	194.44	214.30	234.21	242.25	252.39	262.66	320.42
54	113.72	197.94	218.07	238.25	246.61	256.84	267.34	326.15
55	115.99	202.48	222.07	242.48	250.93	261.21	272.02	331.88
56	118.40	206.03	225.85	246.48	255.25	265.66	276.79	337.69
57	120.44	209.48	229.70	250.61	259.57	270.11	281.48	343.38
58	122.49	212.80	233.52	254.61	263.97	274.57	286.20	349.15
59	124.17	216.25	237.34	258.70	268.43	279.06	290.93	354.92
60	125.86	219.71	241.21	262.79	272.75	283.48	295.66	360.69
61	127.62	223.25	245.25	267.06	277.11	287.88	300.38	366.47
62	129.62	226.61	248.98	270.97	281.39	292.24	305.20	372.33
63	131.76	230.03	252.84	275.06	285.79	296.79	309.97	378.14
64	133.53	233.48	256.66	279.06	290.20	301.24	314.70	383.92
65	135.80	236.94	260.48	283.11	294.52	305.57	319.33	389.60
66	138.35	240.48	264.43	287.29	298.88	310.02	324.02	395.28
67	139.95	243.84	268.34	291.39	303.11	314.29	328.79	401.10
68	141.80	247.30	272.15	295.33	307.66	318.93	333.65	407.05
69	144.04	250.79	275.97	299.38	311.88	323.20	338.15	412.55
70	146.67	254.25	279.88	303.42	316.29	327.60	342.93	418.37

Commercial Plus Flat Rate Envelope

	($)
Commercial Plus Regular Flat Rate Envelope, per piece	21.18
Commercial Plus Legal Flat Rate Envelope, per piece	21.28
Commercial Plus Padded Flat Rate Envelope, per piece	21.64

Pickup On Demand Service

Add $22.00 for each Pickup On Demand stop.

Sunday/Holiday Delivery

Add $12.50 for requesting Sunday or holiday delivery.

10:30 am Delivery

Add $5.00 for requesting delivery by 10:30 am.

IMpb Noncompliance Fee

Add $0.20 for each IMpb-noncompliant parcel paying commercial prices.

2110 Priority Mail

* * *

2110.5 Optional Features

The following additional postal services may be available in conjunction with the product specified in this section:

- Pickup On Demand Service

- Ancillary Services (1505)
  - Address Correction Service (1505.1)
  - Business Reply Mail (1505.3)
  - Certified Mail (1505.5)
  - Certificate of Mailing (1505.6)
  - ~~Collect On Delivery~~ COD Hold for Pickup (1505.7)
  - USPS Tracking (1505.8)
  - Insurance (1505.9)
  - Merchandise Return (1505.10)
  - Registered Mail (1505.12)
  - Return Receipt (1505.13)
  - Return Receipt for Merchandise (1505.14)
  - Signature Confirmation (1505.17)
  - Special Handling (1505.18)

- Competitive Ancillary Services (2545)
  - Adult Signature (2545.1)
  - Package Intercept Service (2545.2)

2110.6 Prices

Retail Priority Mail Zone/Weight

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
1	6.65	7.10	7.25	7.40	7.50	7.75	8.35	10.50
2	7.20	7.60	8.65	9.75	10.55	11.70	12.75	16.70
3	7.80	8.70	10.05	11.65	13.20	14.50	17.15	22.35
4	8.50	9.90	11.15	13.50	16.45	18.00	20.05	26.15
5	9.85	10.95	11.95	14.15	18.70	20.65	23.15	30.25
6	10.40	11.30	12.50	15.10	20.80	22.40	25.25	34.15
7	11.05	12.15	13.90	18.05	23.05	25.15	28.45	38.40
8	11.40	13.10	15.45	20.95	25.25	27.80	31.80	42.95
9	11.90	14.15	17.10	23.90	27.50	30.05	35.40	47.80
10	12.65	15.15	18.40	25.95	29.70	33.05	38.60	52.10
11	13.50	16.20	19.75	28.00	31.90	36.50	42.35	57.65
12	14.25	17.40	21.20	30.00	34.70	39.45	45.45	61.85
13	15.10	18.45	22.45	31.70	37.25	41.05	47.10	64.10
14	16.00	19.60	23.85	33.70	39.30	43.35	49.45	67.30
15	16.70	20.70	25.20	35.65	41.00	44.30	50.80	69.20
16	17.20	21.80	26.55	37.65	43.30	46.75	53.65	73.00
17	17.95	22.95	27.95	39.60	45.50	49.25	56.45	76.85
18	18.30	23.80	29.15	41.55	47.90	51.65	59.35	80.80
19	18.80	24.30	29.80	42.70	48.85	52.75	60.60	84.60
20	19.60	24.60	30.25	43.40	50.00	54.65	63.40	88.50
21	20.25	24.95	30.70	44.05	50.85	55.55	64.85	91.25
22	20.75	25.55	31.40	45.10	52.00	56.90	66.40	93.50
23	21.20	26.00	31.95	45.85	52.95	58.00	67.60	95.15
24	21.70	26.55	32.65	46.85	54.05	59.45	69.25	97.50
25	22.55	27.10	33.95	47.65	54.75	60.95	70.40	99.10

Retail Priority Mail Zone/Weight (Continued)

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
26	23.50	28.35	36.35	48.60	56.10	62.45	72.65	102.25
27	24.20	28.75	37.45	49.55	56.90	63.90	75.35	106.10
28	24.95	29.15	38.55	50.80	57.65	65.35	78.20	110.10
29	25.70	29.45	39.50	51.55	58.65	66.85	80.30	113.05
30	26.45	29.85	40.45	52.25	60.25	68.40	82.05	115.50
31	27.25	30.15	41.10	52.95	61.15	69.85	83.70	118.80
32	27.55	30.80	41.80	53.55	61.95	71.35	85.40	121.20
33	28.00	31.65	42.85	54.25	63.15	72.85	87.00	123.50
34	28.25	32.50	43.90	55.40	64.60	74.35	88.65	125.80
35	28.55	33.30	44.50	56.60	66.35	75.80	90.10	127.90
36	28.85	34.20	45.10	57.80	68.05	76.85	91.70	130.10
37	29.15	34.85	45.75	58.85	69.80	77.85	93.20	132.25
38	29.45	35.70	46.35	60.00	71.75	78.80	94.70	134.40
39	29.75	36.50	46.90	61.25	73.50	80.80	96.10	136.40
40	30.10	37.30	47.55	62.55	74.65	82.65	97.45	138.30
41	30.40	38.00	48.05	63.15	75.85	84.40	98.85	141.40
42	30.65	38.70	48.60	64.50	77.20	85.50	100.20	143.35
43	31.00	39.30	49.05	65.95	79.10	86.60	101.45	145.15
44	31.20	39.95	49.65	67.30	80.35	87.60	102.65	146.90
45	31.40	40.40	50.00	68.85	81.20	88.60	103.95	148.75
46	31.65	40.70	50.55	70.10	82.10	89.55	105.20	150.55
47	31.95	41.05	51.00	71.70	83.00	90.55	106.35	152.15
48	32.20	41.40	51.50	73.10	84.10	91.40	107.50	153.80
49	32.40	41.70	51.90	74.45	85.20	92.35	108.60	155.35
50	32.55	41.95	52.25	75.90	86.35	93.55	109.70	156.95

Retail Priority Mail Zone/Weight (Continued)

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
51	32.70	42.35	52.75	77.15	87.55	94.90	110.70	159.65
52	33.10	42.60	53.10	77.80	88.45	96.30	112.00	161.60
53	33.65	42.90	53.45	78.40	89.20	97.85	113.45	163.70
54	34.10	43.10	53.80	79.05	89.85	99.30	115.10	165.95
55	34.70	43.40	54.10	79.60	90.55	100.85	116.60	168.20
56	35.15	43.65	54.40	80.15	91.15	102.30	117.70	169.75
57	35.65	43.80	54.75	80.60	91.85	103.85	118.55	171.00
58	36.25	44.00	55.05	81.15	92.35	105.25	119.45	172.25
59	36.80	44.20	55.35	81.65	92.90	105.90	120.40	173.65
60	37.30	44.40	55.90	82.05	93.40	106.55	121.15	174.80
61	37.85	44.60	56.90	82.45	93.90	107.15	122.80	177.20
62	38.25	44.70	57.60	82.90	94.40	107.65	124.80	180.00
63	39.00	44.95	58.55	83.30	94.90	108.15	126.80	182.90
64	39.35	45.05	59.40	83.65	95.25	108.70	128.70	185.65
65	39.90	45.15	60.20	83.95	95.60	109.20	130.75	188.60
66	40.40	45.35	61.15	84.35	96.05	109.55	132.60	191.30
67	41.05	45.45	62.20	84.65	96.35	110.00	134.35	193.80
68	41.55	45.55	63.00	84.85	97.55	110.40	135.80	195.90
69	42.10	45.60	63.75	85.05	98.75	110.70	137.25	197.95
70	42.55	45.70	64.80	85.35	99.95	111.10	138.75	200.10

Retail Flat Rate Envelopes[1]

	($)
Retail Regular Flat Rate Envelope, per piece	6.65
Retail Legal Flat Rate Envelope, per piece	6.95
Retail Padded Flat Rate Envelope, per piece	7.20

Notes

1. The price for Regular, Legal, or Padded Flat Rate Envelopes also applies to sales of Regular, Legal, or Padded Flat Rate Envelopes, respectively, marked with Forever postage, at the time the envelopes are purchased.

Retail Flat Rate Boxes[1]

Size	Delivery to Domestic Address ($)	Delivery to APO/FPO/DPO Address ($)
Small Flat Rate Box	7.15	7.15
Medium Flat Rate Boxes	13.60	13.60
Large Flat Rate Boxes	18.85	17.35

Notes

1. The price for Small, Medium, or Large Flat Rate Boxes also applies to sales of Small, Medium, or Large Flat Rate Boxes, respectively, marked with Forever postage, at the time the boxes are purchased.

Regional Rate Boxes

Size	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
A	8.77	8.85	9.08	9.15	10.19	10.99	11.28	16.14
B	9.42	10.26	11.44	11.95	16.68	18.93	21.41	29.72

Retail Balloon Price

In Zones 1-4 (including local), parcels weighing less than 20 pounds but measuring more than 84 inches in combined length and girth (but not more than 108 inches) are charged the applicable price for a 20-pound parcel.

Retail Dimensional Weight

In Zones 5-8, parcels exceeding one cubic foot are priced at the actual weight or the dimensional weight, whichever is greater.

For box-shaped parcels, the dimensional weight (pounds) is calculated by multiplying the length (inches) times the width (inches) times the height (inches) of the parcel, and dividing by 194.

For irregular-shaped parcels (parcels not appearing box-shaped), the dimensional weight (pounds) is calculated by multiplying the length (inches) times the width (inches) times the height (inches) at the associated maximum cross-sections of the parcel, dividing by 194, and multiplying by an adjustment factor of 0.785.

Commercial Base Priority Mail Zone/Weight

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
1	5.95	6.46	6.56	6.73	6.86	6.92	7.25	9.89
2	6.52	6.60	6.83	8.15	9.19	9.99	10.28	15.14
3	6.61	7.38	7.86	9.50	11.81	12.77	14.90	20.54
4	6.83	7.62	8.72	10.50	13.77	15.60	17.61	24.73
5	7.17	8.01	9.19	10.95	15.68	17.93	20.41	28.72
6	7.52	8.44	9.54	13.64	17.59	20.44	23.37	32.91
7	7.83	8.86	9.90	15.13	19.48	23.05	26.25	36.95
8	8.20	9.28	10.97	16.36	21.41	25.37	29.47	41.49
9	8.57	9.87	11.08	17.49	23.29	27.48	32.77	46.13
10	9.09	10.28	11.22	18.81	25.16	30.21	35.64	50.17
11	10.30	11.93	13.82	20.03	27.00	32.88	38.61	54.81
12	10.84	12.60	14.52	21.38	29.44	35.55	41.40	58.77
13	11.34	13.24	15.11	22.51	31.61	36.99	42.87	60.86
14	11.84	13.89	15.79	23.75	33.38	39.06	45.00	63.88
15	12.23	14.56	16.46	24.81	34.67	39.80	46.19	65.57
16	12.70	15.33	17.32	25.92	36.64	42.03	48.73	69.17
17	13.04	16.00	18.07	27.07	38.50	44.22	51.30	72.81
18	13.26	16.44	18.83	28.18	40.53	46.40	53.88	76.49
19	13.55	16.86	19.29	28.91	42.35	48.57	56.44	80.11
20	14.02	17.17	19.73	29.47	43.44	50.38	59.05	83.81
21	14.77	17.76	20.35	30.30	43.79	50.85	59.81	85.60
22	15.54	18.54	21.39	31.25	44.09	51.25	60.50	86.59
23	16.30	19.29	22.33	32.24	44.34	51.61	60.86	87.10
24	17.21	20.46	24.16	34.04	45.27	52.94	62.34	89.23
25	18.11	21.56	26.41	35.72	45.93	54.26	63.42	90.77

Commercial Base Priority Mail Zone/Weight (Continued)

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
26	19.05	23.35	29.68	38.63	47.05	55.59	65.40	93.60
27	19.89	24.04	31.04	41.12	47.69	56.89	67.87	97.15
28	20.50	24.37	31.91	42.19	48.33	58.22	70.42	100.79
29	21.12	24.61	32.77	42.75	49.15	59.55	72.31	103.48
30	21.76	24.98	33.55	43.35	50.53	60.86	73.87	105.72
31	22.36	25.22	34.07	43.89	51.26	62.21	75.37	108.76
32	22.62	25.75	34.64	44.41	51.93	63.54	76.91	110.98
33	22.97	26.46	35.51	44.99	52.93	64.84	78.33	113.02
34	23.18	27.16	36.40	45.96	54.18	66.19	79.81	115.16
35	23.45	27.81	36.92	46.93	55.63	67.51	81.17	117.12
36	23.74	28.61	37.41	47.95	57.04	68.43	82.55	119.12
37	23.99	29.13	37.95	48.81	58.53	69.30	83.90	121.08
38	24.21	29.84	38.43	49.78	60.17	70.11	85.24	123.01
39	24.46	30.53	38.88	50.81	61.59	71.96	86.56	124.91
40	24.71	31.18	39.37	51.86	62.58	73.56	87.74	126.61
41	24.98	31.71	39.79	52.33	63.63	75.12	89.00	129.46
42	25.16	32.36	40.29	53.47	64.74	76.15	90.21	131.23
43	25.45	32.88	40.70	54.67	66.29	77.09	91.37	132.91
44	25.62	33.42	41.18	55.82	67.35	78.01	92.41	134.44
45	25.79	33.76	41.49	55.84	68.10	78.87	93.58	136.14
46	26.01	34.02	41.91	56.87	68.85	79.71	94.70	137.76
47	26.22	34.29	42.31	58.20	69.57	80.62	95.76	139.30
48	26.43	34.60	42.66	59.29	70.47	81.39	96.79	140.81
49	26.63	34.87	43.01	60.36	71.43	82.24	97.75	142.19
50	26.74	35.08	43.31	61.58	72.43	83.28	98.78	143.71

Commercial Base Priority Mail Zone/Weight (Continued)

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
51	27.13	35.40	43.71	62.63	73.42	84.48	99.70	146.21
52	27.55	35.57	43.97	63.07	74.14	85.76	100.87	147.92
53	28.05	35.83	44.27	63.59	74.76	87.15	102.16	149.81
54	28.46	35.99	44.60	64.14	75.29	88.41	103.60	151.92
55	28.90	36.30	44.86	64.55	75.91	89.80	104.99	153.95
56	29.30	36.47	45.13	65.03	76.42	91.07	106.06	155.54
57	29.77	36.64	45.16	65.42	77.00	92.45	107.01	156.93
58	30.21	36.81	45.19	65.83	77.44	93.68	107.89	158.21
59	30.65	37.00	45.54	66.24	77.90	94.32	108.69	159.38
60	31.04	37.16	45.90	66.59	78.29	94.88	109.45	160.50
61	31.53	37.34	46.25	66.93	78.72	95.42	110.92	162.67
62	31.92	37.42	46.87	67.23	79.09	95.85	112.69	165.25
63	32.49	37.54	47.62	67.58	79.54	96.31	114.49	167.89
64	32.78	38.14	48.34	67.87	79.89	96.75	116.26	170.48
65	33.26	38.22	48.98	68.09	80.13	97.21	118.07	173.15
66	33.70	38.28	49.74	68.40	80.53	97.51	119.79	175.66
67	34.20	38.37	50.58	68.65	80.80	97.91	121.37	177.98
68	34.60	38.45	51.23	68.83	81.80	98.41	122.66	179.88
69	35.08	38.50	51.87	69.04	82.78	98.88	123.96	181.79
70	35.44	38.58	52.69	69.25	83.78	99.24	125.29	183.74

Commercial Base Flat Rate Envelope

	($)
Commercial Base Regular Flat Rate Envelope, per piece	5.95
Commercial Base Legal Flat Rate Envelope, per piece	6.25
Commercial Base Padded Flat Rate Envelope, per piece	6.50

Commercial Base Flat Rate Box

Size	Delivery to Domestic Address ($)	Delivery to APO/FPO/DPO Address ($)
Small Flat Rate Box	6.45	6.45
Medium Flat Rate Boxes	12.40	12.40
Large Flat Rate Boxes	17.05	15.55

Commercial Base Regional Rate Boxes

Size	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
A	6.52	6.60	6.83	8.15	9.19	9.99	10.28	15.14
B	7.17	8.01	9.19	10.95	15.68	17.93	20.41	28.72

Commercial Base Balloon Price

In Zones 1-4 (including local), parcels weighing less than 20 pounds but measuring more than 84 inches in combined length and girth (but not more than 108 inches) are charged the applicable price for a 20-pound parcel.

Commercial Base Dimensional Weight

In Zones 5-8, parcels exceeding one cubic foot are priced at the actual weight or the dimensional weight, whichever is greater.

For box-shaped parcels, the dimensional weight (pounds) is calculated by multiplying the length (inches) times the width (inches) times the height (inches) of the parcel, and dividing by 194.

For irregular-shaped parcels (parcels not appearing box-shaped), the dimensional weight (pounds) is calculated by multiplying the length (inches) times the width (inches) times the height (inches) at the associated maximum cross-sections of the parcel, dividing by 194, and multiplying by an adjustment factor of 0.785.

Commercial Plus Priority Mail Zone/Weight

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 $)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
0.5	5.75	6.26	6.37	6.53	6.66	6.71	7.04	9.59
1	5.75	6.26	6.37	6.53	6.66	6.71	7.04	9.59
2	6.33	6.40	6.63	7.91	8.91	9.69	9.97	14.69
3	6.41	7.16	7.62	9.22	11.46	12.39	14.45	19.92
4	6.62	7.39	8.46	10.19	13.36	15.13	17.08	23.99
5	6.96	7.77	8.91	10.62	15.21	17.39	19.80	27.86
6	7.29	8.18	9.26	13.23	17.06	19.83	22.67	31.92
7	7.60	8.59	9.60	14.68	18.89	22.36	25.46	35.84
8	7.96	9.00	10.64	15.87	20.77	24.61	28.59	40.24
9	8.32	9.57	10.75	16.96	22.59	26.66	31.79	44.75
10	8.82	9.97	10.88	18.24	24.41	29.30	34.57	48.66
11	9.99	11.57	13.40	19.43	26.19	31.89	37.45	53.17
12	10.52	12.23	14.08	20.74	28.55	34.48	40.16	57.01
13	11.00	12.84	14.66	21.83	30.66	35.88	41.58	59.04
14	11.48	13.48	15.31	23.03	32.38	37.89	43.65	61.97
15	11.87	14.13	15.96	24.06	33.63	38.61	44.81	63.60
16	12.32	14.87	16.80	25.15	35.54	40.77	47.27	67.10
17	12.65	15.52	17.52	26.26	37.35	42.90	49.76	70.63
18	12.87	15.94	18.27	27.33	39.31	45.00	52.26	74.20
19	13.14	16.35	18.71	28.05	41.08	47.11	54.75	77.71
20	13.60	16.65	19.14	28.59	42.13	48.86	57.28	81.30
21	14.33	17.22	19.74	29.39	42.47	49.33	58.01	83.03
22	15.07	17.98	20.75	30.31	42.77	49.71	58.68	83.99
23	15.81	18.71	21.66	31.27	43.01	50.06	59.03	84.49
24	16.70	19.84	23.43	33.02	43.91	51.35	60.47	86.55
25	17.56	20.91	25.62	34.65	44.55	52.63	61.52	88.04

Commercial Plus Priority Mail Zone/Weight (Continued)

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
26	18.48	22.64	28.79	37.47	45.64	53.92	63.44	90.79
27	19.29	23.32	30.11	39.88	46.26	55.18	65.84	94.23
28	19.88	23.64	30.95	40.92	46.88	56.47	68.30	97.77
29	20.48	23.87	31.79	41.46	47.68	57.76	70.14	100.37
30	21.11	24.23	32.54	42.05	49.02	59.03	71.65	102.55
31	21.69	24.47	33.05	42.57	49.73	60.34	73.11	105.49
32	21.94	24.98	33.60	43.08	50.37	61.63	74.60	107.65
33	22.28	25.67	34.45	43.64	51.34	62.89	75.98	109.63
34	22.48	26.35	35.31	44.58	52.55	64.20	77.42	111.71
35	22.75	26.98	35.81	45.52	53.96	65.48	78.73	113.60
36	23.03	27.75	36.29	46.51	55.33	66.37	80.07	115.55
37	23.27	28.25	36.81	47.35	56.78	67.22	81.39	117.44
38	23.48	28.94	37.28	48.29	58.37	68.01	82.69	119.32
39	23.73	29.61	37.72	49.29	59.75	69.80	83.97	121.16
40	23.97	30.24	38.19	50.30	60.71	71.36	85.11	122.81
41	24.23	30.76	38.60	50.76	61.72	72.87	86.33	125.58
42	24.41	31.39	39.08	51.86	62.79	73.86	87.50	127.29
43	24.69	31.89	39.47	53.03	64.30	74.78	88.62	128.93
44	24.85	32.42	39.94	54.14	65.33	75.67	89.64	130.40
45	25.02	32.75	40.24	54.16	66.06	76.51	90.77	132.05
46	25.23	33.00	40.65	55.17	66.78	77.32	91.86	133.63
47	25.44	33.26	41.04	56.46	67.48	78.20	92.88	135.12
48	25.64	33.56	41.38	57.51	68.36	78.95	93.89	136.58
49	25.83	33.82	41.72	58.55	69.29	79.77	94.81	137.92
50	25.94	34.03	42.01	59.73	70.26	80.78	95.82	139.40

Commercial Plus Priority Mail Zone/Weight (Continued)

Maximum Weight (pounds)	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
51	26.32	34.34	42.40	60.75	71.22	81.94	96.71	141.82
52	26.73	34.50	42.65	61.18	71.92	83.19	97.85	143.49
53	27.21	34.76	42.94	61.69	72.51	84.53	99.09	145.32
54	27.61	34.91	43.26	62.21	73.03	85.76	100.49	147.36
55	28.03	35.21	43.51	62.61	73.63	87.10	101.84	149.33
56	28.42	35.38	43.78	63.08	74.12	88.34	102.88	150.87
57	28.87	35.54	43.81	63.45	74.69	89.67	103.80	152.22
58	29.30	35.71	43.83	63.86	75.11	90.87	104.65	153.47
59	29.73	35.89	44.18	64.26	75.56	91.49	105.43	154.60
60	30.11	36.05	44.52	64.59	75.94	92.03	106.16	155.68
61	30.58	36.22	44.87	64.92	76.36	92.56	107.59	157.79
62	30.96	36.30	45.46	65.21	76.72	92.98	109.31	160.30
63	31.51	36.42	46.20	65.56	77.15	93.42	111.05	162.86
64	31.80	36.99	46.89	65.83	77.49	93.85	112.77	165.37
65	32.26	37.08	47.52	66.04	77.73	94.29	114.53	167.95
66	32.69	37.13	48.25	66.35	78.11	94.58	116.19	170.39
67	33.17	37.22	49.06	66.59	78.38	94.97	117.72	172.64
68	33.56	37.30	49.69	66.77	79.35	95.45	118.98	174.49
69	34.03	37.34	50.31	66.97	80.30	95.92	120.24	176.33
70	34.38	37.42	51.11	67.17	81.27	96.26	121.53	178.23

Commercial Plus Flat Rate Envelope

	($)
Commercial Plus Regular Flat Rate Envelope, per piece	5.75
Commercial Plus Legal Flat Rate Envelope, per piece	6.05
Commercial Plus Padded Flat Rate Envelope, per piece	6.30

Commercial Plus Flat Rate Box

Size	Delivery to Domestic Address ($)	Delivery to APO/FPO/DPO Address ($)
Small Flat Rate Box	6.25	6.25
Medium Flat Rate Boxes	12.05	12.05
Large Flat Rate Boxes	16.55	15.05

Commercial Plus Regional Rate Boxes

Maximum Cubic Feet	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
A	6.52	6.60	6.83	8.15	9.19	9.99	10.28	15.14
B	7.17	8.01	9.19	10.95	15.68	17.93	20.41	28.72

Commercial Plus Balloon Price

In Zones 1-4 (including local), parcels weighing less than 20 pounds but measuring more than 84 inches in combined length and girth (but not more than 108 inches) are charged the applicable price for a 20-pound parcel.

Commercial Plus Dimensional Weight

In Zones 5-8, parcels exceeding one cubic foot are priced at the actual weight or the dimensional weight, whichever is greater.

For box-shaped parcels, the dimensional weight (pounds) is calculated by multiplying the length (inches) times the width (inches) times the height (inches) of the parcel, and dividing by 194.

For irregular-shaped parcels (parcels not appearing box-shaped), the dimensional weight (pounds) is calculated by multiplying the length (inches) times the width (inches) times the height (inches) at the associated maximum cross-sections of the parcel, dividing by 194, and multiplying by an adjustment factor of 0.785.

Commercial Plus Cubic

Maximum Cubic Feet	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
0.10	5.75	6.26	6.37	6.53	6.66	6.71	7.04	9.59
0.20	6.19	6.51	6.65	7.14	7.45	7.71	7.95	11.19
0.30	6.60	6.71	6.94	8.19	9.17	9.93	10.23	15.00
0.40	6.71	7.26	7.67	9.24	11.19	12.12	13.69	19.19
0.50	6.88	7.68	8.59	10.36	13.37	14.93	17.02	23.77

Open and Distribute (PMOD)

a. DDU

Container	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
Half Tray	8.24	10.09	12.19	19.61	19.87	21.60	23.98	29.98
Full Tray	11.20	14.01	16.31	28.55	32.81	34.86	38.90	48.62
EMM Tray	12.84	15.30	18.90	31.58	34.67	38.07	42.33	52.91
Flat Tub	18.35	23.00	28.44	48.10	58.06	62.77	69.86	87.33

b. Processing Facilities

Container	Local, Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)	Zone 9 ($)
Half Tray	6.53	8.27	10.16	17.71	18.10	19.80	21.25	26.57
Full Tray	8.45	10.89	13.56	24.74	29.24	31.30	34.98	43.73
EMM Tray	10.08	11.68	15.91	27.31	31.02	34.16	39.47	49.34
Flat Tub	14.42	19.06	24.15	44.10	53.86	58.63	64.49	80.62

Pickup On Demand Service

Add $22.00 for each Pickup On Demand stop.

IMpb-Noncompliance Fee

Add $0.20 for each IMpb-noncompliant parcel paying commercial prices.

2115 Parcel Select

2115.1 Description

a. Any mailable matter may be mailed as Parcel Select mail, except matter required to be mailed by First-Class Mail or Priority Mail services; and publications required to be entered as Periodicals mail.

b. Parcel Select mail is not sealed against postal inspection. Mailing of matter as such constitutes consent by the mailer to postal inspection of the contents, regardless of the physical closure.

c. Undeliverable-as-addressed Parcel Select pieces will be forwarded on request of the addressee or forwarded or returned on request of the mailer, subject to the applicable Parcel Select Ground price, plus an applicable fee, when forwarded or returned. Pieces which combine Parcel Select matter with First-Class Mail or ~~Standard Mail~~USPS Marketing Mail matter will be forwarded or returned if undeliverable-as-addressed, as specified in the Domestic Mail Manual.

~~d. An annual mailing permit fee is required for destination entered parcels to be paid at each office of mailing or office of verification by or for mailers of Parcel Select (1505.2). Payment of the fee allows the mailer to mail at any Parcel Select price.~~

Attachments and enclosures

a. First-Class Mail or ~~Standard Mail~~USPS Marketing Mail pieces may be attached to or enclosed in Parcel Select mail. Postage at the applicable First-Class Mail or ~~Standard Mail~~USPS Marketing Mail price may be required.

* * *

2115.5 Optional Features

The following additional postal services may be available in conjunction with the product specified in this section:

- Pickup On Demand Service

- Ancillary Services (1505)
  - Address Correction Service (1505.1)
  - Certificate of Mailing (1505.6)
  - ~~Collect On Delivery~~ COD Hold for Pickup (1505.7)
  - USPS Tracking (1505.8)
  - Insurance (1505.9)
  - Return Receipt (1505.13)
  - Return Receipt for Merchandise (1505.14)
  - Signature Confirmation (1505.17)
  - Special Handling (1505.18)

- Competitive Ancillary Services (2545)
  - Adult Signature (2545.1)
  - Package Intercept Service (2545.2)

2115.6 Prices

Destination Entered — DDU

a. DDU

Maximum Weight (pounds)	DDU ($)
1	2.74
2	2.79
3	2.84
4	2.91
5	2.98
6	3.05
7	3.12
8	3.19
9	3.26
10	3.33
11	3.39
12	3.45
13	3.51
14	3.57
15	3.63
16	3.69
17	3.75
18	3.81
19	3.87
20	3.93
21	3.99
22	4.05
23	4.11
24	4.17
25	4.23

a. DDU (Continued)

Maximum Weight (pounds)	DDU ($)
26	4.29
27	4.35
28	4.41
29	4.47
30	4.53
31	4.59
32	4.65
33	4.71
34	4.77
35	4.83
36	4.89
37	4.95
38	5.01
39	5.07
40	5.13
41	5.19
42	5.25
43	5.31
44	5.37
45	5.43
46	5.49
47	5.55
48	5.61
49	5.67
50	5.73

a. DDU (Continued)

Maximum Weight (pounds)	DDU ($)
51	5.79
52	5.85
53	5.91
54	5.97
55	6.03
56	6.09
57	6.15
58	6.21
59	6.27
60	6.33
61	6.39
62	6.45
63	6.51
64	6.57
65	6.63
66	6.69
67	6.75
68	6.81
69	6.87
70	6.94
Oversized	10.51

b. Balloon Price

Pieces exceeding 84 inches in length and girth combined (but not more than 108 inches) and weighing less than 20 pounds are subject to a price equal to that for a 20-pound parcel for the zone to which the parcel is addressed.

c. Oversized Pieces

Regardless of weight, any piece that measures more than 108 inches (but not more than 130 inches) in length plus girth must pay the oversized price.

d. Forwarding and Returns

Parcel Select pieces that are forwarded on request of the addressee or forwarded or returned on request of the mailer will be subject to the applicable Parcel Select Ground price, plus $3.00, when forwarded or returned. For customers using Address Correction Service with Shipper Paid Forwarding/Return, and also using an IMpb, the additional fee will be $~~1~~<u>2</u>.50.

Destination Entered — DSCF

a. DSCF — 5-Digit Machinable

Maximum Weight (pounds)	DSCF 5-Digit ($)
1	3.75
2	3.84
3	3.93
4	4.09
5	4.25
6	4.41
7	4.57
8	4.73
9	4.89
10	5.05
11	5.21
12	5.37
13	5.53
14	5.68
15	5.83
16	5.98
17	6.13
18	6.28
19	6.43
20	6.58
21	6.73
22	6.88
23	7.03
24	7.18
25	7.33

a. DSCF — 5-Digit Machinable (Continued)

Maximum Weight (pounds)	DSCF 5-Digit ($)
26	7.48
27	7.63
28	7.78
29	7.93
30	8.08
31	8.23
32	8.38
33	8.53
34	8.68
35	8.83

b. DSCF — 3-Digit, 5-Digit Non-Machinable

Maximum Weight (pounds)	DSCF 3-Digit ($)	DSCF 5-Digit ($)
1	5.25	3.75
2	5.34	3.84
3	5.43	3.93
4	5.59	4.09
5	5.75	4.25
6	5.91	4.41
7	6.07	4.57
8	6.23	4.73
9	6.39	4.89
10	6.55	5.05
11	6.71	5.21
12	6.87	5.37
13	7.03	5.53
14	7.18	5.68
15	7.33	5.83
16	7.48	5.98
17	7.63	6.13
18	7.78	6.28
19	7.93	6.43
20	8.08	6.58
21	8.23	6.73
22	8.38	6.88
23	8.53	7.03
24	8.68	7.18
25	8.83	7.33

b. DSCF — 3-Digit, 5-Digit Non-Machinable (Continued)

Maximum Weight (pounds)	DSCF 3-Digit ($)	DSCF 5-Digit ($)
26	8.98	7.48
27	9.13	7.63
28	9.28	7.78
29	9.43	7.93
30	9.58	8.08
31	9.73	8.23
32	9.88	8.38
33	10.03	8.53
34	10.18	8.68
35	10.33	8.83
36	10.48	8.98
37	10.63	9.13
38	10.78	9.28
39	10.93	9.43
40	11.08	9.58
41	11.23	9.73
42	11.38	9.88
43	11.53	10.03
44	11.68	10.18
45	11.83	10.33
46	11.98	10.48
47	12.13	10.63
48	12.28	10.78
49	12.43	10.93
50	12.58	11.08

b. DSCF — 3-Digit, 5-Digit Non-Machinable (Continued)

Maximum Weight (pounds)	DSCF 3-Digit ($)	DSCF 5-Digit ($)
51	12.72	11.22
52	12.86	11.36
53	13.00	11.50
54	13.14	11.64
55	13.28	11.78
56	13.42	11.92
57	13.56	12.06
58	13.70	12.20
59	13.84	12.34
60	13.98	12.48
61	14.12	12.62
62	14.26	12.76
63	14.40	12.90
64	14.54	13.04
65	14.68	13.18
66	14.82	13.32
67	14.96	13.46
68	15.10	13.60
69	15.24	13.74
70	15.38	13.88
Oversized	20.98	20.98

c. Balloon Price

Pieces exceeding 84 inches in length and girth combined (but not more than 108 inches) and weighing less than 20 pounds are subject to a price equal to that for a 20-pound parcel for the zone to which the parcel is addressed.

d. Oversized Pieces

Regardless of weight, any piece that measures more than 108 inches (but not more than 130 inches) in length plus girth must pay the oversized price.

e. Forwarding and Returns

Parcel Select pieces that are forwarded on request of the addressee or forwarded or returned on request of the mailer will be subject to the applicable Parcel Select Ground price, plus $3.00, when forwarded or returned. For customers using Address Correction Service with Shipper Paid Forwarding/Return, and also using an IMpb, the additional fee will be $~~1~~2.50.

Destination Entered — DNDC

a. DNDC — Machinable

Maximum Weight (pounds)	DNDC Zones 1 & 2 ($)	DNDC Zone 3 ($)	DNDC Zone 4 ($)	DNDC Zones 5 ($)
1	5.07	5.82	6.63	7.50
2	5.22	6.09	7.02	7.96
3	5.37	6.36	7.41	8.42
4	5.66	6.89	8.17	9.25
5	5.95	7.42	8.93	10.05
6	6.24	7.95	9.67	10.81
7	6.52	8.48	10.38	11.54
8	6.80	9.01	11.05	12.22
9	7.08	9.54	11.66	12.86
10	7.35	10.06	12.23	13.47
11	7.61	10.58	12.76	14.04
12	7.87	11.08	13.26	14.58
13	8.12	11.55	13.72	15.09
14	8.37	12.00	14.15	15.56
15	8.61	12.43	14.57	16.00
16	8.85	12.84	14.96	16.41
17	9.09	13.22	15.33	16.80
18	9.33	13.58	15.67	17.17
19	9.57	13.92	16.00	17.52
20	9.81	14.24	16.32	17.86
21	10.05	14.54	16.63	18.19
22	10.29	14.82	16.94	18.52
23	10.53	15.08	17.24	18.84
24	10.77	15.34	17.54	19.16
25	11.01	15.59	17.84	19.47

a. DNDC — Machinable (Continued)

Maximum Weight (pounds)	DNDC Zones 1 & 2 ($)	DNDC Zone 3 ($)	DNDC Zone 4 ($)	DNDC Zones 5 ($)
26	11.24	15.83	18.13	19.77
27	11.47	16.07	18.42	20.06
28	11.70	16.31	18.70	20.35
29	11.93	16.55	18.97	20.63
30	12.15	16.79	19.24	20.91
31	12.37	17.03	19.51	21.19
32	12.59	17.27	19.78	21.47
33	12.81	17.51	20.04	21.75
34	13.03	17.75	20.31	22.03
35	13.25	17.99	20.58	22.31

b. DNDC — Non-Machinable

Maximum Weight (pounds)	DNDC Zones 1 & 2 ($)	DNDC Zone 3 ($)	DNDC Zone 4 ($)	DNDC Zones 5 ($)
1	7.57	8.32	9.13	10.00
2	7.72	8.59	9.52	10.46
3	7.87	8.86	9.91	10.92
4	8.16	9.39	10.67	11.75
5	8.45	9.92	11.43	12.55
6	8.74	10.45	12.17	13.31
7	9.02	10.98	12.88	14.04
8	9.30	11.51	13.55	14.72
9	9.58	12.04	14.16	15.36
10	9.85	12.56	14.73	15.97
11	10.11	13.08	15.26	16.54
12	10.37	13.58	15.76	17.08
13	10.62	14.05	16.22	17.59
14	10.87	14.50	16.65	18.06
15	11.11	14.93	17.07	18.50
16	11.35	15.34	17.46	18.91
17	11.59	15.72	17.83	19.30
18	11.83	16.08	18.17	19.67
19	12.07	16.42	18.50	20.02
20	12.31	16.74	18.82	20.36
21	12.55	17.04	19.13	20.69
22	12.79	17.32	19.44	21.02
23	13.03	17.58	19.74	21.34
24	13.27	17.84	20.04	21.66
25	13.51	18.09	20.34	21.97

b. DNDC — Non-Machinable (Continued)

Maximum Weight (pounds)	DNDC Zones 1 & 2 ($)	DNDC Zone 3 ($)	DNDC Zone 4 ($)	DNDC Zones 5 ($)
26	13.74	18.33	20.63	22.27
27	13.97	18.57	20.92	22.56
28	14.20	18.81	21.20	22.85
29	14.43	19.05	21.47	23.13
30	14.65	19.29	21.74	23.41
31	14.87	19.53	22.01	23.69
32	15.09	19.77	22.28	23.97
33	15.31	20.01	22.54	24.25
34	15.53	20.25	22.81	24.53
35	15.75	20.49	23.08	24.81
36	15.97	20.73	23.34	25.09
37	16.19	20.97	23.59	25.37
38	16.41	21.21	23.85	25.65
39	16.63	21.45	24.11	25.93
40	16.85	21.69	24.37	26.21
41	17.07	21.93	24.63	26.49
42	17.29	22.17	24.88	26.77
43	17.51	22.41	25.13	27.05
44	17.73	22.65	25.38	27.33
45	17.95	22.89	25.63	27.61
46	18.17	23.13	25.88	27.89
47	18.39	23.37	26.13	28.17
48	18.61	23.61	26.37	28.45
49	18.83	23.85	26.61	28.73
50	19.05	24.09	26.85	29.01

b. DNDC — Non-Machinable (Continued)

Maximum Weight (pounds)	DNDC Zones 1 & 2 ($)	DNDC Zone 3 ($)	DNDC Zone 4 ($)	DNDC Zones 5 ($)
51	19.27	24.33	27.09	29.29
52	19.49	24.57	27.33	29.57
53	19.71	24.80	27.57	29.85
54	19.93	25.03	27.81	30.13
55	20.15	25.26	28.05	30.41
56	20.37	25.49	28.29	30.69
57	20.59	25.72	28.53	30.97
58	20.81	25.95	28.77	31.25
59	21.03	26.18	29.01	31.53
60	21.25	26.41	29.25	31.81
61	21.47	26.64	29.49	32.09
62	21.69	26.87	29.73	32.37
63	21.91	27.10	29.97	32.64
64	22.13	27.33	30.21	32.91
65	22.35	27.56	30.45	33.18
66	22.57	27.79	30.69	33.44
67	22.79	28.02	30.93	33.69
68	23.01	28.25	31.17	33.94
69	23.23	28.48	31.41	34.19
70	23.45	28.71	31.65	34.44
Oversized	32.96	44.59	53.75	63.99

c. Balloon Price

Pieces exceeding 84 inches in length and girth combined (but not more than 108 inches) and weighing less than 20 pounds are subject to a price equal to that for a 20-pound parcel for the zone to which the parcel is addressed.

d. Oversized Pieces

Regardless of weight, any piece that measures more than 108 inches (but not more than 130 inches) in length plus girth must pay the oversized price.

e. Forwarding and Returns

Parcel Select pieces that are forwarded on request of the addressee or forwarded or returned on request of the mailer will be subject to the applicable Parcel Select Ground price, plus $3.00, when forwarded or returned. For customers using Address Correction Service with Shipper Paid Forwarding/Return, and also using an IMpb, the additional fee will be $~~1~~2.50.

Non-Destination Entered — Parcel Select Ground

a. Parcel Select Ground

Maximum Weight (pounds)	Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)
1	5.95	6.46	6.56	6.68	6.81	6.87	7.20
2	6.52	6.60	6.83	8.15	9.14	9.99	10.28
3	6.61	7.38	7.86	9.50	11.76	12.77	14.90
4	6.83	7.62	8.72	10.50	13.72	15.55	17.56
5	7.17	8.01	9.19	10.95	15.63	17.88	20.36
6	7.52	8.44	9.54	13.59	17.50	20.39	23.32
7	7.83	8.86	9.90	15.08	19.31	23.00	26.20
8	8.20	9.28	10.97	16.31	21.22	25.32	29.42
9	8.57	9.87	11.08	17.44	22.70	27.43	32.72
10	9.09	10.28	11.22	18.76	24.44	29.79	35.59
11	10.30	11.93	13.82	19.98	26.21	32.83	38.56
12	10.84	12.60	14.52	21.33	28.54	35.50	41.35
13	11.34	13.24	15.11	22.46	30.61	36.20	42.82
14	11.84	13.89	15.79	23.70	32.37	38.32	44.95
15	12.23	14.56	16.46	24.76	33.70	39.12	46.14
16	12.70	15.33	17.32	25.87	35.67	41.25	48.68
17	13.04	16.00	18.07	27.02	37.44	43.48	51.25
18	13.26	16.44	18.83	28.13	39.43	45.57	53.83
19	13.55	16.86	19.29	28.86	40.19	46.56	55.16
20	14.02	17.17	19.73	29.42	41.18	48.25	57.74
21	14.77	17.76	20.35	30.25	41.85	49.02	59.05
22	15.54	18.54	21.39	31.20	42.79	50.20	60.45
23	16.30	19.29	22.33	32.19	43.58	51.20	60.81
24	17.21	20.46	24.16	33.99	44.46	52.46	62.29
25	18.11	21.56	26.41	35.67	45.07	53.79	63.37

a. Parcel Select Ground (Continued)

Maximum Weight (pounds)	Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)
26	19.05	23.35	29.68	38.58	46.17	55.12	65.35
27	19.89	24.04	31.04	41.07	46.80	56.43	67.82
28	20.50	24.37	31.91	42.14	47.49	57.70	70.37
29	21.12	24.61	32.77	42.70	48.29	59.03	72.26
30	21.76	24.98	33.55	43.30	49.60	60.38	73.82
31	22.36	25.22	34.07	43.84	50.31	61.65	75.32
32	22.62	25.75	34.64	44.36	50.94	62.97	76.86
33	22.97	26.46	35.51	44.94	52.39	64.34	78.28
34	23.18	27.16	36.40	45.91	53.68	65.66	79.76
35	23.45	27.81	36.92	46.88	54.83	66.93	81.12
36	23.74	28.61	37.41	47.90	56.05	67.85	82.50
37	23.99	29.13	37.95	48.76	57.42	68.75	83.85
38	24.21	29.84	38.43	49.73	59.04	69.55	85.19
39	24.46	30.53	38.88	50.76	60.47	71.33	86.51
40	24.71	31.18	39.37	51.81	61.47	72.96	87.69
41	24.98	31.71	39.79	52.28	62.44	74.51	88.95
42	25.16	32.36	40.29	53.42	63.54	75.46	90.16
43	25.45	32.88	40.70	54.62	65.10	76.42	91.32
44	25.62	33.42	41.18	55.77	66.12	77.38	92.36
45	25.79	33.76	41.49	55.79	67.93	78.23	93.53
46	26.01	34.02	41.91	56.82	68.65	79.06	94.65
47	26.22	34.29	42.31	58.15	69.40	79.92	95.71
48	26.43	34.60	42.66	59.24	70.29	80.70	96.74
49	26.63	34.87	43.01	60.31	71.17	81.50	97.70
50	26.74	35.08	43.31	61.53	72.18	82.60	98.73

a. Parcel Select Ground (Continued)

Maximum Weight (pounds)	Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)
51	27.13	35.40	43.71	62.58	73.19	83.78	99.65
52	27.55	35.57	43.97	63.02	73.90	85.01	100.82
53	28.05	35.83	44.27	63.54	74.48	86.41	102.11
54	28.46	35.99	44.60	64.09	75.04	87.70	103.55
55	28.90	36.30	44.86	64.50	75.59	88.99	104.94
56	29.30	36.47	45.13	64.98	76.10	90.27	106.01
57	29.77	36.64	45.16	65.37	76.64	91.69	106.96
58	30.21	36.81	45.19	65.78	77.08	92.91	107.84
59	30.65	37.00	45.54	66.19	77.60	93.51	108.64
60	31.04	37.16	45.90	66.54	77.96	94.05	109.40
61	31.53	37.34	46.25	66.88	78.40	94.61	110.87
62	31.92	37.42	46.87	67.18	78.76	95.05	112.64
63	32.49	37.54	47.62	67.53	79.19	95.51	114.44
64	32.78	38.14	48.34	67.82	79.50	95.95	116.21
65	33.26	38.22	48.98	68.04	79.73	96.41	118.02
66	33.70	38.28	49.74	68.35	80.13	96.74	119.74
67	34.20	38.37	50.58	68.60	80.38	97.08	121.32
68	34.60	38.45	51.23	68.78	81.39	97.45	122.61
69	35.08	38.50	51.87	68.99	82.37	97.73	123.91
70	35.44	38.58	52.69	69.20	83.34	98.11	125.24
Oversized	63.99	67.94	86.89	106.11	123.37	141.62	173.87

b. Balloon Price

Pieces exceeding 84 inches in length and girth combined (but not more than 108 inches) and weighing less than 20 pounds are subject to a price equal to that for a 20-pound parcel for the zone to which the parcel is addressed.

c. Oversized Pieces

Regardless of weight, any piece that measures more than 108 inches (but not more than 130 inches) in length plus girth must pay the oversized price.

d. Forwarding and Returns

Parcel Select pieces that are forwarded on request of the addressee or forwarded or returned on request of the mailer will be subject to the applicable Parcel Select Ground price, plus $3.00, when forwarded or returned. For customers using Address Correction Service with Shipper Paid Forwarding/Return, and also using an IMpb, the additional fee will be $~~1~~2.50.

Parcel Select Lightweight

Maximum Weight (ounces)	Entry Point/Sortation Level							
	DDU/ 5-Digit ($)	DSCF/ 5-Digit ($)	DNDC/ 5-Digit ($)	DSCF/ SCF ($)	DNDC/ SCF ($)	DNDC/ NDC ($)	None/ NDC ($)	None/ Mixed NDC/Single -Piece ($)
1	1.38	1.63	1.75	1.71	2.17	2.54	2.88	3.20
2	1.38	1.63	1.75	1.71	2.17	2.54	2.88	3.20
3	1.38	1.63	1.75	1.71	2.17	2.54	2.88	3.20
4	1.38	1.63	1.75	1.71	2.17	2.54	2.88	3.20
5	1.46	1.74	1.91	1.82	2.32	2.70	3.05	3.38
6	1.46	1.74	1.91	1.82	2.32	2.70	3.05	3.38
7	1.46	1.74	1.91	1.82	2.32	2.70	3.05	3.38
8	1.46	1.74	1.91	1.82	2.32	2.70	3.05	3.38
9	1.61	1.92	2.16	2.05	2.59	2.95	3.31	3.65
10	1.61	1.92	2.16	2.05	2.59	2.95	3.31	3.65
11	1.61	1.92	2.16	2.05	2.59	2.95	3.31	3.65
12	1.61	1.92	2.16	2.05	2.59	2.95	3.31	3.65
13	1.87	2.21	2.55	2.43	2.92	3.29	3.66	4.01
14	1.87	2.21	2.55	2.43	2.92	3.29	3.66	4.01
15	1.87	2.21	2.55	2.43	2.92	3.29	3.66	4.01
15.999	1.87	2.21	2.55	2.43	2.92	3.29	3.66	4.01

Pickup On Demand Service

Add $22.00 for each Pickup On Demand stop.

IMpb Noncompliance Fee

Add $0.20 for each IMpb-noncompliant parcel paying commercial prices.

2120 Parcel Return Service

2120.1 Description

a. Parcel Return Service mail consists of returned merchandise meeting preparation and entry requirements, which is retrieved or delivered in bulk, with postage paid by the addressee.

b. Any mailable matter may be mailed as Parcel Return Service mail, except matter required to be mailed by First-Class Mail or Priority Mail services; as Customized MarketMail pieces; and publications required to be entered as Periodicals mail.

c. Parcel Return Service mail is not sealed against postal inspection. Mailing of matter as such constitutes consent by the mailer to postal inspection of the contents, regardless of the physical closure.

d. Undeliverable-as-addressed Parcel Return Service pieces will be forwarded on request of the addressee or forwarded or returned on request of the mailer, subject to the applicable Standard Post price when forwarded or returned from one Post Office location to another. Pieces which combine Parcel Return Service matter with First-Class Mail or ~~Standard Mail~~USPS Marketing Mail matter will be forwarded or returned if undeliverable-as-addressed, as specified in the Domestic Mail Manual.

~~e. Payment of an annual mailing permit fee and an account maintenance fee are required for Parcel Return Service (1505.2).~~

Attachments and enclosures

a. First-Class Mail or ~~Standard Mail~~USPS Marketing Mail pieces may be attached to or enclosed in Parcel Return Service mail. Additional postage may be required. Parcel Return Service mail may have limited written additions placed on the wrapper, on a tag or label attached to the outside of the parcel, or inside the parcel, either loose or attached to the article.

* * *

2120.6 Prices

RSCF Entered

a. Machinable RSCF

Maximum Weight (pounds)	RSCF ($)
1	3.32
2	3.74
3	4.04
4	4.36
5	4.66
6	5.08
7	5.47
8	5.83
9	6.26
10	6.64
11	7.05
12	7.49
13	7.79
14	8.14
15	8.34
16	8.63
17	8.88
18	9.14
19	9.39
20	9.64
21	9.89
22	10.18
23	10.37
24	10.64
25	10.81

a. Machinable RSCF (Continued)

Maximum Weight (pounds)	RSCF ($)
26	10.98
27	11.22
28	11.43
29	11.66
30	11.86
31	12.12
32	12.33
33	12.53
34	12.83
35	13.04

b. Nonmachinable RSCF

Maximum Weight (pounds)	RSCF ($)
1	5.82
2	6.24
3	6.54
4	6.86
5	7.16
6	7.58
7	7.97
8	8.33
9	8.76
10	9.14
11	9.55
12	9.99
13	10.29
14	10.64
15	10.84
16	11.13
17	11.38
18	11.64
19	11.89
20	12.14
21	12.39
22	12.68
23	12.87
24	13.14
25	13.31

b. Nonmachinable RSCF (Continued)

Maximum Weight (pounds)	RSCF ($)
26	13.48
27	13.72
28	13.93
29	14.16
30	14.36
31	14.62
32	14.83
33	15.03
34	15.33
35	15.54
36	15.78
37	16.08
38	16.24
39	16.49
40	16.68
41	16.90
42	17.16
43	17.35
44	17.56
45	17.70
46	17.90
47	18.14
48	18.24
49	18.42
50	18.61

b. Nonmachinable RSCF (Continued)

Maximum Weight (pounds)	RSCF ($)
51	18.74
52	18.88
53	18.97
54	19.17
55	19.37
56	19.48
57	19.66
58	19.79
59	19.98
60	20.20
61	20.32
62	20.51
63	20.62
64	20.78
65	20.98
66	21.12
67	21.26
68	21.40
69	21.54
70	21.69
Oversized	30.21

c. Balloon Price

RSCF entered pieces exceeding 84 inches in length and girth combined, but not more than 108 inches, and weighing less than 20 pounds are subject to a price equal to that for a 20-pound parcel for the zone to which the parcel is addressed.

d. Oversized Pieces

Regardless of weight, any piece that measures more than 108 inches (but not more than 130 inches) in length plus girth must pay the oversized price.

RDU Entered

a. Machinable RDU

Maximum Weight (pounds)	RDU ($)
1	2.65
2	2.72
3	2.78
4	2.85
5	2.91
6	2.97
7	3.05
8	3.10
9	3.18
10	3.23
11	3.31
12	3.38
13	3.43
14	3.51
15	3.56
16	3.64
17	3.70
18	3.77
19	3.84
20	3.89
21	3.97
22	4.03
23	4.10
24	4.16
25	4.23

a. Machinable RDU (Continued)

Maximum Weight (pounds)	RDU ($)
26	4.30
27	4.36
28	4.43
29	4.49
30	4.56
31	4.63
32	4.69
33	4.76
34	4.82
35	4.89

b. Nonmachinable RDU

Maximum Weight (pounds)	RDU ($)
1	2.65
2	2.72
3	2.78
4	2.85
5	2.91
6	2.97
7	3.05
8	3.10
9	3.18
10	3.23
11	3.31
12	3.38
13	3.43
14	3.51
15	3.56
16	3.64
17	3.70
18	3.77
19	3.84
20	3.89
21	3.97
22	4.03
23	4.10
24	4.16
25	4.23

b. Nonmachinable RDU (Continued)

Maximum Weight (pounds)	RDU ($)
26	4.30
27	4.36
28	4.43
29	4.49
30	4.56
31	4.63
32	4.69
33	4.76
34	4.82
35	4.89
36	4.96
37	5.03
38	5.09
39	5.15
40	5.22
41	5.29
42	5.36
43	5.42
44	5.50
45	5.55
46	5.62
47	5.69
48	5.75
49	5.83
50	5.89

b. Nonmachinable RDU (Continued)

Maximum Weight (pounds)	RDU ($)
51	5.96
52	6.02
53	6.08
54	6.16
55	6.22
56	6.29
57	6.36
58	6.42
59	6.49
60	6.55
61	6.62
62	6.69
63	6.75
64	6.82
65	6.89
66	6.95
67	7.02
68	7.08
69	7.15
70	7.23
Oversized	9.95

c. Oversized Pieces

Regardless of weight, any piece that measures more than 108 inches (but not more than 130 inches) in length plus girth must pay the oversized price.

IMpb Noncompliance Fee

Add $0.20 for each IMpb-noncompliant parcel paying commercial prices.

2125 First-Class Package Service

2125.1 Description

a. Any mailable matter may be mailed as First-Class Package Service mail, except matter that meets the definition of “letter” in 39 CFR 310.1 and does not fit within any of the exceptions or suspensions to the Private Express Statutes in 39 CFR parts 310 and 320.

b. First-Class Package Service mail is not sealed against postal inspection. Mailing of matter as such constitutes consent by the mailer to postal inspection of the contents, regardless of the physical closure.

c. First-Class Package Service pieces that are undeliverable-as-addressed are entitled to be forwarded or returned to the sender without additional charge.

d. Postage for First-Class Package Service pieces must be paid for by one of the following methods:
   - Registered end-users of USPS-approved PC Postage products when using a qualifying shipping label managed by PC Postage system.
   - USPS-approved IBI postage meters that electronically transmit transactional data to the USPS.
   - Permit imprint.
   - Permit holders using Merchandise Return Service (MRS) for First-Class Package Service mailpieces when all MRS requirements are met (505.3.0).

Attachments and Enclosures

a. First-Class Mail or ~~Standard Mail~~USPS Marketing Mail pieces may be attached to or enclosed in First-Class Package Service mail. Additional postage may be required.

* * *

2125.5 Optional Features

The following additional postal services may be available in conjunction with the product specified in this section:

- Ancillary Services (1505)
  - Address Correction Service (1505.1)
  - Business Reply Mail (1505.3)
  - Certified Mail (1505.5)
  - Certificate of Mailing (1505.6)
  - ~~Collect On Delivery~~ COD Hold for Pickup (1505.7)
  - USPS Tracking (1505.8)
  - Insurance (1505.9)
  - Merchandise Return Service (1505.10)
  - Registered Mail (1505.12)
  - Return Receipt (1505.13)
  - Signature Confirmation (1505.17)
  - Special Handling (1505.18)

- Pickup on Demand Service

2125.6 Prices

Single-Piece

Maximum Weight (ounces)	Single-Piece ($)			
1	2.61			
2	2.61			
3	2.61			
4	2.61			
5	2.77			
6	2.77			
7	2.77			
8	2.77			
9	3.32			
10	3.46			
11	3.60			
12	3.74			
13	3.88			
14	4.02			
15	4.16			
15.999	4.30			

Irregular Parcel Surcharge

Add $0.20 for each irregularly shaped parcel (such as rolls, tubes, and triangles).

IMpb Noncompliance Fee

Add $0.20 for each IMpb-noncompliant parcel paying commercial prices.

Pickup On Demand Service

Add $22.00 for each Pickup On Demand stop.

2135 USPS Retail Ground

2135.1 Description

a. USPS Retail Ground provides reliable and economical ground package delivery service for less-than-urgent deliveries and oversized packages up to 130 inches in combined length and girth.

b. Any mailable matter may be mailed as USPS Retail Ground, except matter required to be mailed: (1) by First-Class Mail service; (2) as Customized MarketMail pieces; or (3) copies of a publication that are required to be entered as Periodicals mail.

c. USPS Retail Ground pieces are not sealed against postal inspection. Mailing of matter as USPS Retail Ground mail constitutes consent by the mailer to postal inspection of the contents, regardless of the physical closure.

d. USPS Retail Ground mail may receive deferred service.

e. USPS Retail Ground pieces that are undeliverable-as-addressed will be forwarded on request of the addressee, or forwarded and returned on request of the mailer, subject to the applicable single-piece USPS Retail Ground when forwarded or returned from one post office to another. Pieces which combine domestic USPS Retail Ground mail with First-Class Mail or ~~Standard Mail~~USPS Marketing Mail pieces will be forwarded if undeliverable-as-addressed, and returned if undeliverable.

Attachments and enclosures

a. First-Class Mail or ~~Standard Mail~~USPS Marketing Mail pieces may be attached to or enclosed in USPS Retail Ground mail. Additional postage may be required.

b. USPS Retail Ground mail may have limited written additions placed on the wrapper, on a tag or label attached to the outside of the package, or inside the package, either loose or attached to the article.

* * *

2135.4 Price Categories

- USPS Retail Ground
  - Zones 1-8
  - Limited Overland Routes
  - Balloon Price
  - Oversized

2135.5 Optional Features

The following additional postal services may be available in conjunction with the product specified in this section:

- Pickup On Demand Service

- Ancillary Services (1505)
  - Address Correction Service (1505.1)
  - Certificate of Mailing (1505.6)
  - ~~Collect On Delivery~~ COD Hold for Pickup (1505.7)
  - USPS Tracking (1505.8)
  - Insurance (1505.9)
  - Merchandise Return Service (1505.10)
  - Return Receipt (1505.13)
  - Return Receipt for Merchandise (1505.14)
  - Signature Confirmation (1505.17)
  - Special Handling (1505.18)

- Competitive Ancillary Services (2645)
  - Package Intercept Service (2645.2)

2135.6 Prices

USPS Retail Ground[1]

Maximum Weight (pounds)	Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)
1	6.65	7.10	7.25	7.37	7.49	7.67	8.17
2	7.20	7.60	8.65	9.32	10.03	11.14	12.21
3	7.80	8.70	10.05	11.14	12.29	13.75	16.06
4	8.50	9.90	11.15	11.86	13.97	16.40	18.98
5	9.85	10.95	11.95	12.89	15.74	19.00	21.99
6	10.40	11.30	12.50	14.22	17.50	20.88	24.19
7	11.05	12.15	13.90	15.75	19.31	23.50	26.99
8	11.40	13.10	15.45	18.31	21.22	25.54	30.24
9	11.90	14.15	17.10	20.88	22.70	27.72	33.78
10	12.65	15.15	18.40	22.32	24.44	29.79	35.81
11	13.50	16.20	19.75	24.04	26.21	32.87	39.28
12	14.25	17.40	21.20	25.79	28.54	35.55	42.19
13	15.10	18.45	22.45	27.28	30.61	36.20	42.89
14	16.00	19.60	23.85	28.96	32.37	38.32	45.05
15	16.70	20.70	25.20	30.68	33.70	39.12	46.27
16	17.20	21.80	26.55	32.37	35.67	41.25	48.89
17	17.95	22.95	27.95	34.08	37.44	43.48	51.43
18	18.30	23.80	29.15	35.73	39.43	45.57	54.04
19	18.80	24.30	29.80	36.70	40.19	46.56	55.16
20	19.60	24.60	30.25	37.35	41.18	48.25	57.74
21	20.25	24.95	30.70	37.87	41.85	49.02	59.05
22	20.75	25.55	31.40	38.76	42.79	50.20	60.47
23	21.20	26.00	31.95	39.44	43.58	51.20	61.58
24	21.70	26.55	32.65	40.28	44.46	52.46	63.09
25	22.55	27.10	33.95	41.39	45.07	53.79	64.13

USPS Retail Ground (Continued)

Maximum Weight (pounds)	Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)
26	23.50	28.35	36.35	42.25	46.17	55.12	66.18
27	24.20	28.75	37.45	44.44	46.80	56.43	68.62
28	24.95	29.15	38.55	45.57	47.49	57.70	71.24
29	25.70	29.45	39.50	46.20	48.29	59.03	73.11
30	26.45	29.85	40.45	46.86	49.60	60.38	74.71
31	27.25	30.15	41.10	47.49	50.31	61.65	76.26
32	27.55	30.80	41.80	48.06	50.94	62.97	77.75
33	28.00	31.65	42.85	48.66	52.39	64.34	79.21
34	28.25	32.50	43.90	49.66	53.68	65.66	80.76
35	28.55	33.30	44.50	50.72	54.83	66.93	82.07
36	28.85	34.20	45.10	51.90	56.05	67.85	83.46
37	29.15	34.85	45.75	52.81	57.42	68.75	84.87
38	29.45	35.70	46.35	53.83	59.04	69.55	86.24
39	29.75	36.50	46.90	54.93	60.47	71.33	87.50
40	30.10	37.30	47.55	56.13	61.47	72.96	88.72
41	30.40	38.00	48.05	56.63	62.44	74.51	90.04
42	30.65	38.70	48.60	57.83	63.54	75.46	91.26
43	31.00	39.30	49.05	59.12	65.10	76.42	92.38
44	31.20	39.95	49.65	60.33	66.12	77.38	93.50
45	31.40	40.40	50.00	61.77	67.93	78.23	94.67
46	31.65	40.70	50.55	62.87	68.65	79.06	95.79
47	31.95	41.05	51.00	64.31	69.40	79.92	96.83
48	32.20	41.40	51.50	65.60	70.29	80.70	97.91
49	32.40	41.70	51.90	66.79	71.17	81.50	98.89
50	32.55	41.95	52.25	68.10	72.18	82.60	99.93

USPS Retail Ground (Continued)

Maximum Weight (pounds)	Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)	Zone 6 ($)	Zone 7 ($)	Zone 8 ($)
51	32.70	42.35	52.75	69.21	73.19	83.78	100.81
52	33.10	42.60	53.10	69.79	73.90	85.01	101.99
53	33.65	42.90	53.45	70.35	74.48	86.41	103.35
54	34.10	43.10	53.80	70.90	75.04	87.70	104.80
55	34.70	43.40	54.10	71.41	75.59	88.99	106.15
56	35.15	43.65	54.40	71.86	76.10	90.27	107.18
57	35.65	43.80	54.75	72.29	76.64	91.69	107.99
58	36.25	44.00	55.05	72.81	77.08	92.91	108.78
59	36.80	44.20	55.35	73.21	77.60	93.51	109.62
60	37.30	44.40	55.90	73.58	77.96	94.05	110.33
61	37.85	44.60	56.90	73.96	78.40	94.61	111.89
62	38.25	44.70	57.60	74.36	78.76	95.05	113.65
63	39.00	44.95	58.55	74.73	79.19	95.51	115.43
64	39.35	45.05	59.40	75.06	79.50	95.95	117.22
65	39.90	45.15	60.20	75.28	79.73	96.41	119.04
66	40.40	45.35	61.15	75.65	80.13	96.74	120.79
67	41.05	45.45	62.20	75.93	80.38	97.08	122.37
68	41.55	45.55	63.00	76.12	81.39	97.45	123.70
69	42.10	45.60	63.75	76.31	82.37	97.73	124.95
70	42.55	45.70	64.80	76.53	83.34	98.11	126.36
Oversized	66.51	71.73	91.72	108.00	126.75	145.50	174.52

Notes

1. Except for oversized pieces, the Zone 1-4 prices are applicable only to parcels containing hazardous or other material not permitted to travel by air transportation.

Limited Overland Routes

Pieces delivered to or from designated intra-Alaska ZIP Codes not connected by overland routes are eligible for the following prices.

Maximum Weight (pounds)	Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)
1	6.55	7.00	7.16	7.24
2	7.11	7.46	8.07	8.49
3	7.33	8.11	8.51	9.74
4	8.06	8.54	8.98	9.98
5	8.20	8.77	9.45	10.42
6	8.35	9.01	9.71	10.91
7	8.66	9.42	10.20	11.54
8	8.96	9.83	10.71	12.18
9	9.27	10.41	11.22	12.81
10	9.57	10.63	11.73	13.44
11	9.90	11.03	12.22	14.08
12	10.20	11.45	12.72	14.70
13	10.51	11.85	13.24	15.32
14	10.82	12.26	13.74	15.96
15	11.12	12.67	14.24	16.58
16	11.44	13.07	14.74	17.21
17	11.76	13.48	15.26	17.86
18	12.07	13.89	15.76	18.48
19	12.36	14.29	16.24	19.11
20	12.67	14.70	16.76	19.75
21	12.98	15.10	17.26	20.37
22	13.30	15.50	17.77	21.00
23	13.61	15.92	18.26	21.64
24	13.92	16.31	18.77	22.26
25	14.22	16.71	19.25	22.88

Limited Overland Routes (Continued)

Maximum Weight (pounds)	Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)
26	14.51	17.10	19.75	23.49
27	14.82	17.50	20.23	24.11
28	15.12	17.91	20.74	24.71
29	15.50	18.30	21.22	25.32
30	15.89	18.70	21.72	25.96
31	16.41	19.09	22.21	26.58
32	16.67	19.49	22.70	27.18
33	17.06	19.89	23.19	27.82
34	17.46	20.29	23.68	28.42
35	17.96	20.68	24.19	29.05
36	18.25	21.08	24.67	29.66
37	18.66	21.48	25.16	30.28
38	19.07	21.88	25.66	30.90
39	19.49	22.28	26.16	31.51
40	19.92	22.66	26.78	32.14
41	20.33	23.07	27.26	32.74
42	20.65	23.48	27.78	33.37
43	20.98	23.87	28.26	33.99
44	21.30	24.27	28.75	34.59
45	21.62	24.65	29.24	35.21
46	21.95	25.06	29.75	35.83
47	22.27	25.46	30.25	36.45
48	22.59	25.86	30.73	37.07
49	22.92	26.26	31.23	37.68
50	23.23	26.64	31.73	38.31

Limited Overland Routes (Continued)

Maximum Weight (pounds)	Zones 1 & 2 ($)	Zone 3 ($)	Zone 4 ($)	Zone 5 ($)
51	23.56	27.05	32.23	38.92
52	23.89	27.45	32.71	39.54
53	24.21	27.85	33.22	40.16
54	24.52	28.24	33.71	40.78
55	24.85	28.63	34.21	41.38
56	25.17	29.04	34.69	42.01
57	25.50	29.44	35.20	42.63
58	25.83	29.84	35.69	43.23
59	26.15	30.23	36.19	43.86
60	26.47	30.62	36.68	44.47
61	26.79	31.02	37.18	45.09
62	27.11	31.42	37.67	45.71
63	27.43	31.82	38.17	46.33
64	27.75	32.22	38.66	46.94
65	28.08	32.62	39.16	47.56
66	28.40	33.01	39.65	48.19
67	28.72	33.41	40.15	48.78
68	29.05	33.80	40.64	49.41
69	29.37	34.21	41.14	50.04
70	29.70	35.23	41.97	50.66
Oversized	43.95	49.97	56.17	65.40

Balloon Price

Pieces exceeding 84 inches in length and girth combined (but not more than 108 inches) and weighing less than 20 pounds are subject to a price equal to that for a 20-pound parcel for the zone to which the parcel is addressed.

Oversized Pieces

Regardless of weight, any piece that measures more than 108 inches (but not more than 130 inches) in length plus girth must pay the oversized price.

Pickup On Demand Service

Add $22.00 for each Pickup On Demand stop.

IMpb Noncompliance Fee

Add $0.20 for each IMpb-noncompliant parcel paying commercial prices.

2300 International Products

* * *

2305 Outbound International Expedited Services

* * *

2305.6 Prices

Global Express Guaranteed Retail Prices

Maximum Weight (pounds)	Country Price Group							
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)
0.5	62.00	69.25	80.00	131.25	88.25	93.25	69.50	107.95
1	74.25	75.35	90.95	149.35	102.55	106.00	82.25	121.30
2	79.35	82.00	97.80	165.30	109.50	114.25	92.00	135.25
3	84.45	88.65	104.65	181.25	116.45	122.50	101.75	149.20
4	89.55	95.30	111.50	197.20	123.40	130.75	111.50	163.15
5	94.40	101.95	118.35	213.15	130.35	139.00	121.25	177.10
6	99.25	108.20	124.50	229.00	137.30	147.25	127.60	190.75
7	104.10	114.45	130.65	244.85	144.25	155.50	133.95	204.40
8	108.95	120.70	136.80	260.70	151.20	163.75	140.30	218.05
9	113.80	126.95	142.95	276.55	158.15	172.00	146.65	231.70
10	118.65	133.20	149.10	292.40	165.10	180.25	153.00	245.35
11	123.30	137.05	154.05	308.25	169.95	187.20	158.15	255.80
12	127.95	140.90	159.00	324.10	174.80	194.15	163.30	266.25
13	132.60	144.75	163.95	339.95	179.65	201.10	168.45	276.70
14	137.25	148.60	168.90	355.80	184.50	208.05	173.60	287.15
15	141.90	152.45	173.85	371.65	189.35	215.00	178.75	297.60
16	146.55	156.30	178.80	387.50	194.20	221.95	183.90	308.05
17	151.20	160.15	183.75	403.35	199.05	228.90	189.05	318.50
18	155.85	164.00	188.70	419.20	203.90	235.85	194.20	328.95
19	160.50	167.85	193.65	435.05	208.75	242.80	199.35	339.40
20	165.15	171.70	198.60	450.90	213.60	249.75	204.50	349.85
21	169.80	174.25	203.55	463.35	218.45	256.70	209.65	360.30
22	174.45	176.80	208.50	475.80	223.30	263.65	214.80	370.75
23	179.10	179.35	213.45	488.25	228.15	270.60	219.95	381.20
24	183.75	181.90	218.40	500.70	233.00	277.55	225.10	391.65
25	188.40	184.45	223.35	513.15	237.85	284.50	230.25	402.10

Global Express Guaranteed Retail Prices (Continued)

Maximum Weight (pounds)	Country Price Group							
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)
26	193.05	187.00	228.30	525.60	242.70	291.45	235.40	412.55
27	197.70	189.55	233.25	538.05	247.55	298.40	240.55	423.00
28	202.35	192.10	238.20	550.50	252.40	305.35	245.70	433.45
29	207.00	194.65	243.15	562.95	257.25	312.30	250.85	443.90
30	211.65	197.20	248.10	575.40	262.10	319.25	256.00	454.35
31	215.60	199.75	253.05	587.85	266.95	326.20	261.15	464.80
32	219.55	202.30	258.00	600.30	271.80	333.15	266.30	475.25
33	223.50	204.85	262.95	612.75	276.65	340.10	271.45	485.70
34	227.45	207.40	267.90	625.20	281.50	347.05	276.60	496.15
35	231.40	209.95	272.85	637.65	286.35	354.00	281.75	506.60
36	235.35	212.50	277.80	650.10	291.20	360.95	286.90	517.05
37	239.30	215.05	282.75	662.55	296.05	367.90	292.05	527.50
38	243.25	217.60	287.70	675.00	300.90	374.85	297.20	537.95
39	247.20	220.15	292.65	687.45	305.75	381.80	302.35	548.40
40	251.15	222.70	297.60	699.90	310.60	388.75	307.50	558.85
41	254.60	225.25	302.55	712.35	315.45	395.70	312.65	569.30
42	258.05	227.80	307.50	724.80	320.30	402.65	317.80	579.75
43	261.50	230.35	312.45	737.25	325.15	409.60	322.95	590.20
44	264.95	232.90	317.40	749.70	330.00	416.55	328.10	600.65
45	268.40	235.45	322.35	762.15	334.85	423.50	333.25	611.10
46	271.85	238.00	327.30	774.60	339.70	430.45	338.40	621.55
47	275.30	240.55	332.25	787.05	344.55	437.40	343.55	632.00
48	278.75	243.10	337.20	799.50	349.40	444.35	348.70	642.45
49	282.20	245.65	342.15	811.95	354.25	451.30	353.85	652.90
50	285.65	248.20	347.10	824.40	359.10	458.25	359.00	663.35

Global Express Guaranteed Retail Prices (Continued)

Maximum Weight (pounds)	Country Price Group							
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)
51	289.10	250.75	352.05	836.85	363.95	465.20	364.15	673.80
52	292.55	253.30	357.00	849.30	368.80	472.15	369.30	684.25
53	296.00	255.85	361.95	861.75	373.65	479.10	374.45	694.70
54	299.45	258.40	366.90	874.20	378.50	486.05	379.60	705.15
55	302.90	260.95	371.85	886.65	383.35	493.00	384.75	715.60
56	306.35	263.50	376.80	899.10	388.20	499.95	389.90	726.05
57	309.80	266.05	381.75	911.55	393.05	506.90	395.05	736.50
58	313.25	268.60	386.70	924.00	397.90	513.85	400.20	746.95
59	316.70	271.15	391.65	936.45	402.75	520.80	405.35	757.40
60	320.15	273.70	396.60	948.90	407.60	527.75	410.50	767.85
61	323.60	276.25	401.55	961.35	412.45	534.70	415.65	778.30
62	327.05	278.80	406.50	973.80	417.30	541.65	420.80	788.75
63	330.50	281.35	411.45	986.25	422.15	548.60	425.95	799.20
64	333.95	283.90	416.40	998.70	427.00	555.55	431.10	809.65
65	337.40	286.45	421.35	1,011.15	431.85	562.50	436.25	820.10
66	340.85	289.00	426.30	1,023.60	436.70	569.45	441.40	830.55
67	344.30	291.55	431.25	1,036.05	441.55	576.40	446.55	841.00
68	347.75	294.10	436.20	1,048.50	446.40	583.35	451.70	851.45
69	351.20	296.65	441.15	1,060.95	451.25	590.30	456.85	861.90
70	354.65	299.20	446.10	1,073.40	456.10	597.25	462.00	872.35

Global Express Guaranteed Commercial Base Prices

Maximum Weight (pounds)	Country Price Group							
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)
0.5	58.90	65.79	76.00	124.69	83.84	88.59	66.03	102.55
1	70.54	71.58	86.40	141.88	97.42	100.70	78.14	115.24
2	75.38	77.90	92.91	157.04	104.03	108.54	87.40	128.49
3	80.23	84.22	99.42	172.19	110.63	116.38	96.66	141.74
4	85.07	90.54	105.93	187.34	117.23	124.21	105.93	154.99
5	89.68	96.85	112.43	202.49	123.83	132.05	115.19	168.25
6	94.29	102.79	118.28	217.55	130.44	139.89	121.22	181.21
7	98.90	108.73	124.12	232.61	137.04	147.73	127.25	194.18
8	103.50	114.67	129.96	247.67	143.64	155.56	133.29	207.15
9	108.11	120.60	135.80	262.72	150.24	163.40	139.32	220.12
10	112.72	126.54	141.65	277.78	156.85	171.24	145.35	233.08
11	117.14	130.20	146.35	292.84	161.45	177.84	150.24	243.01
12	121.55	133.86	151.05	307.90	166.06	184.44	155.14	252.94
13	125.97	137.51	155.75	322.95	170.67	191.05	160.03	262.87
14	130.39	141.17	160.46	338.01	175.28	197.65	164.92	272.79
15	134.81	144.83	165.16	353.07	179.88	204.25	169.81	282.72
16	139.22	148.49	169.86	368.13	184.49	210.85	174.71	292.65
17	143.64	152.14	174.56	383.18	189.10	217.46	179.60	302.58
18	148.06	155.80	179.27	398.24	193.71	224.06	184.49	312.50
19	152.48	159.46	183.97	413.30	198.31	230.66	189.38	322.43
20	156.89	163.12	188.67	428.36	202.92	237.26	194.28	332.36
21	161.31	165.54	193.37	440.18	207.53	243.87	199.17	342.29
22	165.73	167.96	198.08	452.01	212.14	250.47	204.06	352.21
23	170.15	170.38	202.78	463.84	216.74	257.07	208.95	362.14
24	174.56	172.81	207.48	475.67	221.35	263.67	213.85	372.07
25	178.98	175.23	212.18	487.49	225.96	270.28	218.74	382.00

Global Express Guaranteed Commercial Base Prices (Continued)

Maximum Weight (pounds)	Country Price Group							
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)
26	183.40	177.65	216.89	499.32	230.57	276.88	223.63	391.92
27	187.82	180.07	221.59	511.15	235.17	283.48	228.52	401.85
28	192.23	182.50	226.29	522.98	239.78	290.08	233.42	411.78
29	196.65	184.92	230.99	534.80	244.39	296.69	238.31	421.71
30	201.07	187.34	235.70	546.63	249.00	303.29	243.20	431.63
31	204.82	189.76	240.40	558.46	253.60	309.89	248.09	441.56
32	208.57	192.19	245.10	570.29	258.21	316.49	252.99	451.49
33	212.33	194.61	249.80	582.11	262.82	323.10	257.88	461.42
34	216.08	197.03	254.51	593.94	267.43	329.70	262.77	471.34
35	219.83	199.45	259.21	605.77	272.03	336.30	267.66	481.27
36	223.58	201.88	263.91	617.60	276.64	342.90	272.56	491.20
37	227.34	204.30	268.61	629.42	281.25	349.51	277.45	501.13
38	231.09	206.72	273.32	641.25	285.86	356.11	282.34	511.05
39	234.84	209.14	278.02	653.08	290.46	362.71	287.23	520.98
40	238.59	211.57	282.72	664.91	295.07	369.31	292.13	530.91
41	241.87	213.99	287.42	676.73	299.68	375.92	297.02	540.84
42	245.15	216.41	292.13	688.56	304.29	382.52	301.91	550.76
43	248.43	218.83	296.83	700.39	308.89	389.12	306.80	560.69
44	251.70	221.26	301.53	712.22	313.50	395.72	311.70	570.62
45	254.98	223.68	306.23	724.04	318.11	402.33	316.59	580.55
46	258.26	226.10	310.94	735.87	322.72	408.93	321.48	590.47
47	261.54	228.52	315.64	747.70	327.32	415.53	326.37	600.40
48	264.81	230.95	320.34	759.53	331.93	422.13	331.27	610.33
49	268.09	233.37	325.04	771.35	336.54	428.74	336.16	620.26
50	271.37	235.79	329.75	783.18	341.15	435.34	341.05	630.18

Global Express Guaranteed Commercial Base Prices (Continued)

Maximum Weight (pounds)	Country Price Group							
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)
51	274.65	238.21	334.45	795.01	345.75	441.94	345.94	640.11
52	277.92	240.64	339.15	806.84	350.36	448.54	350.84	650.04
53	281.20	243.06	343.85	818.66	354.97	455.15	355.73	659.97
54	284.48	245.48	348.56	830.49	359.58	461.75	360.62	669.89
55	287.76	247.90	353.26	842.32	364.18	468.35	365.51	679.82
56	291.03	250.33	357.96	854.15	368.79	474.95	370.41	689.75
57	294.31	252.75	362.66	865.97	373.40	481.56	375.30	699.68
58	297.59	255.17	367.37	877.80	378.01	488.16	380.19	709.60
59	300.87	257.59	372.07	889.63	382.61	494.76	385.08	719.53
60	304.14	260.02	376.77	901.46	387.22	501.36	389.98	729.46
61	307.42	262.44	381.47	913.28	391.83	507.97	394.87	739.39
62	310.70	264.86	386.18	925.11	396.44	514.57	399.76	749.31
63	313.98	267.28	390.88	936.94	401.04	521.17	404.65	759.24
64	317.25	269.71	395.58	948.77	405.65	527.77	409.55	769.17
65	320.53	272.13	400.28	960.59	410.26	534.38	414.44	779.10
66	323.81	274.55	404.99	972.42	414.87	540.98	419.33	789.02
67	327.09	276.97	409.69	984.25	419.47	547.58	424.22	798.95
68	330.36	279.40	414.39	996.08	424.08	554.18	429.12	808.88
69	333.64	281.82	419.09	1,007.90	428.69	560.79	434.01	818.81
70	336.92	284.24	423.80	1,019.73	433.30	567.39	438.90	828.73

Global Express Guaranteed Commercial Plus Prices

Maximum Weight (pounds)	Country Price Group							
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)
0.5	58.90	65.79	76.00	124.69	83.84	88.59	66.03	102.55
1	70.54	71.58	86.40	141.88	97.42	100.70	78.14	115.24
2	75.38	77.90	92.91	157.04	104.03	108.54	87.40	128.49
3	80.23	84.22	99.42	172.19	110.63	116.38	96.66	141.74
4	85.07	90.54	105.93	187.34	117.23	124.21	105.93	154.99
5	89.68	96.85	112.43	202.49	123.83	132.05	115.19	168.25
6	94.29	102.79	118.28	217.55	130.44	139.89	121.22	181.21
7	98.90	108.73	124.12	232.61	137.04	147.73	127.25	194.18
8	103.50	114.67	129.96	247.67	143.64	155.56	133.29	207.15
9	108.11	120.60	135.80	262.72	150.24	163.40	139.32	220.12
10	112.72	126.54	141.65	277.78	156.85	171.24	145.35	233.08
11	117.14	130.20	146.35	292.84	161.45	177.84	150.24	243.01
12	121.55	133.86	151.05	307.90	166.06	184.44	155.14	252.94
13	125.97	137.51	155.75	322.95	170.67	191.05	160.03	262.87
14	130.39	141.17	160.46	338.01	175.28	197.65	164.92	272.79
15	134.81	144.83	165.16	353.07	179.88	204.25	169.81	282.72
16	139.22	148.49	169.86	368.13	184.49	210.85	174.71	292.65
17	143.64	152.14	174.56	383.18	189.10	217.46	179.60	302.58
18	148.06	155.80	179.27	398.24	193.71	224.06	184.49	312.50
19	152.48	159.46	183.97	413.30	198.31	230.66	189.38	322.43
20	156.89	163.12	188.67	428.36	202.92	237.26	194.28	332.36
21	161.31	165.54	193.37	440.18	207.53	243.87	199.17	342.29
22	165.73	167.96	198.08	452.01	212.14	250.47	204.06	352.21
23	170.15	170.38	202.78	463.84	216.74	257.07	208.95	362.14
24	174.56	172.81	207.48	475.67	221.35	263.67	213.85	372.07
25	178.98	175.23	212.18	487.49	225.96	270.28	218.74	382.00

Global Express Guaranteed Commercial Plus Prices (Continued)

Maximum Weight (pounds)	Country Price Group							
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)
26	183.40	177.65	216.89	499.32	230.57	276.88	223.63	391.92
27	187.82	180.07	221.59	511.15	235.17	283.48	228.52	401.85
28	192.23	182.50	226.29	522.98	239.78	290.08	233.42	411.78
29	196.65	184.92	230.99	534.80	244.39	296.69	238.31	421.71
30	201.07	187.34	235.70	546.63	249.00	303.29	243.20	431.63
31	204.82	189.76	240.40	558.46	253.60	309.89	248.09	441.56
32	208.57	192.19	245.10	570.29	258.21	316.49	252.99	451.49
33	212.33	194.61	249.80	582.11	262.82	323.10	257.88	461.42
34	216.08	197.03	254.51	593.94	267.43	329.70	262.77	471.34
35	219.83	199.45	259.21	605.77	272.03	336.30	267.66	481.27
36	223.58	201.88	263.91	617.60	276.64	342.90	272.56	491.20
37	227.34	204.30	268.61	629.42	281.25	349.51	277.45	501.13
38	231.09	206.72	273.32	641.25	285.86	356.11	282.34	511.05
39	234.84	209.14	278.02	653.08	290.46	362.71	287.23	520.98
40	238.59	211.57	282.72	664.91	295.07	369.31	292.13	530.91
41	241.87	213.99	287.42	676.73	299.68	375.92	297.02	540.84
42	245.15	216.41	292.13	688.56	304.29	382.52	301.91	550.76
43	248.43	218.83	296.83	700.39	308.89	389.12	306.80	560.69
44	251.70	221.26	301.53	712.22	313.50	395.72	311.70	570.62
45	254.98	223.68	306.23	724.04	318.11	402.33	316.59	580.55
46	258.26	226.10	310.94	735.87	322.72	408.93	321.48	590.47
47	261.54	228.52	315.64	747.70	327.32	415.53	326.37	600.40
48	264.81	230.95	320.34	759.53	331.93	422.13	331.27	610.33
49	268.09	233.37	325.04	771.35	336.54	428.74	336.16	620.26
50	271.37	235.79	329.75	783.18	341.15	435.34	341.05	630.18

Global Express Guaranteed Commercial Plus Prices (Continued)

Maximum Weight (pounds)	Country Price Group							
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)
51	274.65	238.21	334.45	795.01	345.75	441.94	345.94	640.11
52	277.92	240.64	339.15	806.84	350.36	448.54	350.84	650.04
53	281.20	243.06	343.85	818.66	354.97	455.15	355.73	659.97
54	284.48	245.48	348.56	830.49	359.58	461.75	360.62	669.89
55	287.76	247.90	353.26	842.32	364.18	468.35	365.51	679.82
56	291.03	250.33	357.96	854.15	368.79	474.95	370.41	689.75
57	294.31	252.75	362.66	865.97	373.40	481.56	375.30	699.68
58	297.59	255.17	367.37	877.80	378.01	488.16	380.19	709.60
59	300.87	257.59	372.07	889.63	382.61	494.76	385.08	719.53
60	304.14	260.02	376.77	901.46	387.22	501.36	389.98	729.46
61	307.42	262.44	381.47	913.28	391.83	507.97	394.87	739.39
62	310.70	264.86	386.18	925.11	396.44	514.57	399.76	749.31
63	313.98	267.28	390.88	936.94	401.04	521.17	404.65	759.24
64	317.25	269.71	395.58	948.77	405.65	527.77	409.55	769.17
65	320.53	272.13	400.28	960.59	410.26	534.38	414.44	779.10
66	323.81	274.55	404.99	972.42	414.87	540.98	419.33	789.02
67	327.09	276.97	409.69	984.25	419.47	547.58	424.22	798.95
68	330.36	279.40	414.39	996.08	424.08	554.18	429.12	808.88
69	333.64	281.82	419.09	1,007.90	428.69	560.79	434.01	818.81
70	336.92	284.24	423.80	1,019.73	433.30	567.39	438.90	828.73

* * *

Priority Mail Express International Retail Prices

* * *

Priority Mail Express International Offered at a Discount at Retail

If a customer requests PMI at a Postal Service retail counter for an item for which postage has not been previously paid, weight-rated PMEI may be offered to certain destinations, for certain weight steps, at a discounted price equivalent to the corresponding weight-based rate in the PMI Parcels Retail price table (2315.6), if all PMEI eligibility requirements are met and the Postal Service determines that service can be improved and/or the PMEI destination country delivery costs are lower than PMI destination country delivery costs.

Priority Mail Express International Commercial Base Prices

* * *

Pickup On Demand Service

Add $22.00 for each Pickup On Demand stop.

* * *

2315 Outbound Priority Mail International

2315.1 Description

* * *

f. A signature may be obtained upon delivery unless otherwise specified by destination country requirements. Priority Mail International shipments bearing a designated barcode receive a scan upon delivery in lieu of a signature.

* * *

2315.6 Prices

* * *

Pickup On Demand Service

Add $22.00 for each Pickup On Demand stop.

International Service Center (ISC) Zone Chart

The International Service Center (ISC) Zone Chart identifies the appropriate distance code assigned to each origin.

	Annual Fee ($)
Zone Chart concerning appropriate International Service Center and partner Induction Facility from every ZIP Code in the nation (per year)	68.00

2320 International Priority Airmail (IPA)

* * *

2320.6 Prices

International Priority Airmail Letters and Postcards

The price to be paid is the applicable per-piece price plus the applicable per-pound price. The per-piece price applies to each mailpiece regardless of weight. The per-pound price applies to the net weight (gross weight of the container minus the tare weight of the container) of the mail for the specific Country Price Group.

a. Presort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
Direct Country Containers	0.59	0.19	0.58	0.59	0.58	0.57	0.61	0.54	0.49	0.22
Mixed Country Containers	—	—	—	—	—	—	—	—	0.58	0.24

	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
Direct Country Containers	0.21	0.53	0.49	0.19	0.54	0.22	0.22	0.21	0.17
Mixed Country Containers	0.22	0.55	0.53	0.20	0.58	0.24	0.24	0.22	0.19

ii. Per Pound

	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
Direct Country Containers (Full Service)	7.47	8.89	9.14	9.53	9.29	10.03	9.53	9.69	10.16	11.23
Direct Country Containers (ISC Drop Shipment)	5.06	5.56	6.78	7.18	6.97	7.51	7.12	7.00	7.61	7.41
Mixed Country Containers (ISC Drop Shipment)	—	—	—	—	—	—	—	—	7.98	7.77

	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
Direct Country Containers (Full Service)	9.93	9.65	9.77	10.43	9.73	10.08	11.28	9.98	11.06
Direct Country Containers (ISC Drop Shipment)	7.56	7.07	7.12	8.07	7.03	7.52	7.45	7.59	8.71
Mixed Country Containers (ISC Drop Shipment)	7.88	7.44	7.53	8.46	7.55	7.58	7.81	7.91	9.16

b. Worldwide Nonpresort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	($)
Worldwide Nonpresorted Containers	0.64

ii. Per Pound

	($)
Worldwide Nonpresorted Containers (Full Service)	12.93
Worldwide Nonpresorted Containers (ISC Drop Shipment)	10.18

International Priority Airmail Large Envelopes (Flats)

The price to be paid is the applicable per-piece price plus the applicable per-pound price. The per-piece price applies to each mailpiece regardless of weight. The per-pound price applies to the net weight (gross weight of the container minus the tare weight of the container) of the mail for the specific Country Price Group.

a. Presort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
Direct Country Containers	0.59	0.19	0.58	0.59	0.58	0.57	0.61	0.54	0.49	0.22
Mixed Country Containers	—	—	—	—	—	—	—	—	0.58	0.24

	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
Direct Country Containers	0.21	0.53	0.49	0.19	0.54	0.22	0.22	0.21	0.17
Mixed Country Containers	0.22	0.55	0.53	0.20	0.58	0.24	0.24	0.22	0.19

ii. Per Pound

	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
Direct Country Containers (Full Service)	6.37	7.59	7.81	8.17	7.97	8.59	8.16	8.28	8.69	9.59
Direct Country Containers (ISC Drop Shipment)	4.34	4.76	5.82	6.16	5.96	6.43	6.10	5.97	6.50	6.34
Mixed Country Containers (ISC Drop Shipment)	—	—	—	—	—	—	—	—	6.81	6.67

	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
Direct Country Containers (Full Service)	8.50	8.24	8.35	8.93	9.73	10.08	11.28	9.98	11.06
Direct Country Containers (ISC Drop Shipment)	6.47	6.07	6.10	6.91	7.03	7.52	7.45	7.59	8.71
Mixed Country Containers (ISC Drop Shipment)	6.74	6.37	6.45	7.23	7.55	7.58	7.81	7.91	9.16

b. Worldwide Nonpresort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	($)
Worldwide Nonpresorted Containers	0.64

ii. Per Pound

	($)
Worldwide Nonpresorted Containers (Full Service)	12.93
Worldwide Nonpresorted Containers (ISC Drop Shipment)	10.18

International Priority Airmail Packages (Small Packets and Rolls)

The price to be paid is the applicable per-piece price plus the applicable per-pound price. The per-piece price applies to each mailpiece regardless of weight. The per-pound price applies to the net weight (gross weight of the container minus the tare weight of the container) of the mail for the specific Country Price Group.

a. Presort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
Direct Country Containers	0.59	0.19	0.58	0.59	0.58	0.57	0.62	0.54	0.49	0.22
Mixed Country Containers	—	—	—	—	—	—	—	—	0.58	0.24

	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
Direct Country Containers	0.21	0.53	0.49	0.19	0.54	0.22	0.22	0.21	0.17
Mixed Country Containers	0.22	0.55	0.53	0.20	0.58	0.24	0.24	0.22	0.19

ii. Per Pound

	Price Group									
	1 ($)	**2 ($)**	**3 ($)**	**4 ($)**	**5 ($)**	**6 ($)**	**7 ($)**	**8 ($)**	**9 ($)**	**10 ($)**
Direct Country Containers (Full Service)	6.09	7.26	7.46	7.77	7.59	8.20	7.77	7.90	8.30	9.15
Direct Country Containers (ISC Drop Shipment)	4.13	4.55	5.54	5.86	5.69	6.14	5.81	5.71	6.20	6.04
Mixed Country Containers (ISC Drop Shipment)	—	—	—	—	—	—	—	—	6.52	6.33

	Price Group								
	11 ($)	**12 ($)**	**13 ($)**	**14 ($)**	**15 ($)**	**16 ($)**	**17 ($)**	**18 ($)**	**19 ($)**
Direct Country Containers (Full Service)	8.10	7.87	7.97	8.51	9.73	10.08	11.28	9.98	11.06
Direct Country Containers (ISC Drop Shipment)	6.17	5.79	5.81	6.58	7.03	7.52	7.45	7.59	8.71
Mixed Country Containers (ISC Drop Shipment)	6.44	6.05	6.15	6.89	7.55	7.58	7.81	7.91	9.16

b. Worldwide Nonpresort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	($)
Worldwide Nonpresorted Containers	0.64

ii. Per Pound

	($)
Worldwide Nonpresorted Containers (Full Service)	12.93
Worldwide Nonpresorted Containers (ISC Drop Shipment)	10.18

International Priority Airmail M-Bag

The price to be paid is the applicable per-pound price. The per-pound price applies to the total weight of the sack (M-bag) for the specific Country Price Group.

a. International Priority Airmail M-Bag (Full Service)

Maximum Weight (pounds)	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
11	60.39	68.20	79.97	79.97	79.97	100.43	79.97	79.97	95.70	87.78
For each additional pound or fraction thereof	5.49	6.20	7.27	7.27	7.27	9.13	7.27	7.27	8.70	7.98

Maximum Weight (pounds)	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
11	97.68	82.83	79.97	97.35	79.97	90.53	87.78	97.68	96.25
For each additional pound or fraction thereof	8.88	7.53	7.27	8.85	7.27	8.23	7.98	8.88	8.75

b. International Priority Airmail M-Bag (ISC Drop Shipment)

Maximum Weight (pounds)	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
5	23.65	29.25	36.73	36.73	36.73	53.51	36.73	36.73	48.98	46.40
6	24.06	30.08	37.93	37.93	37.93	55.51	37.93	37.93	50.77	47.30
7	24.47	30.91	39.13	39.13	39.13	57.51	39.13	39.13	52.56	48.20
8	24.88	31.74	40.33	40.33	40.33	59.51	40.33	40.33	54.35	49.10
9	25.29	32.57	41.53	41.53	41.53	61.51	41.53	41.53	56.14	50.00
10	25.70	33.40	42.73	42.73	42.73	63.51	42.73	42.73	57.93	50.90
11	26.11	34.23	43.93	43.93	43.93	65.51	43.93	43.93	59.72	51.80
For each additional pound or fraction thereof	2.39	3.11	4.00	4.00	4.00	5.95	4.00	4.00	5.43	4.71

Maximum Weight (pounds)	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
5	53.19	39.77	36.73	53.43	36.73	46.50	46.40	53.19	51.49
6	54.61	40.94	37.93	54.73	37.93	47.81	47.30	54.61	52.96
7	56.03	42.11	39.13	56.03	39.13	49.12	48.20	56.03	54.43
8	57.45	43.28	40.33	57.33	40.33	50.43	49.10	57.45	55.90
9	58.87	44.45	41.53	58.63	41.53	51.74	50.00	58.87	57.37
10	60.29	45.62	42.73	59.93	42.73	53.05	50.90	60.29	58.84
11	61.71	46.79	43.93	61.23	43.93	54.36	51.80	61.71	60.31
For each additional pound or fraction thereof	5.60	4.25	4.00	5.57	4.00	4.95	4.71	5.60	5.49

2325 International Surface Air Lift (ISAL)

* * *

2325.6 Prices

International Surface Air Lift Letters and Postcards

The price to be paid is the applicable per-piece price plus the applicable per-pound price. The per-piece price applies to each mailpiece regardless of weight. The per-pound price applies to the net weight (gross weight of the container minus the tare weight of the container) of the mail for the specific price group.

a. Presort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
Direct Country Containers	0.55	0.17	0.52	0.55	0.55	0.52	0.56	0.50	0.44	0.21
Mixed Country Containers	—	—	—	—	—	—	—	—	0.54	0.22

	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
Direct Country Containers	0.19	0.45	0.50	0.17	0.50	0.21	0.21	0.19	0.16
Mixed Country Containers	0.20	0.46	0.54	0.19	0.54	0.22	0.22	0.20	0.17

ii. Per Pound

	Price Group									
	1 ($)	**2 ($)**	**3 ($)**	**4 ($)**	**5 ($)**	**6 ($)**	**7 ($)**	**8 ($)**	**9 ($)**	**10 ($)**
Direct Country Containers (Full Service)	7.37	8.49	8.24	8.83	8.67	9.34	8.83	8.68	9.25	10.49
Direct Country Containers (ISC Drop Shipment)	4.98	5.32	6.14	6.64	6.49	6.98	6.58	6.27	6.92	6.93
Mixed Country Containers (ISC Drop Shipment)	—	—	—	—	—	—	—	—	7.02	7.27

	Price Group								
	11 ($)	**12 ($)**	**13 ($)**	**14 ($)**	**15 ($)**	**16 ($)**	**17 ($)**	**18 ($)**	**19 ($)**
Direct Country Containers (Full Service)	8.95	8.82	8.68	9.63	8.74	9.37	10.44	8.99	10.25
Direct Country Containers (ISC Drop Shipment)	6.82	6.45	6.27	7.47	6.30	6.97	6.89	6.85	8.07
Mixed Country Containers (ISC Drop Shipment)	7.06	6.79	6.96	7.67	6.99	7.03	7.23	7.09	8.22

b. Worldwide Nonpresort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	($)
Worldwide Nonpresorted Containers	0.59

ii. Per Pound

	($)
Worldwide Nonpresorted Containers (Full Service)	11.89
Worldwide Nonpresorted Containers (ISC Drop Shipment)	9.37

International Surface Air Lift Large Envelopes (Flats)

The price to be paid is the applicable per-piece price plus the applicable per-pound price. The per-piece price applies to each mailpiece regardless of weight. The per-pound price applies to the net weight (gross weight of the container minus the tare weight of the container) of the mail for the specific price group.

a. Presort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
Direct Country Containers	0.55	0.18	0.52	0.55	0.55	0.52	0.56	0.50	0.45	0.21
Mixed Country Containers	—	—	—	—	—	—	—	—	0.54	0.22

	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
Direct Country Containers	0.19	0.46	0.50	0.17	0.50	0.21	0.21	0.19	0.16
Mixed Country Containers	0.20	0.47	0.54	0.19	0.54	0.22	0.22	0.20	0.17

ii. Per Pound

	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
Direct Country Containers (Full Service)	6.28	7.29	7.06	7.56	7.42	7.98	7.56	7.43	7.92	8.98
Direct Country Containers (ISC Drop Shipment)	4.26	4.56	5.24	5.69	5.55	5.98	5.64	5.37	5.90	5.93
Mixed Country Containers (ISC Drop Shipment)	—	—	—	—	—	—	—	—	6.01	6.23

	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
Direct Country Containers (Full Service)	7.67	7.52	7.43	8.24	8.74	9.37	10.44	8.99	10.25
Direct Country Containers (ISC Drop Shipment)	5.84	5.52	5.37	6.39	6.30	6.97	6.89	6.85	8.07
Mixed Country Containers (ISC Drop Shipment)	6.04	5.80	5.95	6.55	6.99	7.03	7.23	7.09	8.22

b. Worldwide Nonpresort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	($)
Worldwide Nonpresorted Containers	0.59

ii. Per Pound

	($)
Worldwide Nonpresorted Containers (Full Service)	11.89
Worldwide Nonpresorted Containers (ISC Drop Shipment)	9.37

International Surface Air Lift Packages (Small Packets and Rolls)

The price to be paid is the applicable per-piece price plus the applicable per-pound price. The per-piece price applies to each mailpiece regardless of weight. The per-pound price applies to the net weight (gross weight of the container minus the tare weight of the container) of the mail for the specific price group.

a. Presort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
Direct Country Containers	0.55	0.17	0.52	0.55	0.55	0.52	0.56	0.50	0.45	0.21
Mixed Country Containers	—	—	—	—	—	—	—	—	0.54	0.22

	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
Direct Country Containers	0.19	0.46	0.50	0.17	0.50	0.21	0.21	0.19	0.16
Mixed Country Containers	0.20	0.47	0.54	0.19	0.54	0.22	0.22	0.20	0.17

ii. Per Pound

	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
Direct Country Containers (Full Service)	6.00	6.92	6.73	7.20	7.07	7.61	7.20	7.08	7.53	8.57
Direct Country Containers (ISC Drop Shipment)	4.06	4.35	4.98	5.41	5.29	5.70	5.37	5.12	5.64	5.66
Mixed Country Containers (ISC Drop Shipment)	—	—	—	—	—	—	—	—	5.73	5.94

	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
Direct Country Containers (Full Service)	7.32	7.20	7.08	7.87	8.74	9.37	10.44	8.99	10.25
Direct Country Containers (ISC Drop Shipment)	5.58	5.26	5.12	6.12	6.30	6.97	6.89	6.85	8.07
Mixed Country Containers (ISC Drop Shipment)	5.78	5.54	5.67	6.26	6.99	7.03	7.23	7.09	8.22

b. Worldwide Nonpresort Mail (Full Service and ISC Drop Shipment)

i. Per Piece

	($)
Worldwide Nonpresorted Containers	0.59

ii. Per Pound

	($)
Worldwide Nonpresorted Containers (Full Service)	11.89
Worldwide Nonpresorted Containers (ISC Drop Shipment)	9.37

International Surface Air Lift M-Bags

The price to be paid is applicable per-pound price. The per-pound price applies to the total weight of the sack (M-bag) for the specific price group.

a. International Surface Air Lift M-Bag (Full Service)

Maximum Weight (pounds)	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
11	21.01	22.44	26.29	26.29	26.29	36.52	26.29	26.73	34.21	30.69
For each additional pound or fraction thereof	1.91	2.04	2.39	2.39	2.39	3.32	2.39	2.43	3.11	2.79

Maximum Weight (pounds)	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
11	34.21	27.50	26.73	35.97	26.73	30.69	30.69	34.21	42.79
For each additional pound or fraction thereof	3.11	2.50	2.43	3.27	2.43	2.79	2.79	3.11	3.89

b. International Surface Air Lift M-Bag (ISC Drop Shipment)

Maximum Weight (pounds)	Price Group									
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)	10 ($)
5	19.34	17.78	13.88	13.88	13.88	19.66	13.88	14.11	19.04	17.93
6	19.47	18.38	15.47	15.47	15.47	22.31	15.47	15.75	21.14	19.61
7	19.60	18.98	17.06	17.06	17.06	24.96	17.06	17.39	23.24	21.29
8	19.73	19.58	18.65	18.65	18.65	27.61	18.65	19.03	25.34	22.97
9	19.86	20.18	20.24	20.24	20.24	30.26	20.24	20.67	27.44	24.65
10	19.99	20.78	21.83	21.83	21.83	32.91	21.83	22.31	29.54	26.33
11	20.12	21.38	23.42	23.42	23.42	35.56	23.42	23.95	31.64	28.01
For each additional pound or fraction thereof	1.83	1.94	2.13	2.13	2.13	3.23	2.13	2.17	2.88	2.55

Maximum Weight (pounds)	Price Group								
	11 ($)	12 ($)	13 ($)	14 ($)	15 ($)	16 ($)	17 ($)	18 ($)	19 ($)
5	15.09	14.86	14.11	15.80	14.11	16.22	17.93	15.09	20.34
6	17.80	16.52	15.75	18.71	15.75	18.18	19.61	17.80	23.63
7	20.51	18.18	17.39	21.62	17.39	20.14	21.29	20.51	26.92
8	23.22	19.84	19.03	24.53	19.03	22.10	22.97	23.22	30.21
9	25.93	21.50	20.67	27.44	20.67	24.06	24.65	25.93	33.50
10	28.64	23.16	22.31	30.35	22.31	26.02	26.33	28.64	36.79
11	31.35	24.82	23.95	33.26	23.95	27.98	28.01	31.35	40.08
For each additional pound or fraction thereof	2.86	2.25	2.17	3.02	2.17	2.55	2.55	2.86	3.65

2330 International Direct Sacks—Airmail M-Bags

* * *

2330.6 Prices

Outbound International Direct Sacks—Airmail M-Bags

The price is based on the applicable per-pound price. The per-pound price applies to the total weight of the sack (M-Bag) for the specific price group.

Maximum Weight (pounds)	Price Group[1]								
	1 ($)	2 ($)	3 ($)	4 ($)	5 ($)	6 ($)	7 ($)	8 ($)	9 ($)
11	46.20	42.35	83.05	66.55	55.00	79.75	67.65	66.55	63.80
For each additional pound or fraction thereof	4.20	3.85	7.55	6.05	5.00	7.25	6.15	6.05	5.80

Notes

1. Same as Price Groups 1-9 for Single-Piece First-Class Mail International (SPFCMI).

Inbound International Direct Sacks—M-Bags

Payment is made in accordance with Part III of the Universal Postal Convention and associated UPU Letter Post Regulations. This information is available in the Letter Post Manual at www.upu.int.

2335 Outbound Single-Piece First-Class Package International Service

* * *

2335.5 Optional Features

* * *

- Electronic USPS Delivery Confirmation® International
  Electronic USPS Delivery Confirmation® International, which is optionally provided at no charge for certain price tiers, offers scan events for customers using select software or online tools. It is available for Outbound Single-Piece First-Class Package International Service mailpieces meeting certain physical characteristics to select destinations.

* * *

2335.6 Prices

* * *

Pickup On Demand Service

Add $22.00 for each Pickup On Demand stop.

2500 Negotiated Service Agreements

* * *

2510 Outbound International

* * *

2510.9 Priority Mail International Regional Rate Boxes—Non-Published Rates

* * *

2510.9.6 Prices

* * *

Pickup On Demand Service

Add $22.00 for each Pickup On Demand stop

* * *

2600 Special Services

* * *

2605 Address Enhancement Services

2605.1 Description

Address Enhancement Services ensures that address elements and address lists are correct and up-to-date. In addition to providing software or information about ZIP Code lists, addresses, or moves, the services also include certifying systems to ensure that the proper address information is used. Some services allow the purchaser or licensee to make unlimited copies or to make additional copies for a fee.

AEC (Address Element Correction)

AEC service identifies and corrects bad or incomplete addresses using enhanced computer logic.

AMS API (Address Matching System Application Program Interface)

AMS API is a core set of compiled address-matching software instructions that developers incorporate into their software so that address lists can be updated with address data from the following databases, which are integrated into the AMS-API: City State, ZIP + 4, Five-Digit ZIP, eLOT, DPV, and LACS^{Link}.

For an additional fee, a developer may install the AMS-API on multiple computers for its own use. Additional fees are charged if the developer wants to resell its address-matching software. Developers, for an additional fee, may obtain computer software instructions that permit the API to access the RDI data when licensed separately. Additional fees are charged if the developer wants to resell RDI-API (Residential Delivery Indicator Application Program Interface).

~~*TIGER/ZIP + 4 (Topological Integrated Geographic Encoding and Referencing)*~~

~~The Topological Integrated Geographic Encoding and Referencing (TIGER/ZIP + 4) service is a bridge file that allows mailers to access other information using the ZIP + 4 codes they already have associated with their addresses. This file offers demographers and market researchers a method to relate ZIP + 4 coded address lists to Census Bureau demographic data.~~

2605.2 Prices

	($)
AEC	
Per record processed	0.024
Minimum charge per list	24.00
AMS API Address Matching System Application Program Interface (per year, per platform) [1]	
Developer's Kit, one platform	5,200.00
Each Additional, per platform	1,850.00
Resell License, one platform	22,850.00
Each Additional, per platform	11,500.00
Additional Database License	
Number of Additional Licenses	
1-100	2,750.00
101-200	5,600.00
201-300	8,400.00
301-400	11,200.00
401-500	14,050.00
501-600	16,900.00
601-700	19,550.00
701-800	22,550.00
801-900	25,500.00
901-1,000	28,050.00
1,001-10,000	36,350.00
10,001-20,000	44,650.00
20,001-30,000	53,450.00
30,001-40,000	61,850.00

	($)
RDI API Developer's Kit[1]	
Each, per platform	420.00
Resell License, one platform	1,600.00
Each Additional, per platform	900.00
~~TIGER/ZIP+4 (per year)*~~	
~~Per State~~	~~75.00~~
~~All States~~	~~950.00~~

Notes

~~* See AMS Price Table for Single Issues of Additional Copies appearing at the end of section 1515.2. TIGER/ZIP+4 is not a subscription service. Single issue pricing does not apply.~~

1. Above API License Fees prorated during the first year based on the date of the license agreement.

2615 International Ancillary Services

* * *

2615.2 Outbound Competitive International Registered Mail

* * *

2615.2.2 Prices

	($)
Per Piece	14.95

* * *

2615.5 Outbound International Insurance

* * *

2615.5.3 Prices

Outbound International Insurance

a. Priority Mail International Insurance and Priority Mail Express International Merchandise Insurance

Indemnity Limit Not Over ($)	Price ($)
200[1]	0.00
300	5.25
400	6.45
500	7.65
600	8.85
700	10.05
800	11.25
900	12.45
Over 900	12.45 plus 1.20 for each 100.00 or fraction thereof over 900.00. Maximum indemnity varies by country.

Notes

1. Insurance coverage is provided, for no additional charge, up to $200.00 for merchandise, and up to $100.00 for document reconstruction.

* * *

2620 International Money Transfer Service—Outbound

* * *

2620.3 Prices

International Money Order

	($)
Per International Money Order	8.25
Inquiry Fee	5.95

Vendor Assisted Electronic Money Transfer

	Transfer Amount		
	Minimum Amount ($)	**Maximum Amount ($)**	**Per Transfer ($)**
Electronic Money Transfer	0.01	750.00	11.75
	750.01	1,500.00	17.75
Refund	0.01	1,500.00	26.95
Change of Recipient	0.01	1,500.00	12.95

* * *

2630 Premium Forwarding Service

2630.1 Description

a. Premium Forwarding Service Residential: provides residential delivery customers, and certain Post Office Box customers, the option to receive substantially all mail addressed to a primary address instead at a temporary address by means of a weekly Priority Mail shipment. Parcels that are too large for the weekly shipment, mail pieces that require a scan upon delivery or arrive postage due at the office serving the customer's primary address, and certain Priority Mail pieces may be rerouted as specified in the Domestic Mail Manual. Rerouted Priority Mail Express, First-Class Mail, and Priority Mail pieces incur no additional reshipping charges. Rerouted ~~Standard Mail~~USPS Marketing Mail and Package Service pieces may be rerouted postage due. Mail sent to a primary address for which an addressee has activated Premium Forwarding Service Residential is not treated as undeliverable-as-addressed. Premium Forwarding Service Residential is available for a period of at least two weeks and not more than twelve months, may not be used simultaneously with temporary or permanent forwarding orders, and is not available to customers whose primary address consists of a size three, four, or five Post Office Box, subject to exceptions allowed by the Postal Service, or a centralized delivery point.

b. Premium Forwarding Service Commercial: provides commercial customers the option to have mail addressed to business Post Office Boxes or business street addresses within the same servicing postal facility reshipped as Priority Mail Express or Priority Mail to a new address, for a period of time specified by the customer. Mail pieces that are accountable, require a scan, or arrive postage due at the customer's primary address will be rerouted separately as specified in the Domestic Mail Manual. Containers are used based on volumes and are charged the appropriate Priority Mail Express or Priority Mail postage. Flat rate tray boxes may be used, when available.

2630.2 Prices

	($)
Online Enrollment (Commercial and Residential)	17.75
Retail Counter Enrollment (Residential Only)	19.35
Weekly Reshipment (Residential Only)	19.35
Priority Mail Half Tray Box (Commercial Only)	20.35
Priority Mail Full Tray Box (Commercial Only)	37.12
Priority Mail Express Half Tray Box (Commercial Only)	50.00
Priority Mail Express Full Tray Box (Commercial Only)	96.00

* * *

2640 Post Office Box Service

* * *

2640.4 Prices

Regular – Semi-Annual Fees[1, 2, 3, 4]

Box Size	C1 ($)	C2 ($)	C3 ($)	C4 ($)	C5 ($)	C6 ($)	C7 ($)
1	37.00 to 180.00	30.00 to 150.00	25.00 to 120.00	21.00 to 90.00	19.00 to 80.00	14.00 to 56.00	12.00 to 50.00
2	55.00 to 270.00	46.00 to 225.00	38.00 to 185.00	32.00 to 135.00	25.00 to 105.00	20.00 to 85.00	16.00 to 70.00
3	100.00 to 432.00	80.00 to 275.00	70.00 to 235.00	50.00 to 172.00	45.00 to 140.00	34.00 to 128.00	27.00 to 104.00
4	205.00 to 690.00	160.00 to 414.00	128.00 to 330.00	100.00 to 302.00	80.00 to 242.00	60.00 to 212.00	45.00 to 164.00
5	325.00 to 1080.00	275.00 to 708.00	215.00 to 570.00	185.00 to 526.00	140.00 to 402.00	105.00 to 344.00	80.00 to 272.00

Notes

1. At ZIP Code locations specified on usps.com, customers who have not had box service for the last six months may obtain an initial 13 months of service for twice the semi-annual fees provided above.

2. 3-month fees must fall within the range consisting of one-half the applicable minimum and one-half the applicable maximum in the above price table.

3. A portion of the fee may serve as postage on packages delivered to competitive Post Office Box service customers after being brought to the Post Office by a private carrier.

4. <u>For customers using the Enterprise PO Box Online system, the semi-annual fees may be prorated one time to align payment periods for multiple boxes. The prorated fee for each such box will be based on the number of months between the expiration of the current fee and the month of the payment alignment.</u>

Postal Facilities Primarily Serving Academic Institutions or Their Students

Period of box use (days)	Price
95 or less	½ semiannual price
96 to 140	¾ semiannual price
141 to 190	Semiannual price
191 to 230	1 ¼ semiannual price
231 to 270	1 ½ semiannual price
271 to full year	Two times semiannual price

Ancillary Post Office Box Services

	($)
Key duplication or replacement	6.00
Lock replacement	20.00
Key deposit[1]	3.00

Notes

1. Key deposit only applies to additional keys or replacement keys.

2645 Competitive Ancillary Services

2645.1 Adult Signature

* * *

2645.1.2 Prices

	($)
Adult Signature Required	5.90
Adult Signature Restricted Delivery	6.15

2645.2 Package Intercept Service

* * *

2645.2.2 Prices

	($)
Package Intercept Service	12.95

* * *

[FR Doc. 2016–25955 Filed 10–31–16; 8:45 am]
BILLING CODE P

FEDERAL REGISTER

Vol. 81 Tuesday,

No. 211 November 1, 2016

Part IV

Federal Communications Commission

47 CFR Part 73

2014 Quadrennial Regulatory Review; Final Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket Nos. 14–50, 09–182, 07–294, and 04–256; FCC 16–107]

2014 Quadrennial Regulatory Review

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document retains the broadcast ownership rules with minor modifications in compliance with section 202(h) of the Telecommunications Act of 1996 which requires the Commission to review its broadcast ownership rules quadrennially to review these rules to determine whether they are necessary in the public interest as a result of competition. In addition, this document adopts an eligible entity definition pursuant to the remand of the Commission's 2008 *Diversity Order* by the U.S. Court of Appeals for the Third Circuit. This document also readopts the Television Joint Sales Agreement (JSA) Attribution Rule, which was vacated on procedural grounds by the Third Circuit. Lastly, this document adopts a definition of Shared Service Agreements (SSAs) and requires commercial television stations to disclose those SSAs by placing the agreements in each station's online public inspection file.

DATES: Effective December 1, 2016, except for the amendment to § 73.3526, which contains information collection requirements that are not effective until approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these changes. A separate notice will be published in the **Federal Register** soliciting public and agency comments on the information collections and establishing a deadline for accepting such comments.

FOR FURTHER INFORMATION CONTACT: Benjamin Arden, Industry Analysis Division, Media Bureau, FCC, (202) 418–2605. For additional information concerning the PRA information collection requirements contained in the *Second Report and Order,* contact Cathy Williams at (202) 418–2918, or via the Internet at *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This *Second Report and Order,* in MB Docket Nos. 14–50, 09–182, 07–294, and 04–256; FCC 16–107, was adopted on August 10, 2016, and released on August 25, 2016. The complete text of this document is available electronically via the search function on the FCC's Electronic Document Management System (EDOCS) Web page at *https://apps.fcc.gov/edocs_public/.* The complete document is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), 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

I. Introduction

1. The Commission brings to a close the 2010 and 2014 Quadrennial Review proceedings with this *Second Report and Order* (*Order*). In this *Order,* the Commission maintains strong media ownership rules and adopts rules that will help to promote diversity and transparency in local television markets. The *Order* readopts the Television JSA Attribution Rule, which was vacated on procedural grounds by the Third Circuit. Also, pursuant to the Third Circuit's remand in *Prometheus Radio Project* v. *FCC,* 652 F.3d 431 (3d Cir. 2011) (*Prometheus II*), of certain aspects of the Commission's 2008 *Diversity Order* (73 FR 28361, May 16, 2008, FCC 07–217, rel. March 5, 2008), the *Order* also reinstates the revenue-based eligible entity standard, as well as the associated measures to promote the Commission's goal of encouraging small business participation in the broadcast industry, which will cultivate innovation and enhance viewpoint diversity. Finally, the *Order* adopts a definition of SSAs and requires commercial television stations to disclose those SSAs by placing the agreements in each station's online public inspection file.

II. Background

2. The media ownership rules subject to this quadrennial review are the local television ownership rule, the local radio ownership rule, the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, and the dual network rule. Congress requires the Commission to review these rules every four years to determine whether they are necessary in the public interest as the result of competition and to repeal or modify any regulation the Commission determines to be no longer in the public interest. The Third Circuit has instructed in *Prometheus Radio Project* v. *FCC,* 373 F.3d 372 (3d Cir. 2004) (*Prometheus I*) that necessary in the public interest is a plain public interest standard under which necessary means convenient, useful, or helpful, not essential or indispensable. The court also concluded that the Commission is required to take a fresh look at its regulations periodically to ensure that they remain 'necessary in the public interest. No presumption in favor of repealing or modifying the ownership rules exists. Rather, the Commission has the discretion to make the rule more or less stringent. This 2014 Quadrennial Review will focus on identifying a reasoned basis for retaining, repealing, or modifying each rule consistent with the public interest.

3. *Policy Goals.* The Commission continues to find that the longstanding policy goals of competition, localism, and diversity represent the appropriate framework within which to evaluate the Commission's media ownership rules. Accordingly, the Commission rejects suggestions in the record that the Commission should adopt any additional or different policy goals. While those proposals generally represent worthwhile pursuits, the Commission does not believe that they can be meaningfully promoted through the structural ownership rules and/or are outside the Commission's statutory authority.

III. Media Ownership Rules

A. Local Television Ownership Rule

1. Introduction

4. The current Local Television Ownership Rule allows an entity to own two television stations in the same Nielsen Designated Market Area (DMA) only if no Grade B contour overlap between the commonly owned stations exists, or at least one of the commonly owned stations is not ranked among the top-four stations in the market (top-four prohibition) and at least eight independently owned television stations remain in the DMA after ownership of the two stations is combined (eight-voices test). Based on the record that was compiled for the 2010 and 2014 Quadrennial Review proceedings, the Commission finds that the current Local Television Ownership Rule, with a limited contour modification, remains necessary in the public interest.

5. Under the revised Local Television Ownership Rule, an entity may own up to two television stations in the same DMA if: (1) The digital NLSCs of the stations (as determined by § 73.622(e) of the Commission's rules) do not overlap;

or (2) at least one of the stations is not ranked among the top-four stations in the market and at least eight independently owned television stations would remain in the DMA following the combination. In calculating the number of stations that would remain post-transaction, only those stations whose digital NLSCs overlap with the digital NLSC of at least one of the stations in the proposed combination will be considered.

2. Discussion

6. *Market.* The Commission finds that the record supports its conclusion from the *FNPRM* (79 FR 29010, May 20, 2014, FCC 14–28, rel. Apr. 14, 2014) that non-broadcast video offerings still do not serve as meaningful substitutes for local broadcast television. Accordingly, the Commission's analysis regarding the Local Television Ownership Rule must continue to focus on promoting competition among broadcast television stations in local television viewing markets. Competition within a local market motivates a broadcast television station to invest in better programming and to provide programming tailored to the needs and interests of the local community to gain market share. Community-tailored programming, which includes local news and public interest programming, is largely limited to broadcast television as online video and cable network programming is largely national in scope. By thus strengthening its position in the local market, a television broadcaster also strengthens its ability to compete for advertising revenue and retransmission consent fees, an increasingly important source of revenue for many stations. As a result, viewers in the local market benefit from such competition among numerous strong rivals in the form of higher quality programming.

7. While the Commission recognizes the popularity of video programming delivered via MVPDs, the Internet, and mobile devices, it finds that competition from such video programming providers remains of limited relevance for the purposes of analysis. Video programming delivered by MVPDs such as cable and DBS is generally uniform across all markets, as is online video programming content. Unlike local broadcast stations, such programming providers are not likely to make programming decisions based on conditions or preferences in local markets. No commenter in this proceeding offered evidence of non-broadcast video programmers modifying their programming decisions based on the competitive conditions in a particular local market. This strengthens the Commission's determination that, while non-broadcast video programming may offer consumers additional programming options in general, they do not serve as a meaningful substitute in local markets due to their national focus. Unlike broadcast television stations, national programmers are not responsive to the specific needs and interests of local markets, and as the Commission has previously stated, competition among local rivals most benefits consumers and serves the public interest.

8. In addition, the Commission finds that broadcast television's strong position in the local advertising market supports the Commission's view that non-broadcast video programming distributors are not meaningful substitutes in local television markets. The current data do not support the claim that advertisers no longer distinguish local broadcast television from non-broadcast sources of video programming when choosing how to allocate spending for local advertising, as advertising revenues for broadcast television stations remain strong and are projected to grow through 2019. While advertising revenues on cable, satellite, and digital platforms have risen, those gains do not appear to be at the expense of broadcast television stations. The Commission finds that broadcast television continues to play a significant role in the local advertising market, particularly when it comes to political advertising. Broadcast stations receive considerable revenue from political advertising every other year, which further highlights broadcast television's unparalleled value to advertisers for reaching local markets.

9. With regard to an economic study submitted by the National Association of Broadcasters, the Commission does not find the study relevant or informative in this proceeding for multiple reasons. First, the Commission finds significant issues with the statistical methods employed within the study and with the interpretation of those results. In addition, the study critiques the local broadcast television market relied on by the Department of Justice (DOJ) in its merger reviews pursuant to Section 7 of the Clayton Act—which focuses solely on the impact of the transaction in the local advertising market—and not the market definition relied on by the Commission for analyzing its Local Television Ownership Rule pursuant to Section 202(h), as discussed herein. While the Commission's market definition for purposes of the Local Television Ownership Rule is similar to the market definition used by DOJ when evaluating broadcast television mergers, in that the scope of the Commission's rule is limited to broadcasters, DOJ focuses on competition for advertising, whereas the Commission's rule is premised on multiple factors, including audience share. Therefore, the Commission finds that the study does not inform the current proceeding.

10. The Commission concludes that broadcast television stations continue to play a unique and vital role in local communities that is not meaningfully duplicated by non-broadcast sources of video programming. In addition to providing viewers with the majority of the most popular programming on television, broadcast television stations remain the primary source of local news and public interest programming. Accordingly, the Commission concludes that, for purposes of determining whether the Local Television Rule remains necessary in the public interest, the relevant product market is the delivery of local broadcast television service.

11. *Contour Overlap/Grandfathering Existing Ownership Combinations.* Consistent with the tentative conclusions in the *FNPRM,* the Commission declines to adopt the DMA-only approach. Instead, the Commission will retain the existing DMA and contour overlap approach but replace the analog Grade B contour with the digital NLSC, which the Commission has treated as the functional equivalent of the Grade B contour in previous proceedings. By contrast, there is no digital counterpart to a station's analog city grade contour, which is an aspect of the Commission's satellite station inquiry. Accordingly, consistent with case law developed after the digital transition, the Commission continues to evaluate all future requests for new or continued satellite status on an ad hoc basis. The Commission finds that this modified approach accurately reflects current digital service areas while minimizing any potential disruptive impact. In addition, consistent with previous Commission decisions, the Commission finds that retaining the DMA and contour overlap approach serves the public interest by promoting local television service in rural areas. That is, such an approach continues to allow station owners in rural areas to build or purchase an additional station in remote portions of the DMA, so long as no digital NLSC overlap exists.

12. The Commission confirms that the digital NLSC is an accurate measure of a station's current service area and thus is an appropriate standard. The Local Television Ownership Rule must take into account the current digital service

area of a station. Thus, the Commission continues to define the geographic dimensions of the local television market by referring to DMAs under the adopted modified rule but replaces the analog Grade B contour with the digital NLSC, with the effect that within a DMA an entity may own or operate two stations in a market if the digital NLSCs of those stations do not overlap. The Commission previously determined that the DMA is the most appropriate definition of the geographic dimensions of the local television market, and it does not disturb that finding. The approach adopted in this *Order* is consistent with the approach under the prior Local Television Ownership Rule. Where digital NLSC overlap exists, the combination will be permitted only if it satisfies the top-four prohibition and the eight-voices test.

13. The Commission also adopts the proposal to grandfather existing ownership combinations that would exceed the numerical limits by virtue of the revised contour approach instead of requiring divestiture. Under these circumstances, the Commission does not believe that compulsory divestiture is appropriate. In the Local Radio Ownership Rule section, the Commission confirms the disruptive impact of compulsory divestitures but determine that divestitures would be appropriate if it tightened the local radio ownership limits. In adopting the digital NLSC standard, the Commission is not reducing the number of stations that can be commonly owned by all licensees; rather, it is adopting a technical change that may result in a small number of station combinations no longer complying with the criteria necessary to permit such common ownership. Accordingly, compulsory divestiture is not appropriate in these circumstances. The Commission continues to believe that the disruption to the marketplace and hardship for individual owners resulting from forced divestiture of stations would outweigh any benefits of forced divestiture to its policy goals, including promoting ownership diversity. Furthermore, the Commission notes that the replacing the Grade B contour with the digital NLSC—given the similarity in the contours—effectively maintains the status quo for most, if not all, owners of duopolies formed as a result of the previous Grade B contour overlap provision.

14. However, the Commission concludes that where grandfathered combinations are sold, the ownership rule governing television stations in effect at the time of the sale must be complied with. If the digital NLSC of two stations in the same DMA overlap, then the stations serve the same area, even if there was no Grade B contour overlap before the digital transition. Accordingly, requiring that a grandfathered combination be brought into compliance with the new standard at the time of sale is consistent with the Commission's rationale for adopting the digital NLSC-based standard and does not cause hardship by requiring premature divestiture. Consistent with Commission precedent, the Commission finds 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 ownership rules at the time of transfer or assignment. Under the adopted approach, the Commission continues to allow grandfathered combinations to survive *pro forma* changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee.

15. *Numerical Limits.* The Commission concludes that the local television marketplace has not changed sufficiently to justify tightening the current numerical limits of the rule and returning to a single-license television rule. The record data demonstrate that the duopolies permitted subject to the restrictions of the current rule have created tangible public interest benefits for viewers in local television markets that offset any potential harms that are associated with common ownership. Such benefits include substantial operating efficiencies, which potentially allow a local broadcast station to invest more resources in news or other public interest programming that meets the needs of its local community.

16. Likewise, the Commission does not find that there have been sufficient changes in the local television marketplace to justify ownership of a third in-market station. Growing competition from non-broadcast alternatives and the economic efficiencies of owning multiple stations are cited generally as the reasons why the Commission should permit ownership of more than two stations. As with the decision to define the relevant product market as broadcast television, the Commission concludes that it is not appropriate to consider competition from non-broadcast sources in evaluating whether the rule remains necessary. Despite the aforementioned benefits that duopolies can create, excessive consolidation remains likely to threaten the Commission's competition and diversity goals by jeopardizing small and mid-sized broadcasters. Without significant evidence of the public interest benefits that could result from the ownership of three stations in a local market that are not already available from the ownership of two stations, the Commission does not believe that adequate justification exists at this time for increasing the numerical limits.

17. *Top-Four Prohibition.* The Commission concludes that the top-four prohibition remains necessary to promote competition in the local television marketplace; accordingly, it retains the top-four prohibition in the Local Television Ownership Rule. First, the Commission continues to find that audience share is the appropriate metric for purposes of the top-four prohibition, and the record does not offer persuasive reason to depart from this determination. Second, the Commission finds that there typically remains a significant cushion of audience share points that separates the top-four stations in a market from the fifth-ranked station. Further, the court has twice upheld the Commission's rationale for retaining the top-four prohibition. The Commission notably has never based the top-four prohibition solely on the existence of the ratings cushion in every market. The Commission previously determined that the cushion existed in two-thirds of the markets with five or more full-power commercial television stations and the court in *Prometheus I,* cited specifically to this finding as evidence to support the Commission's line-drawing decision. Therefore, the Commission finds unconvincing any claim that the top-four prohibition cannot be supported because the ratings cushion is not present in every market. The cushion continues to exist in most markets and, as such, it continues to support the Commission's decision to retain the top-four prohibition. The Commission is not persuaded by NAB's assertions regarding the revenue of fourth- and fifth-ranked stations in a market. As noted in the *FNPRM,* NAB's analysis evaluates revenue share and does not sufficiently examine audience share, which the Commission has utilized when evaluating the need for the top-four prohibition. The Commission continues to find that the ability to attract mass audiences distinguishes the top ranked stations in local television markets, which is why ratings appropriately serve as the basis for the top-four prohibition. The only data NAB offers regarding audience share relate to the shares of the third and fourth ranked stations in comparison to the top ranked station in Nielsen markets, but do not compare

them to the fifth ranked station in the market. The court in *Prometheus I* rejected a similar argument when upholding the Commission's decision to retain the top-four prohibition. Therefore, NAB's evidence does not disturb the Commission's previous determinations that the relevant metric for purposes of the top-four prohibition is audience share and does not rebut the evidence in this proceeding that a cushion still exists between the fourth- and fifth-ranked stations in most markets.

18. The Commission reaffirms its belief that top-four combinations would generally result in a single firm obtaining a significantly larger market share than other firms in the market and that such combinations would create welfare harms. Top-four combinations reduce incentives for local stations to improve their programming by giving once strong rivals incentives to coordinate their programming to minimize competition between the commonly owned stations. The Commission is not persuaded by assertions that commonly owned stations have no incentive to coordinate their programming based solely on anecdotal showings from Nexstar-owned stations in two DMAs. While the Commission recognizes that duopolies permitted subject to the restrictions of the current rule can create operating efficiencies, which allow the commonly owned stations to invest in news and other local programming, the Commission finds that this potential benefit is outweighed by the harm to competition where a single firm obtains a significantly larger market share through a combination of two top-four stations. Accordingly, the Commission finds that the public interest is best served by retaining the top-four prohibition.

19. *Affiliation Swaps.* The Commission finds that application of the top-four prohibition to affiliation swaps is consistent with previous Commission action and policy; the Commission is merely closing a potential loophole and preventing circumvention of its rules. Parties can achieve through an affiliation swap the same result as a transfer of control or assignment of license, which would be subject to Commission review and be required to comply with the Local Television Ownership Rule. Absent Commission action, parties could utilize affiliation swaps to achieve a result otherwise prohibited by the Local Television Ownership Rule. Therefore, the Commission finds that its statutory authority to extend the Local Television Ownership Rule to include affiliation swaps derives from the same general rulemaking authority that supports all of the Commission's broadcast ownership rules, as the Supreme Court has repeatedly held. In the *1999 Ownership Order* (64 FR 50651, Sept. 17, 1999, FCC 99–209, rel. Aug. 6, 1999) that adopted the top-four prohibition, the Commission did not make a statement regarding its authority to require divestiture if two merged stations both became ranked among the top-four rated stations in the market; it stated only that it would refrain from doing so to further certain, specific public interest benefits. By allowing combinations between a large station and a small station, the Commission sought to enable the smaller station to improve its operations and local program offerings. The Commission wanted to avoid penalizing a station whose operations improved to the point that it became a top-four station. By contrast, the Commission was concerned that mergers involving top-four stations would harm competition and viewpoint diversity. Affiliation swaps, by their design, implicate the specific harms to public interest that led the Commission to adopt the top-four prohibition. Aside from the assignment/transfer of a station license, an affiliation swap is essentially indistinguishable in its effect on the policy underlying the Commission's duopoly rule from a top-four merger described by the Commission in the *1999 Ownership Order.* If compelling evidence exists that an affiliation swap involving a top-four station and a non-top-four station would not result in the non-top-four station becoming a top-four station after the swap (*e.g.,* a station's top-four ratings are driven by non-network programming that is unaffected by the affiliation swap), the parties are free to seek a waiver of this prohibition under Section 1.3 of the Commission's rules.

20. Moreover, the Commission cautioned in 1999 that future transactions, such as license transfers, that do not satisfy the top-four prohibition may not be granted. This demonstrates that the Commission sought to distinguish instances where a station organically becomes a top-four station through station improvement from situations where a station actively transacts to become a top-four station via an ownership transfer or assignment. As the Commission said in the *FNPRM,* acquiring control over a second in-market top-four station through affiliation swap transactions can be distinguished easily from other, legitimate actions a station may undertake to increase ratings at the expense of a competitor, such as producing higher quality or more extensive local programming or acquiring higher quality syndicated programming. Moreover, the adopted extension of the top-four prohibition would not apply in situations where a network offers an existing duopoly owner (one top-four station and one station ranked outside the top four) a top-four-rated affiliation for the lower-rated station, perhaps because the network is no longer satisfied with the existing affiliate station and the duopoly owner has demonstrated superior station operation (*i.e.,* earned the affiliation on merit). Such a circumstance represents organic growth of the station and not a transaction that is the functional equivalent of an assignment or transfer of control.

21. While the Commission said in the *1999 Ownership Order* that the top-four determination would be made at the time of the initial transaction, the Commission signaled its intent to review future transactions involving assignments or transfers of ownership resulting in a single entity owning two top-four stations in the same market. A contrary conclusion would greatly diminish the effectiveness of the top-four prohibition, as an entity could essentially transact to acquire a top-four station through an affiliation swap as soon as the Commission approved the initial duopoly. Although the Commission decided in 1999 not to prohibit licensees from owning two top-four stations when a station's top-four status resulted from organic growth, transactions involving the sale or swap of network affiliations between in-market stations that result in an entity holding an attributable interest in two top-four stations serve as the functional equivalent of a transfer of control or assignment of license. Therefore, affiliation swaps undermine the purpose of the top-four prohibition and the Local Television Ownership Rule as a whole. Application of the top-four prohibition to affiliation swaps is necessary to prevent circumvention of the Local Television Ownership Rule.

22. The Commission rejects any assertion that extending the top-four prohibition to affiliation swaps amounts to impermissible content regulation and is subject to strict scrutiny. The adopted clarifying amendment does not regulate content any more than the top-four prohibition and the media ownership rules that consistently have been upheld by the courts, and it is therefore subject to rational basis review. The decision to prohibit affiliation swaps involving two top-four stations, as described herein, does not consider content but rather the

content's ratings only. In that regard, the extension of the top-four prohibition to affiliation swaps operates exactly as the existing top-four prohibition does. The rule is predicated entirely on content-neutral objectives, primarily the public interest goal of promoting competition in local markets. The rule does not limit a licensee's discretion to air the content of its choice but rather limits the number of stations in a single market that a licensee may own if common ownership would result in significantly reduced competition.

23. The *Prometheus II* court found under the rational basis standard of review that the media ownership rules do not violate the First Amendment because they are rationally related to substantial government interests in promoting competition and protecting viewpoint diversity. The court rejected broadcasters' claims that the rules are impermissible attempts by the FCC to manipulate content and rejected Sinclair's argument that the Local Television Ownership Rule violates the First Amendment because it 'singles out television stations. Instead, the court recognized that these rules apply regardless of the content of the programming. The adopted extension of the top-four prohibition merely clarifies that the top-four prohibition applies to agreements that are the functional equivalent of a transfer of control or assignment of license from the standpoint of the Commission's Local Television Ownership Rule. The Commission noted in the *1999 Ownership Order* that a duopoly may not automatically be transferred to a new owner if the market does not satisfy the eight voice/top four-ranked standard. Accordingly, this application of the top-four prohibition remains subject to the same constitutional analysis, and the amended rule is rationally related to the substantial government interests in promoting competition and diversity. Pursuant to that constitutional analysis, courts repeatedly have found that the Local Television Ownership Rule, which includes the top-four prohibition, does not violate the First Amendment.

24. The Commission also rejects the assertion that extension of the top-four prohibition constitutes unlawful interference in the network affiliation marketplace. The Commission does not believe that its action is likely to have a significant impact on the marketplace, as affiliation swaps are, at this point, rare. Indeed, the record demonstrates only a single instance of an affiliation swap that would be subject to the rule adopted herein. Evidence in the record demonstrates that the negotiation of affiliation agreements typically does not involve affiliation swaps; therefore, most negotiations will be unaffected by the amendment clarifying the top-four prohibition. The Commission confirms that extension of the top-four prohibition to affiliation swaps would not prevent a station from obtaining an affiliation through negotiating with a national network outside the context of an affiliation swap. While affiliation swaps have not occurred often to date, given the potential of such transactions to undermine the Local Television Ownership Rule, the Commission finds that the application of the top-four prohibition to such transactions is necessary to ensure the continued effectiveness of that rule. Such action is necessary because the Commission does not believe a reliable marketplace solution exists that would restrain the future use of affiliation swaps to evade the top-four prohibition should it decline to extend the top-four prohibition to affiliation swaps, nor is there a less restrictive means to accomplish the goal.

25. Accordingly, to close this loophole, the Commission finds that affiliation swaps must comply with the top-four prohibition at the time the agreement is executed. Specifically, an entity will not be permitted to directly or indirectly own, operate, or control two television stations in the same DMA through the execution of any agreement (or series of agreements) involving stations in the same DMA, or any individual or entity with a cognizable interest in such stations, in which a station (the new affiliate) acquires the network affiliation of another station (the previous affiliate), if the change in network affiliations would result in the licensee of the new affiliate, or any individual or entity with a cognizable interest in the new affiliate, directly or indirectly owning, operating, or controlling two of the top-four rated television stations in the DMA at the time of the agreement. In addition, for purposes of making this determination, the new affiliate's post-consummation ranking will be the ranking of the previous affiliate at the time the agreement is executed, determined in accordance with § 73.3555(b)(1)(i) of the Commission's rules. The Commission will find any party that directly or indirectly owns, operates, or controls two top-four stations in the same DMA as a result of such transactions to be in violation of the top-four prohibition and subject to enforcement action. Application of this rule to affiliation swaps is prospective; therefore, all future transactions will be required to comply with the Commission's rules then in effect. Parties that acquired control over a second in-market top-four station by engaging in affiliation swaps before the release date of this *Order* will not be subject to divestiture or enforcement action.

26. *Eight-Voices Test.* The Commission does not find that there have been any changes in the local television marketplace that would warrant modification of the eight-voices test at this time. Nearly every market with eight or more full-power television stations—absent a waiver of the Local Television Ownership Rule or unique circumstances—continues to be served by each of the Big Four networks and at least four independent competitors unaffiliated with a Big Four network. Competition among these independently owned stations serves an important function by motivating both the major network stations and the independent stations to improve their programming, including increased local news and public interest programming. This competition is especially valuable during the parts of the day in which local broadcast stations do not transmit the programming of affiliated broadcast networks and rely on local content uniquely relevant to the stations' communities.

27. The Commission continues to believe the minimum threshold maintained by the eight-voices test helps to ensure robust competition among local television stations in the markets where common ownership is permitted under the rule. The eight-voices test increases the likelihood that markets with common ownership will continue to be served by stations affiliated with each of the Big Four networks as well as at least four independently owned and operated stations unaffiliated with these major networks. In addition, the Commission disagrees with the interpretation that the eight-voices test implies that at least eight competing over-the-air TV stations are the minimum necessary to ensure competition and so each market must have at least eight independent stations. The eight-voices test only establishes the minimum level necessary to permit common ownership of stations in a market, subject to the other requirements in the rule. Therefore, markets with fewer than eight independent stations can still maintain a significant level of competition given the absence of duopolies in these markets. Also, because a significant gap in audience share persists between the top-four stations in a market and the remaining stations in most markets—demonstrating the dominant position of

the top-four-rated stations in the market—the Commission continues to believe that it is appropriate to retain the eight-voices test, which helps to promote at least four independent competitors for the top-four stations before common ownership is allowed. Accordingly, the Commission retains the eight-voices test.

28. The Commission also sought comment on whether the *Sinclair Broadcasting Group* v. *FCC,* 284 F.3d 148 (D.C. Cir. 2002) (*Sinclair*), opinion compels the Commission to include other voices in addition to full-power television stations in the eight-voices test. The Commission finds that it does not. In *Sinclair,* the court rejected the eight-voices test, finding that the Commission had failed to justify its decision to define voices differently in the radio-television cross-ownership rule and the Local Television Ownership Rule. The primary purpose of the Local Television Ownership Rule and the eight-voices test is to promote competition among broadcast television stations in local television viewing markets. By contrast, the primary purpose of the radio-television cross-ownership rule is to promote viewpoint diversity; therefore, it is appropriate to consider a broader range of voices there than in the context of the Local Television Ownership Rule. Accordingly, the Commission continues to include only full-power television stations in the voice count for purposes of the Local Television Ownership Rule.

29. The Commission's conclusion adheres to *Prometheus II,* where the court upheld the Commission's rationale in the *2006 Quadrennial Review* (73 FR 9481, Feb. 21, 2008, FCC 07–216, rel. Feb. 2008) proceeding for limiting voices in the Local Television Ownership Rule to full-power television stations. The Commission had determined in that proceeding that the primary goal of the Local Television Ownership Rule was to promote competition among local television stations, and not to foster viewpoint diversity because there were other outlets for diversity of viewpoint in local markets. Therefore, although other types of media contribute to viewpoint diversity, the Commission determined that they should not be counted as voices under the Local Television Ownership Rule. The court agreed and upheld the Commission's decision.

30. *Attribution of Television JSAs.* In the *JSA Order* (79 FR 28996, May 20, 2014, FCC 14–28, rel. Apr. 14, 2014), the Commission adopted a rule that attributed television JSAs under which a television station (the broker) sold more than 15 percent of the weekly advertising time for another same-market television station (the brokered station). Pursuant to the new rule, in such circumstances, the brokering station was deemed to hold an attributable interest in the brokered station. Among other implications associated with attribution, this resulted in counting the brokered station toward the brokering station's permissible ownership totals. While one purpose of the attribution rules is to determine compliance with the Commission's various broadcast ownership rules, including the Local Television Ownership Rule, the Commission's attribution rules are relevant in many other contexts, as well (*e.g.,* Form 323 ownership reporting, auctions, retransmission consent negotiations, and foreign ownership). Accordingly, even if the Commission were to eliminate all its ownership caps, the attribution rules would remain relevant in connection with a large number of other rules. As such, the Commission must retain the ability to update its attribution rules, as appropriate. In addition, the Commission provided a two-year period from the effective date of the *JSA Order* (March 31, 2014) for parties to existing, same-market television JSAs whose attribution resulted in a violation of the ownership limits to terminate or amend those JSAs or otherwise come into compliance with the ownership rules. Following the adoption of the *JSA Order,* Congress twice extended this compliance period, ultimately extending the relief through September 30, 2025.

31. The Third Circuit vacated the Television JSA Attribution Rule in *Prometheus* v. *FCC,* 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*), finding that the adoption of the rule was procedurally invalid as a result of the Commission's failure to also determine that the Local Television Ownership Rule served the public interest. The court stated that the Commission could readopt the rule if it was able to justify readopting the ownership rules to which television JSA attribution applies or to adopt new ownership rules. The court specifically noted that it offered no opinion on substantive challenges to the Television JSA Attribution Rule.

32. Consistent with *Prometheus III,* having concluded that the Local Television Ownership Rule (with minor modifications) continues to serve the public interest, the Commission now readopt the Television JSA Attribution Rule first adopted in the *JSA Order.* In so doing, the Commission incorporates by reference the rationale articulated in the *JSA Order* for the adoption and application of the rule. The Commission notes that television JSA attribution is also relevant in the other adopted broadcast ownership rules that involve ownership of a broadcast television station. The Commission continues to find attributing certain television JSAs under the Commission's attribution standards appropriate. Upon the effective date of this *Order,* the following rules, which were not modified or removed from the CFR, shall again be effective as they relate to television JSAs: 47 CFR 73.3555, Note 2(k)(2)–(3) and 47 CFR 73.3613(d)(2). The Commission finds that readopting the rule serves the public interest by ensuring compliance with its broadcast ownership rules, and anecdotal evidence exists that suggests the attribution of television JSAs has helped promote minority and female ownership opportunities.

33. In addition, the Commission adopts different transition procedures than those adopted in the *JSA Order.* Specifically, the Commission retains the previous effective date for application of the grandfathering relief—March 31, 2014—and will extend the compliance period through September 30, 2025. Until that time, such grandfathered agreements will not be counted as attributable, and parties will be permitted to transfer or assign these agreements to other parties without terminating the grandfathering relief. Any television JSAs adopted or revised following the Third Circuit's decision to vacate the Television JSA Attribution Rule are not provided any transition relief and must immediately be brought into compliance with the Commission's rules. This is consistent with the treatment of television JSAs executed after the release of the *JSA Order,* which were not provided any transition period. The Commission believes that it is reasonable to adopt a similar measure here given that parties were on notice following *Prometheus III* that the Commission could readopt the Television JSA Attribution Rule if the Commission were to conclude, following completion of its Section 202(h) review, that the existing Local Television Ownership Rule should be retained or replaced with a new rule—which has been done herein. In addition, any television JSA that previously lost grandfathering relief as a result of a condition imposed by the Commission in the approval of a transaction may seek to have the condition rescinded. Upon request of the transferee or assignee of the station license, the Commission will rescind the condition and permit the licensees of the stations whose advertising was

jointly sold pursuant to such agreement to enter into a new JSA—to the extent that both parties wish to enter into the agreement—on substantially similar terms and conditions as the prior agreement. The Commission delegates authority to the Media Bureau to review these requests and grant relief, as appropriate. While the Commission notes that this grandfathering relief is not typical of the relief normally provided by the Commission—generally grandfathered combinations cannot be assigned or transferred unless they comply with the ownership rules in effect at the time—it believes that the relief is warranted given the various expressions of Congressional will in this regard.

34. In addition to readopting the Television JSA Attribution Rule, the Commission finds that such attribution does not change its determination here that the existing Local Television Ownership Rule should be retained, with a minor contour modification. The analysis underlying the various components of the Local Television Ownership Rule (*e.g.,* the numerical limits, the top-four prohibition, and the eight-voices test) assumes that independently owned and operating stations are just that—independent. The Commission's attribution rules are designed to help to ensure that independence, or, stated differently, to reflect a determination of when stations are *not* truly independent, because of common ownership or other relationships that provide the ability to exercise influence or control over another station's core operating functions. The Local Television Ownership Rule is a bright-line rule designed to promote competition. Accordingly, Commission analysis focuses on concepts that are generally applicable across all markets and this approach is favored by broadcasters. The bright-line approach, however, precludes full consideration of changing economic conditions within a particular local market or all of the variations that may exist across markets. To take account of such considerations, the Commission would need to adopt a case-by-case approach. However, such an approach provides less certainty to the market, imposes higher administrative burdens on the Commission than the bright-line approach, and may delay Commission decision-making, which could ultimately chill marketplace activity. The Commission does not find any support in the record for such an approach. Accordingly, arguments that the Commission's analysis regarding the Local Television Ownership Rule and/or television JSAs fails to account for market-by-market differences are unavailing, as an approach that takes those differences into account would be inconsistent with the bright-line rule favored by broadcasters.

35. The attribution of certain television JSAs, which prevents those agreements from being used to circumvent the ownership limits by compromising the independence of a same-market station, helps to ensure that the goals of the Local Television Ownership Rule are realized. This mechanism applies to any circumstances in which an individual or entity has an attributable interest in more than one station in a market. The arguments that television JSAs should not be attributed because they produce public interest benefits are essentially indistinguishable from arguments that the ownership limits should be relaxed because common ownership produces public interest benefits. The Commission acknowledges and addresses these arguments throughout; however, it has ultimately determined that the Local Television Ownership Rule should be retained, with a minor modification to the contour standard. The Commission's responsibility under section 202(h) is to ensure that the Local Television Ownership Rule continues to serve the public interest, not to manipulate the rule to counterbalance the attribution of television JSAs. As discussed in this section, the Commission finds that the adopted rule serves the public interest.

36. *Waiver Policy.* Under the existing failed/failing station waiver policy, to obtain a waiver of the local television rule, an applicant must demonstrate that one of the broadcast television stations involved in the proposed transaction is either failed or failing and that the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; and selling the station to an out-of-market buyer would result in an artificially depressed price. A station is considered to be failed if it has not been in operation due to financial distress for at least four consecutive months immediately before the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application; a television station is considered to be failing if it has an all-day audience share of no more than four percent and it has had negative cash flow for three consecutive years immediately before the application. Under the failing station standard, the applicants must also demonstrate that consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.

37. Waiver of the Commission's rules is meant to be exceptional relief, and the Commission finds that the existing waiver criteria effectively establish when relief from the rule is appropriate. The Commission remains concerned that loosening the existing failed/failing station waiver criteria—such as by eliminating the four percent audience share requirement or by reducing the negative cash flow period from three years to one—would result in a waiver standard that is more vulnerable to manipulation by parties seeking to obtain a waiver. Also, such changes may not be rationally related to improving the Commission's ability to evaluate the viability of a station subject to the waiver request. The Commission declines to adopt any industry-proposed waiver standard that would significantly expand the circumstances in which a waiver of the Local Television Ownership Rule would be granted, absent sufficient demonstration that the stations could not effectively compete in the market. Such relaxation of the waiver standard would be inconsistent with the Commission's determination that the public interest is best served by retaining the existing television ownership limits to promote competition. Therefore, the Commission concludes that the existing waiver standard is not unduly restrictive and that it provides appropriate relief in all television markets. The Commission also declines to adopt a 180-day shot clock for waiver request reviews. No record evidence indicates that waiver requests are subject to undue delay; on the contrary, the Commission believes that the current process works effectively and that applications are processed in a timely and efficient manner. In addition, the Commission currently endeavors to complete action on assignment and transfer of control applications (including those requesting a failed/failing station waiver) within 180 days of the public notice accepting the applications. Routine applications are typically decided within the 180-day mark, and all applications are processed expeditiously as possible consistent with the Commission's regulatory responsibilities. However, several factors could cause the Commission's review of a particular application to exceed 180 days. Certain cases will present difficult issues that require additional consideration, and the Commission does not believe that artificially constraining its review is appropriate.

38. *Multicasting.* The Commission finds that the ability to multicast does not justify tightening the current numerical limits. Based on evidence in the record, broadcasting on a multicast stream does not typically produce the cost savings and additional revenue streams that can be achieved by owning a second in-market station. Therefore, tightening the numerical limits might prevent those broadcasters in markets where common ownership is permitted under the existing rule from achieving the efficiencies and related public interest benefits associated with common ownership. Accordingly, the Commission's view, based on the most recent record, is that adjusting the numerical limits as a result of stations' multicasting capability is not appropriate.

39. As proposed in the *FNPRM,* the Commission declines to regulate dual affiliations via multicast, including dual affiliation with more than one Big Four network, at this time. A significant benefit of the multicast capability is the ability to bring more local network affiliates to smaller markets, thereby increasing access to popular network programming and local news and public interest programming tailored to the specific needs and interests of the local community. The Commission finds that the strongest public interest concerns posed by dual affiliations via multicasting involve affiliations between two Big Four networks. However, based on the record, dual affiliations involving two Big Four networks via multicasting are generally limited to smaller markets where there are not enough full-power commercial television stations to accommodate each Big Four network or where other unique marketplace factors responsible for creating the dual affiliation exist. Marketplace incentives, at present, appear to limit the occurrence of dual affiliations via multicasting involving multiple Big Four networks largely to these smaller markets. Therefore, the Commission concludes that the nature of the local television market supports the Commission's decision to decline regulation of dual affiliations via multicasting at this time. However, the Commission will continue to monitor this issue and take action in the future, if appropriate; moreover, the Commission can consider issues that impact the Commission's policy goals in the context of individual transactions such as transfers of control or assignments of licenses.

40. The factors that justify the Commission's decision not to restrict dual affiliations via multicast are not present in circumstances involving affiliation swaps. Dual affiliations via multicasting do not result in an entity owning two television stations rated in the top four in the market in violation of the Local Television Ownership Rule, which is the case with affiliation swaps now subject to the top-four prohibition, and no marketplace forces exist that would limit affiliation swaps absent the Commission's action in this *Order.* Indeed, given the marketplace conditions that tend to give rise to dual affiliations, prohibiting dual affiliation with more than one Big Four network could result in some Big Four networks becoming unavailable over the air in certain markets because there are not enough commercial television stations to accommodate each Big Four network in these markets. Prohibiting affiliation swaps would not create such a result since affiliation swaps, by definition, involve separate licensees affiliated with each network.

41. *Minority and Female Ownership.* The Commission affirms its tentative conclusion from the *FNPRM* that the current rule remains consistent with the Commission's goal to promote minority and female ownership of broadcast television stations. While the Commission retains the existing Local Television Ownership Rule for the reasons stated above, to promote competition among broadcast television stations in local markets, and not with the purpose of preserving or creating specific amounts of minority and female ownership, the Commission finds that retaining the existing rule nevertheless promotes opportunities for diversity in local television ownership. The competition-based rule helps to ensure the presence of independently owned broadcast television stations in the local market, thereby indirectly increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants. The Commission notes also that it retains without modification the current failed/failing station waiver policy, including the requirement that the waiver applicant attempt to first solicit an out-of-market buyer, which promotes possible new entry in a market by ensuring that out-of-market entities interested in purchasing a station are aware of station sale opportunities.

42. The Commission is unconvinced by arguments made by the Coalition of Smaller Market Television Stations that sharing agreements, such as JSAs and SSAs, promote minority and female ownership. While the record demonstrates that some stations that are owned by minorities and women participate in JSAs, the record also indicates that many such stations do not. The Smaller Market Coalition provides statistics regarding only full power television stations owned by women and African Americans. By their own data, the majority of stations owned by women do not participate in JSAs; moreover, they do not offer any statistics for stations owned by other minority groups, which make up the largest portion of minority station owners. No evidence shows that current minority or female station owners utilized such agreements to acquire those stations. To the contrary, anecdotal evidence suggests that JSAs, in particular, have been used by large station owners to foreclose entry into markets and that the Commission's decision to attribute JSAs has actually led to greater ownership diversity—a proposition supported by multiple parties throughout this proceeding.

43. Additionally, the Commission finds the claim that tightening the Local Television Ownership Rule will promote increased opportunities for minority and female ownership to be both speculative and unsupported by existing ownership data. No data provided in the record support a contention that the duopoly rule has reduced minority ownership or suggest that a return to the one-to-a-market rule would increase ownership opportunities for minorities and women. On the other hand, while the data reflect an increase in minority ownership following relaxation of the Local Television Ownership Rule, the Commission has no evidence in the record that would permit it to infer causation and thus it declines to loosen the rule on this basis.

44. Finally, the Commission finds that, at the present time, analyzing the implications of the incentive auction for the Local Television Ownership Rule generally, or minority and female ownership specifically is impossible. In the auction proceeding, the Commission has considered the effects of the auction on diversity, stating that voluntary participation in the reverse auction, via a channel sharing, ultra-high frequency (UHF)-to-very-high frequency (VHF), or high-VHF-to-low-VHF bid, offers a significant and unprecedented opportunity for these owners to raise capital that may enable them to stay in the broadcasting business and strengthen their operations. A licensee's participation in the reverse auction does not mean it has decided to exit the business, even if its bid is accepted. The auction provides for bid options that allow the licensee to obtain a share of auction proceeds but still remain on the air: (i) Channel sharing; (ii) a UHF station could bid to move to a VHF channel; and (iii) a high VHF station

(channels 7–13) could bid to move to a low VHF channel (2–6).

45. The broadcast television incentive auction is ongoing and its implications will not be known for some time. Broadcasters interested in participating in the reverse auction filed their applications in January 2016. Entities interested in bidding in the forward auction on the spectrum made available through the reverse auction filed applications in February 2016. The clock round bidding for the reverse auction commenced on May 31, 2016, and concluded on June 29, 2016; the Commission announced August 16, 2016, as the start date for the initial stage of the forward auction. Under statute, the identities of the broadcasters participating in the reverse auction are confidential. After the conclusion of the auction—the date of which is unknown—the Commission will release a public notice announcing the reverse and forward auction winners, and identifying those television stations that will be reassigned to new channels (or repacked). Reassigned stations will have up to 39 months after release of that public notice to complete the transition to their new channels, while winning bidders who will relinquish their spectrum entirely or move to share a channel with another station must do so within a specified number of months from receipt of their incentive payment.

46. Because of these factors, and because the incentive auction is a unique event without precedent, the Commission cannot evaluate or predict the likely impacts of the auction at this time. The Commission will soon commence its evaluation of the broadcast marketplace post-auction, and the Commission will address the implications of the incentive auction for the media ownership rules in the context of future quadrennial reviews. Further, the court in *Prometheus III* indicated that the Commission should consider how the ongoing broadcast incentive auction affects minority and female ownership. Consistent with this direction and the Commission's previous requests for comment on this issue, the Commission has evaluated the record and the status of the ongoing incentive auction, and its determination is that it is too soon to assess the impact of the auction on minority and female ownership.

B. Local Radio Ownership Rule

1. Introduction

47. Based on the record in the 2010 and 2014 Quadrennial Review proceedings, the Commission finds that the current Local Radio Ownership Rule remains necessary in the public interest and should be retained without modification. The Commission finds that the rule remains necessary to promote competition and that the radio ownership limits promote viewpoint diversity by ensuring a sufficient number of independent radio voices and by preserving a market structure that facilitates and encourages new entry into the local media market. Similarly, the Commission finds that a competitive local radio market helps to promote localism, as a competitive marketplace tends to lead to the selection of programming that is responsive to the needs and interests of the local community. Also, the Commission finds that the Local Radio Ownership Rule is consistent with its goal of promoting minority and female ownership of broadcast television stations. The Commission finds that these benefits outweigh any burdens that may result from retaining the rule without modification.

48. Accordingly, the Local Radio Ownership Rule will continue to permit the following: An entity may own (1) up to eight commercial radio stations in radio markets with 45 or more radio stations, no more than five of which can be in the same service (AM or FM); (2) up to seven commercial radio stations in radio markets with 30–44 radio stations, no more than four of which can be in the same service (AM or FM); (3) up to six commercial radio stations in radio markets with 15–29 radio stations, no more than four of which can be in the same service (AM or FM); and (4) up to five commercial radio stations in radio markets with 14 or fewer radio stations, no more than three of which can be in the same service (AM or FM), provided that an entity may not own more than 50 percent of the stations in such a market, except that an entity may always own a single AM and single FM station combination.

2. Discussion

49. Under section 202(h), the Commission considers whether the Local Radio Ownership Rule continues to be necessary in the public interest as a result of competition. In determining whether the rule meets that standard, the Commission considers whether the rule serves the public interest. While the Commission believes that the competition-based Local Radio Ownership Rule is consistent with its other policy goals and may promote such goals in various ways, the Commission does not rely on these other goals as the basis for retaining the rule. Consistent with Commission precedent, upheld by the court in *Prometheus II,* the Commission finds that the Local Radio Ownership Rule continues to be necessary to protect competition, which provides a sufficient ground on which to retain the rule.

50. *Market.* In this *Order,* the Commission adopts its tentative conclusion from the *FNPRM* that the relevant product market for review of the Local Radio Ownership Rule is the radio listening market and that including non-broadcast audio sources in that market is not appropriate. When determining the appropriate market definition for the Local Radio Ownership Rule, the Commission must determine whether alternate audio platforms provide consumers with a meaningful substitute for local broadcast radio stations. For purposes of Commission review, the nature of broadcast radio must be considered when determining whether an alternate source of audio programming provides a meaningful substitute for broadcast radio—the ability to access audio content alone is not sufficient to demonstrate substitution. Broadcast radio stations provide free, over-the-air programming tailored to the needs of the stations' local markets. In contrast, Internet radio requires either a fixed or mobile broadband Internet connection, and satellite radio requires a monthly subscription to access programming. Neither of these sources is as universally and freely available as broadcast radio, and neither typically provides programming tailored to the needs and interests of specific local markets.

51. As noted in the *FNPRM,* despite the growing popularity of non-broadcast platforms such as satellite radio and Internet-delivered audio in the commercial audio industry, broadcast radio continues to dominate in its reach among listeners. Moreover, no data was submitted to the record to refute the findings stated in the *FNPRM,* and recent data confirm that broadcast radio listenership remains essentially unchanged. In addition, the vast majority of Americans prefer to use broadcast radio as their in-car audio entertainment over new technology options. Lastly, the Commission notes that the growth of online radio listening likely includes audiences that are listening to streams of broadcast radio stations online instead of or in addition to listening over the air. One data source cited by NAB to establish the competitive impact of online radio define online radio as listening to AM/FM radio stations online and/or listening to streamed audio content available only on the Internet. To the extent that online audio merely allows

listeners to access broadcast radio station content over the Internet rather than over the air, it may not be a true alternative to broadcast radio. Ultimately, broadcast radio remains the most easily accessible and popular way for consumers to listen to audio programming, and the only one that focuses on the needs and interests of local markets.

52. In addition, the Commission disagrees with NAB's assertion regarding the lack of significance of non-broadcast radio's national platform. The local character of broadcast radio is a significant aspect of the service that must be considered when determining whether alternate audio platforms provide a meaningful substitute. The record fails to demonstrate that non-broadcast radio programmers make programming decisions to respond to competitive conditions in local markets. As the Commission has stated previously, competition among local rivals most benefits consumers and serves the public interest.

53. The Commission also disagrees with NAB's characterization that the Commission has recognized non-broadcast radio programming as meaningful substitutes for broadcast radio simply by virtue of the Commission's acknowledgment of the potential impact of alternate audio platforms on AM radio. While the Commission has recognized that AM radio is susceptible to audience migration due to its technical shortcomings, recognition of this fact does not mean that non-broadcast audio alternatives are a meaningful substitute for AM radio, specifically, or broadcast radio, in general. As discussed earlier, non-broadcast audio alternatives do not respond to competitive conditions in local markets and are not available to all consumers in a local market to the same extent as broadcast radio, which are critical considerations when determining substitutability. While the Commission does not take the position that advanced telecommunications/broadband deployment and adoption must be universal before it will consider Internet-delivered audio programming to be a competitor in the local radio listening market, the Commission finds that the current level of penetration and adoption of broadband service remains relevant when considering the extent to which this platform is a meaningful substitute for broadcast radio stations.

54. Ultimately, the Commission finds that the record demonstrates that alternative sources of audio programming are not currently meaningful substitutes for broadcast radio stations in local markets; therefore, the Commission declines to depart from its tentative conclusion to exclude non-broadcast sources of audio programming from the relevant market for the purposes of the Local Radio Ownership Rule. The Commission's approach to limit the relevant market to broadcast radio stations in local radio listening markets is consistent with current DOJ precedent in evaluating proposed mergers involving broadcast radio stations. The Commission finds that the Local Radio Ownership Rule should continue to focus on promoting competition among broadcast radio stations in local radio listening markets.

55. *Market Size Tiers.* As the *FNPRM* stated, the Commission's experience in applying the Local Radio Ownership Rule supports retention of the existing framework to promote competition. The Commission consistently has found that setting numerical ownership limits based on market size tiers remains the most effective method for preventing the acquisition of market power in local radio markets. This bright-line approach helps to keep the limited available radio spectrum from becoming locked up in the hands of one or a few radio station owners. Furthermore, the Commission believes that this approach benefits transaction participants by expediting the processing of assignment or transfer of control applications and by providing clear guidance on which transactions comply with the local radio ownership limits.

56. The Commission received two proposals for alternative methodologies for determining market size tiers. Mid-West Family proposes that the Commission assign different values to stations of different classes when calculating how many stations an entity owns in a local market (*e.g.,* Class C FM station = 1 station; Class A FM station = .5 station) or adopt a case-by-case analysis that would allow a station owner to acquire more stations than otherwise permitted under the rule to equalize the population coverage achieved by an in-market competitor. Connoisseur proposes that acquisitions involving stations in embedded markets—smaller radio markets that are located within the boundaries of a larger radio market (parent market)—should not be required to include stations owned in other embedded markets when demonstrating compliance with the ownership limits of a parent market.

57. The Commission declines to adopt Mid-West Family's proposals. First, the Commission disagrees with Mid-West Family's contention that the *Prometheus I* decision mandates an adjustment to the rule's current methodology in the way proposed by Mid-West Family. Second, as the Commission has said previously, adopting Mid-West Family's approach would permit potentially significant consolidation in local radio markets, which would be inconsistent with the rationale for the Commission's retention of the existing numerical ownership limits discussed below. Specifically, Mid-West Family's proposal to assign different values to stations of different classes does not account for the possibility of a relatively low power radio station potentially reaching a larger audience than a station with a larger service contour.

58. Moreover, service contour (and the associated population coverage) is just one of many aspects of station operations that may impact the ability to compete in a local market. Each station serves as a voice in its local market, and the Commission is not inclined to discount the value of certain voices, particularly based on criteria that may have a limited impact on a station's ability to compete. For these reasons, the Commission declines to change the methodology for determining market size tiers, as proposed by Mid-West Family.

59. The Commission also declines to adopt Mid-West Family's proposal for a case-by-case analysis of population coverage. The Commission does not believe that population coverage alone is an appropriate basis on which to judge the competitiveness of a station (or cluster of stations) or the impact of these voices in the local market. The existing rule already provides for economies of scale that help stations compete; the Commission does not believe it is appropriate (or even possible) to revise the rule based on population coverage in an attempt to achieve a competitive equilibrium, which is effectively what Mid-West Family seeks. Moreover, the ability to seek a waiver of the ownership limits already provides parties with an opportunity to assert that special circumstances justify deviation from the rule in a particular case.

60. The Commission also declines to alter the methodology for determining market size tiers as proposed by Connoisseur. Under the current methodology, owners wishing to acquire a radio station in an embedded market must satisfy the numerical limits in both the embedded market and the overall parent market. In the *2002 Biennial Review* (68 FR 46286, Aug. 5, 2003, FCC 03–127, rel. July 2, 2003) that adopted the Nielsen Audio Metro (formerly Arbitron Metro) methodology for determining radio markets, the Commission specifically declined to treat embedded markets differently. The

Commission found that requiring proposed combinations to comply with the Local Radio Ownership Rule in each Nielsen Audio Metro implicated by the proposed combination (*i.e.,* in both the embedded and parent markets) comports with its general recognition that Nielsen Audio's market definitions are the recognized industry standard. The Commission rejected a proposal to apply a different test for embedded markets because it concluded that the proposed scheme would be inconsistent with the general reliance on Nielsen Audio's market definition and cumbersome to administer. The Commission finds that Connoisseur has not presented evidence of changes in the radio industry that would warrant an across-the-board departure from the Commission's longstanding reliance on Nielsen Audio's market analysis as reported by BIA as the basis for multiple ownership calculations for embedded and parent markets. In these situations, a station's above-the-line listing in the parent market (*i.e.,* stations that are listed by BIA as home to that Metro) reflects a determination by Nielsen Audio and BIA that the station at issue competes in the parent market. For this reason, all embedded market stations that are listed as home to the parent market, like any other above-the-line stations, must be taken into account when demonstrating multiple ownership compliance in the parent market. This principle is consistent with Commission treatment of stations whose communities of license are outside the geographic boundaries of a Metro but are listed by BIA as home to the Metro. Such stations must comply with the multiple ownership limits in both the Metro market in which they are listed as home and the market in which their community of license is located, because they are considered to compete in both. Connoisseur conflates the embedded and parent market analyses, suggesting that the parent market analysis erroneously introduces stations from one embedded market to another, which may have tenuous economic or listenership ties to the first. This contention misses the point that, as a separate application of the Commission's multiple ownership rules, the parent market analysis necessarily includes all stations that compete in that market, whether or not they also compete in another embedded Metro market.

61. However, the Commission recognizes Connoisseur's concerns that Nielsen Audio and BIA's practice of designating all embedded market stations as home to the parent market—regardless of actual market share—could result in certain stations being counted for multiple ownership purposes in a market in which they do not actually compete. Although the Commission does not believe that the record justifies a blanket exception to the rule, it will entertain market-specific waiver requests under section 1.3 demonstrating that the BIA listings in a parent market do not accurately reflect competition by embedded market stations and should thus not be counted for multiple ownership purposes.

62. *Numerical Limits.* The Commission concludes that the competitive conditions in the radio marketplace that supported the Commission's decision to retain the existing numerical limits in the *2006 Quadrennial Review Order* and to propose to retain the limits in the *FNPRM* remain largely unchanged. No data was provided in the record to contradict this conclusion. As demonstrated in the record, following the relaxation of the local radio ownership limits by Congress in the 1996 Act, there was substantial consolidation of radio ownership both nationally and locally. In local markets, the largest firms continue to dominate in terms of audience and revenue share.

63. The Commission also concludes that the record in this proceeding does not reflect changes in the marketplace that warrant reconsideration of the Commission's previous decision not to make the limits more restrictive. The Commission continues to believe that tightening the restrictions would disregard the previously identified benefits of consolidation in the radio industry and would be inconsistent with the guidance provided by Congress in the 1996 Act. Further, the Commission continues to find that tightening the rule, absent grandfathering, would require divestitures that it believes would be disruptive to the radio industry and would upset the settled expectations of individual owners. The record does not indicate that the benefits derived from tightening the limits would outweigh these countervailing considerations. For these reasons, and consistent with prior decisions, the Commission concludes that tightening the limits would not be in the public interest.

64. *Clarification of Application of Local Radio Ownership Rule.* In the *2002 Biennial Review Order,* the Commission established safeguards to deter parties from attempting to manipulate Nielsen Audio Metro market definitions for purposes of circumventing the Local Radio Ownership Rule. Specifically, the restrictions prohibit a party from receiving the benefit of a change in Nielsen Audio Metro boundaries or home market designation unless that change has been in place for at least two years (or unless the station's community of license is within the Metro, in the case of a home designation change). In general, a licensee seeking to demonstrate multiple ownership compliance may rely upon the removal of a station from BIA's list of home stations in a Metro, without a two-year waiting period, when the exclusion results from an FCC-approved change in the community of license from a community that is within a Metro's geographic boundaries to one that is outside the Metro. In the *FNPRM,* the Commission proposed to clarify that this exception applies only where the community of license change also involves the physical relocation of the station facilities to a site outside the relevant Nielsen Audio Metro market boundaries. Otherwise, the licensee of a station currently located in a Nielsen Audio Metro market could use the exception to reduce the number of its stations listed as home to that Metro, without triggering the two-year waiting period and without any change in physical coverage or market competition, merely by specifying a new community of license located outside the Metro. No objections to this clarification of the exception to the two-year waiting period were voiced in the record. Accordingly, the Commission adopts this clarification as it will ensure that the local radio ownership limits cannot be manipulated based on Nielsen Audio market definitions.

65. Note 4 to § 73.3555 of the Commission's rules (Note 4) grandfathers existing station combinations that do not comply with the numerical ownership limits of § 73.3555(a). However, the Commission recognizes that certain circumstances require applicants to come into compliance with the numerical ownership limits even though the relevant station may have been part of an existing grandfathered cluster. One such circumstance is a community of license change, which occasionally can lead to difficulty when an applicant with a grandfathered cluster of stations seeks to move a station's community of license outside the relevant Nielsen Audio Metro market. Given that the Commission relies on the BIA database for information regarding Nielsen Audio Metro home designations, such an applicant cannot concurrently demonstrate compliance with the multiple ownership limits at the time of

application filing, because the station proposing to change its community will continue to be listed by BIA as home to the Metro. To resolve this administrative issue, the Commission adopts the proposal in the *FNPRM* to allow a temporary waiver of the radio multiple ownership limits in this limited instance for three months from grant of the community of license modification application to allow BIA sufficient time to change the affected station's home designation following a community of license relocation. Grant of the application will be conditioned on coming into compliance with the applicable multiple ownership limits within three months. If the relevant station is still listed by BIA as home to the Metro at the end of this temporary waiver period, the Commission will rescind grant of the application and re-specify the original community of license.

66. The Commission also proposed to exempt intra-Metro community of license changes from the requirements of Note 4. In 2006, the Commission introduced a streamlined procedure allowing an FM or AM broadcast licensee or permittee to change its community of license by filing a minor modification application. The Commission has found that strict application of Note 4 has produced disproportionately harsh results from what is now otherwise a minor and routine application process. The Commission also agrees with commenter Results Radio that the reasoning supporting the proposed exemption should apply not only to community of license changes within the physical boundaries of the Metro market, but to any community of license change where the station remains designated as home to the Metro market. Such an exemption would, in limited circumstances, provide equitable relief from the divestiture requirements of Note 4. Moreover, the Commission finds that such intra-market community of license changes in most cases will have little or no impact on the concentration of ownership within the local market. Accordingly, the Commission adopts these exemptions to Note 4.

67. Since 2003, the Commission has regularly waived the Nielsen Audio Metro market definition for Puerto Rico, which defines Puerto Rico as a single market, instead relying on a contour overlap analysis for proposed transactions. The Commission has held that the unique characteristics of Puerto Rico present a compelling showing of special circumstances that warrant departing from the Nielsen Audio Metro as the presumptive definition of the local market. This practice is based on Puerto Rico's extremely mountainous topography, large number of radio stations and station owners, and division into eight Metropolitan Statistical Areas (MSAs) as defined by the Office of Management and Budget (OMB), which demonstrate that Puerto Rico has more centers of economic activity than are accounted for by the single Puerto Rico Nielsen Audio Metro definition.

68. In previous waiver proceedings involving the Puerto Rico radio market, the Commission utilized the contour-overlap methodology that normally applies to defining markets in non-Nielsen Audio rated markets. The contour-overlap methodology is generally permitted to define the local radio market only when a station's community of license is located outside of a Nielsen Audio Metro boundary. Under this methodology, the relevant radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned. The Commission has determined previously that this methodology was appropriate to apply when examining the Puerto Rico radio market because of Puerto Rico's unique characteristics. Therefore, the Commission concludes that adoption of the contour-overlap market definition will facilitate the most appropriate application of the Local Radio Ownership Rule in Puerto Rico, and there is no opposition to this proposal in the record. Accordingly, the Commission adopts the market definition based on contour overlap for Puerto Rico that it has applied consistently in previous waiver proceedings.

69. *AM/FM Subcaps.* The AM/FM subcaps limit the number of stations from the same service—AM or FM—that an entity may own in a single market. Just as the Commission has found that the public interest is served by retaining the existing numerical limits, it finds appropriate to retain the existing subcaps. The subcaps, as originally adopted by Congress, were premised on the ownership limits adopted in the 1996 Act. As the Commission has stated previously, tightening one or both of the subcaps absent a corresponding change to the numerical ownership limits (or a tightening of one subcap absent a loosening of the other) would result in an internal inconsistency in the rule, as such a tightening would result in an entity not being permitted to own all the stations otherwise permitted under certain numerical tiers. The Commission sought comment on whether any reason supports adopting different subcaps despite this potential inconsistency and received no comments arguing for tightening the subcaps. The Commission also finds that loosening or abolishing the subcaps would create public interest harms by potentially permitting excessive consolidation of a particular service—an outcome the subcaps are designed to prevent—and reducing opportunities for new entry within local radio markets.

70. The Commission is not persuaded by suggestions that eliminating the subcaps would result in public interest benefits sufficient to justify that action. While flexibility in ownership structuring may benefit existing licensees, such benefits may not extend to new entrants who potentially would see opportunities for radio ownership diminish through the increased concentration of ownership in a particular service that elimination of the subcaps would permit. The Commission also does not agree that eliminating or modifying the AM subcap would be an effective way to revitalize AM radio. NAB's assertion that elimination of the subcap would revitalize AM radio is unsupported, as NAB fails to explain how additional consolidation of AM stations will improve the ability of those stations to overcome existing technological and competitive challenges.

71. The Commission continues to believe that broadcast radio, in general, remains the most likely avenue for new entry in the media marketplace—including entry by small businesses and entities seeking to serve niche audiences—as a result of radio's ability to more easily reach certain demographic groups and the relative affordability of radio stations compared to other mass media. As the Commission has stated previously, AM stations are generally the least expensive option for entry into the radio market, often by a significant margin, and therefore permit new entry for far less capital investment than is required to purchase an FM station. Nothing in the record of this proceeding indicates that this marketplace characteristic has changed. Therefore, the Commission concludes that the public interest remains best served by retaining the existing AM subcap, which limits concentration of AM station ownership and thereby promotes opportunities for new entry that further competition and viewpoint diversity. In addition, FCC Form 323 data for 2011 and 2013 notably indicates that minority and female ownership of radio stations (and AM stations, in particular) exceeds that of television stations.

72. Furthermore, despite the general technological limitations of AM stations, there continue to be many markets in which AM stations are significant radio voices. No data was offered in the record to refute the Commission's tentative conclusion in the *FNPRM* that AM stations continue to be significant radio voices in many markets. Also, AM stations are among the top revenue earners in some of the largest radio markets (*e.g.,* New York, Chicago, and Los Angeles). The Commission therefore finds that, in addition to the general promotion of new entry across all markets described above, retention of the existing AM subcaps is also necessary to prevent a single station owner from acquiring excessive market power through concentration of ownership of AM stations in those markets in which AM stations are significant radio voices.

73. The Commission also concludes that there continue to be technical and marketplace differences between AM and FM stations that justify retention of both the AM and FM subcaps to promote competition in local radio markets. As the Commission has noted previously, FM stations enjoy unique advantages over AM stations, such as increased bandwidth, superior audio signal fidelity, and longer hours of operation. These technological differences often, but not always, result in greater listenership and revenues for FM stations that justifies a limit on the concentration of FM station ownership, in particular. Nothing in the record of this proceeding indicates that the Commission should depart from the tentative conclusions in the *FNPRM* regarding the differences between AM and FM radio. Therefore, the Commission concludes that retaining the existing FM subcap continues to serve the public interest as well. Accordingly, the Commission retains both the AM and FM subcaps without modification.

74. The Commission also finds that the digital radio transition and the changes to the FM translator rules have not yet meaningfully ameliorated the general differences between AM and FM stations, such that the justifications described above have been rendered moot. Recent digital radio deployment data support previous findings that FM stations are actually increasing the technological divide through greater adoption rates of digital radio technology than AM stations. The trends noted in the *FNPRM* have continued. Also, the recent changes to the FM translator rules, to allow AM stations to use currently authorized FM translator stations to retransmit their AM service within their AM stations' current coverage areas, have not yet significantly impacted the technological and marketplace differences between AM and FM stations. While the change to the FM translator rule benefited many AM stations, more than half of all AM stations continue to operate without associated FM translators. The Commission received no objections or material in the record to refute its findings; however, the Commission will continue to monitor the impact of the digital radio deployment and the FM translator rule change in future media ownership proceedings.

75. *Waiver Criteria.* The Commission declines to adopt specific waiver criteria for the Local Radio Ownership Rule and will continue to rely on the general waiver standard. The Commission finds that the considerations in proposals for specific waiver criteria can be advanced adequately in the context of a general waiver request under § 1.3 of the Commission's rules and notes that the Commission has an obligation to take a hard look at whether enforcement of a rule in a particular case serves the rule's purpose or instead frustrates the public interest. Therefore, the Commission concludes that adoption of a specific waiver standard is not appropriate at this time.

76. *Minority and Female Ownership.* The Commission affirms its tentative conclusion from the *FNPRM* that the current rule remains consistent with the Commission's goal to promote minority and female ownership of broadcast radio stations. While the Commission retains the existing Local Radio Ownership Rule for the specific reasons stated above, it finds that retaining the existing rule nevertheless promotes opportunities for diverse ownership in local radio ownership. This competition-based rule indirectly advances the Commission's diversity goal by helping to ensure the presence of independently owned broadcast radio stations in the local market, thereby increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants. The Commission has also retained the AM/FM subcaps, in part, to help promote new entry—as noted, the AM band in particular has historically provided lower-cost ownership opportunities for new entrants.

77. Consistent with Commission analysis of the local television ownership rule above, however, the Commission finds the claim that tightening the Local Radio Ownership Rule would promote increased opportunities for minority and female ownership to be speculative and unsupported by existing ownership data. No data in the record support a contention that tightening the local radio ownership limits would promote ownership opportunities for minorities and women.

78. In addition, the Commission does not believe that Media Ownership Study 7, which considers the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences, supports the contention that tightening the local radio ownership limits would promote minority and female ownership. While the data suggest the existence of a positive relationship between minority ownership of radio stations and the total amount of minority-targeted radio programming available in a market, the potential impact of tightening the ownership limits on minority ownership was not part of the study design, nor something that can be reasonably inferred from the data.

79. Nothing in the data or any other evidence in the record permits the Commission to infer causation; therefore, the Commission declines to loosen the existing ownership limits on the basis of any trend reflected in the data. The Commission remains mindful of the potential impact of consolidation in the radio industry on ownership opportunities for new entrants, including small businesses, and minority- and women-owned businesses, and the Commission will continue to consider the implications in the context of future quadrennial reviews.

C. Newspaper/Broadcast Cross-Ownership Rule

1. Introduction

80. The Newspaper/Broadcast Cross-Ownership (NBCO) Rule prohibits common ownership of a daily newspaper and a full-power broadcast station (AM, FM, or TV) if the station's service contour encompasses the newspaper's community of publication. The rule currently in effect prohibits the licensing of an AM, FM, or TV broadcast station to a party (including all parties under common control) that directly or indirectly owns, operates, or controls a daily newspaper, if the entire community in which the newspaper is published would be encompassed within the service contour of the station, namely: (1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186; (2) the predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313; or (3) the

Grade A contour of a TV station, computed in accordance with § 73.684.

81. In analyzing the NBCO Rule under section 202(h), the Commission's focus is on the rule's primary purpose—to promote viewpoint diversity at the local level. As the Commission noted in adopting the NBCO Rule, if a democratic society is to function, nothing can be more important than insuring a free flow of information from as many divergent sources as possible. Broadcast stations and daily newspapers remain the predominant sources of the viewpoint diversity that the NBCO Rule is designed to protect. The proliferation of (primarily national) content available from cable and satellite programming networks and from online sources has not altered the enduring reality that traditional media outlets are the principal sources of essential local news and information. The rapid and ongoing changes to the overall media marketplace do not negate the rule's basic premise that the divergence of viewpoints between a cross-owned newspaper and broadcast station cannot be expected to be the same as if they were antagonistically run.

82. After careful consideration of the record, the Commission concludes that regulation of newspaper/broadcast cross-ownership within a local market remains necessary to protect and promote viewpoint diversity. The Commission continues to find, however, that an absolute ban on newspaper/broadcast cross-ownership is overly broad. Accordingly, and consistent with the Commission's approach in the 2006 proceeding, the adopted rule generally prohibits common ownership of a broadcast station and daily newspaper in the same local market but provides for a modest loosening of the previous ban on cross-ownership consistent with the Commission's view that an absolute ban may be overly restrictive in some cases. The Commission finds that the benefits of the revised rule outweigh any burdens that may result from adopting the rule.

2. Discussion

a. Policy Goals

83. *Viewpoint diversity.* The record reaffirms the Commission's view that the NBCO Rule remains necessary to promote diversity, specifically viewpoint diversity. The *FNPRM* commenters that oppose this position do not present evidence persuading the Commission to alter its tentative conclusion in the *FNPRM* that newspapers and broadcast television stations, and their affiliated Web sites, continue to be the predominant providers of local news and information upon which consumers rely. For the most part, opponents of the rule reiterate the two principal arguments put forth by commenters to the initial *NPRM,* namely that: (1) Ownership does not necessarily influence viewpoint and (2) an array of diverse viewpoints is widely available from an abundance of outlets, particularly via the Internet. The Commission addressed these arguments extensively in the *FNPRM* and does not find them any more persuasive after reviewing the *FNPRM* comments.

84. With regard to the first argument, in the *FNPRM,* the Commission acknowledged that *NPRM* commenters provided examples of instances when cross-owned properties diverged in viewpoint. The Commission noted, however, that, although similar examples were provided during the Commission's 2002 and 2006 reviews, the Commission continued to restrict newspaper/broadcast cross-ownership given that an owner has the opportunity, ability, and right to influence the editorial process of media outlets it owns, regardless of the degree to which it exercises that power. The Third Circuit affirmed the Commission's reasoning that the possibility of a connection between ownership and viewpoint is not disproved by evidence that a connection is not always present. Moreover, the Commission has noted previously the existence of ample evidence pointing in the other direction, namely that ownership can affect viewpoint. In any event, the Commission's goal is to maximize the number of distinct voices in a market, which the Commission believe is achieved more effectively by relying on separate ownership rather than on a hope or expectation that owners of cross-owned properties will maintain a distance from the editorial process. The Commission's concern is not alleviated by the broadcasters' argument that consumers' ideological preferences have a greater influence on editorial slant than ownership does. Indeed, the Commission believes that such influence only increases the importance of ensuring that a multiplicity of voices are available to consumers.

85. With regard to the second argument, in the *FNPRM,* the Commission addressed arguments that the NBCO Rule is obsolete because today's consumers have access to a vast array of news sources. The Commission tentatively concluded that a cross-ownership restriction remains necessary, despite the increase in media outlets. Supporters of the rule agreed with the Commission that traditional news providers, and their affiliated Web sites, continue to be the most relied-upon sources of local news and information. In the *FNPRM,* the Commission pointed to evidence suggesting that, despite the Internet's increased role in news distribution, traditional news providers are still critical to ensuring viewpoint diversity at the local level. The record showed that independent online sources currently cannot substitute for the original reporting by professional journalists associated with traditional local media.

86. After reviewing the *FNPRM* comments, which raise substantially the same points that were addressed in the *FNPRM,* the Commission's position is unchanged. Several *FNPRM* commenters reiterate that the Commission's focus on traditional media is too narrow because other media outlets contribute to viewpoint diversity. Evidence shows, however, that the contributions of cable, satellite, and Internet sources serve as a supplement, but not as a substitute, for newspapers and broadcasters providing local news and information. A U.S. District Court judge recently rejected an argument that online sources of local news present sufficient competition to local newspapers in Orange County and Riverside County in Southern California (*United States* v. *Tribune Publishing Co.,* No. 16 CV 01822 AB (PJWx) (C.D. Cal. Mar. 18, 2016)). The judge concluded that, as creators of local content, local newspapers continue to serve a unique function in the marketplace and are not reasonably interchangeable with online sources of news. He was not convinced that the Internet renders geography and distinctions between kinds of news sources obsolete. The news and information provided by cable and satellite networks generally targets a wide geographic audience, and the record demonstrates that local news and information available online usually originates from traditional media outlets. As discussed in the *NPRM* and *FNPRM,* considerable evidence shows that most online sources of local news are affiliated with newspapers or broadcast stations or contain content that originates from those traditional sources. The Commission affirms its earlier finding that local, hyperlocal, and niche Web sites generally do not fill the role of local television stations or daily newspapers. Local television continues to dominate despite the increasing use of social media as a source of news. Moreover, the social media platforms that consumers turn to for news, such as Facebook, Twitter,

and Google, generally aggregate news stories from other sources and those sources do not focus necessarily on local news.

87. The Commission concludes that the NBCO Rule should continue to apply to newspaper/radio cross-ownership. The Commission finds that the newspaper/radio cross-ownership restriction serves the public interest because the record shows that radio stations contribute in meaningful ways to viewpoint diversity within their communities. The Commission is persuaded that radio adds an important voice in many local communities such that lifting the restriction could harm viewpoint diversity. Although the Commission tentatively concluded earlier in this proceeding that radio stations are not the primary outlets that contribute to viewpoint diversity in local markets and that consumers rely predominantly on other sources for local news and information, the Commission finds that radio's role in promoting viewpoint diversity is significant enough to warrant retention of the restriction. Therefore, the Commission declines to eliminate the restriction or to adopt a presumptive waiver standard, such as the one proposed in the *NPRM,* favoring newspaper/radio mergers in the top 20 DMAs.

88. As discussed in the *FNPRM,* the Commission's conclusion that radio contributes sufficiently to viewpoint diversity to warrant retention of the newspaper/radio cross-ownership restriction is consistent with the longstanding position that newspaper/radio combinations should be prohibited even though radio generally plays a lesser role in contributing to viewpoint diversity. A lesser role does not mean that radio plays no role. The record shows that broadcast radio stations produce a meaningful amount of local news and information content that is relied on by a significant portion of the population and, therefore, provide significant contributions to viewpoint diversity.

89. With over 90 percent of Americans listening to radio on a weekly basis, radio's potential for influencing viewpoint is great. Moreover, recent evidence suggests that radio stations air a substantial amount of local news programming. Evidence in the record also indicates that members of certain communities may rely more heavily on broadcast radio stations for local news and information. Such reliance may be especially strong when radio stations target particular demographic groups or offer news programs in a foreign language. A community radio station recently licensed in Minneapolis reports local news stories in the Somali language and provides information of particular interest to the local Somali-American community. Although the NBCO Rule does not apply to that particular station due to its low-power status, the example nonetheless demonstrates the important contributions that radio can make to viewpoint diversity.

90. Evidence of reliance on broadcast radio for local news and public information programming is important for assessing radio's contributions to viewpoint diversity; however, to be a meaningful source of viewpoint diversity in local markets, broadcast radio stations must increase the diversity of local information, not simply its availability. The record demonstrates that radio stations still contribute to viewpoint diversity by producing a meaningful amount of local news and public interest programming that is responsive to the needs and concerns of the community. Moreover, invitations to call-in to a radio program offer local residents unique opportunities to participate interactively in a conversation about an issue of local concern.

91. For the foregoing reasons, the Commission finds that radio provides an important contribution to viewpoint diversity such that lifting the newspaper/radio cross-ownership restriction in all markets across-the-board could sweep too broadly. The Commission finds that it must take care not to overlook the contributions to viewpoint diversity offered by radio stations, particularly to the extent that dedicated audiences of radio stations rely on radio as a valuable source of local news and information, and that radio stations provide an additional opportunity for civic engagement, as certain commenters attest. Thus, while the Commission previously has recognized that a radio station generally cannot be considered the equal of a newspaper or television station when it comes to providing news, in fact, for a significant portion of the population radio may play an influential role as a source for news or the medium turned to for discussion of matters of local concern.

92. Accordingly, the Commission finds that radio stations can contribute in a meaningful way to viewpoint diversity within local communities and that a newspaper's purchase of a radio station in the same local market could harm viewpoint diversity in certain circumstances. As a result, the Commission retains both the newspaper/radio and the newspaper/television cross-ownership restrictions. However, consistent with previous Commission findings, the Commission believes that enforcement of the NBCO Rule may not be necessary to promote viewpoint diversity in every circumstance and that there could be situations where enforcement would disserve the public interest. Furthermore, the Commission reaffirms its earlier findings that the opportunity to share newsgathering resources and realize other efficiencies derived from economies of scale and scope may improve the ability of commonly owned media outlets to provide local news and information. In certain circumstances, newspaper/broadcast cross-ownership may benefit the news offerings in a local market without causing undue harm to viewpoint diversity. In recognition of this, the Commission will ease the application of the prohibition through a waiver process and other modifications to the scope of the rule.

93. *Localism.* The Commission affirms its belief stated in the *FNPRM* that the nation's interest in maintaining a robust democracy through a multiplicity of voices justifies maintaining certain NBCO restrictions even if doing so prevents some combinations that might create cost-savings and efficiencies in news production. While *FNPRM* commenters proffer further examples in support of the proposition that such cost-savings and efficiencies may allow cross-owned properties to provide a higher quality and quantity of local news, these additional examples do not change the Commission's conclusion. The Commission has long accepted that proposition but also recognized that increased efficiencies do not necessarily lead to localism benefits. Furthermore, even if cost-savings are used to increase investment in local news production, the purpose of this rule is to promote and preserve the widest possible range of viewpoint; it is not, as NAB seems to suggest, to promote localism. The Commission therefore disagrees with NAB's argument that retaining cross-ownership restrictions will stymie the rule's intended benefits. Allowing media owners to achieve economies of scale and scope may enable them to disseminate a greater amount of local news over one or both of their cross-owned properties, but the costly result would be fewer independently owned outlets in the market. The loss of a local voice runs counter to the Commission's goal of promoting viewpoint diversity, regardless of whether cross-ownership is more or less likely to produce localism benefits. Although the Commission has found previously that

the NBCO Rule is not necessary to promote its localism goal, that determination, which the Commission affirms in this *Order,* does not undermine the viewpoint diversity rationale for the rule.

94. *Competition.* Promoting competition was not the Commission's primary concern when it considered implementation of the NBCO Rule, and in its 2002 biennial review the Commission found that the rule was not necessary to promote competition because newspapers and broadcast stations do not compete in the same product markets. The *FNPRM* record does not present a convincing case that is contrary to the Commission's longstanding position. The fact that broadcasters and newspapers both sell to local advertisers does not mean they compete with each other for advertising.

95. Although the Commission does not find that the rule is necessary to promote competition, it has concluded that the rule is necessary to promote viewpoint diversity. Therefore, the Commission is not swayed by the media industry's arguments that the NBCO Rule should be eliminated because it potentially limits opportunities for newspapers and broadcasters to expand their businesses. As stated in the *FNPRM,* the Commission does not believe that viewpoint diversity in local markets should be jeopardized to enable media owners to increase their revenue by pursuing cross-ownership within the same local market. Moreover, the application of the NBCO Rule has a very limited geographic scope. Even if the potential efficiencies of inter-market consolidation are fewer than those to be gained from in-market acquisitions, the rule does not prevent media owners that seek new revenue streams from acquiring properties in other markets or alternative media outlets that are not subject to the NBCO Rule.

b. Scope of the Rule

96. *Newspaper/Television Combinations.* The current rule prohibits common ownership of a daily newspaper and a television station when the Grade A contour of the station encompasses the entire community in which the newspaper is published. The Commission retained the Grade A contour approach when it revised the NBCO Rule in 2006. The trigger for the newspaper/television cross-ownership restriction therefore relies on a station's Grade A contour, which was rendered obsolete by the transition to digital television service.

97. The Commission adopts its uncontested proposal in the *FNPRM* to update the geographic scope of the restriction by incorporating both a television station's DMA and its digital service contour. Specifically, cross-ownership of a full-power television station and a daily newspaper will be prohibited when: (1) The community of license of the television station and the community of publication of the newspaper are in the same Nielsen DMA, and (2) the principal community contour (PCC) of the television station, as defined in § 73.625 of the Commission's rules, encompasses the entire community in which the newspaper is published. For the reasons provided in the *FNPRM,* the Commission will maintain the current definition of a daily newspaper as one which is published four or more days per week, which is in the dominant language in the market, and which is circulated generally in the community of publication. The Commission explained its disinclination to revise the definition such as by imposing a minimum circulation requirement. Both conditions need to be met for the cross-ownership prohibition to be triggered. The DMA requirement ensures that the newspaper and television station serve the same media market, and the contour requirement ensures that they actually reach the same communities and consumers within that larger geographic market.

98. *Newspaper/Radio Combinations.* The current rule prohibits cross-ownership when the entire community in which the newspaper is published would be encompassed within the service contour of: (1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186, or (2) the predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313. Consistent with arguments made in the record, the Commission will not replace radio contours, but instead the Commission will include an additional requirement that the radio station and the newspaper be located in the same Nielsen Audio Metro market, where one is defined. In circumstances in which neither the radio station nor the newspaper is geographically located within a defined Nielsen Audio Metro market, then the trigger will be determined, as before, solely on the basis of the station's service contour. The Commission finds that the added Nielsen Audio Metro market condition will serve a valid limiting role because Nielsen Audio designations are based on listening patterns, which will focus the restriction on properties serving the same audience.

99. Specifically, in areas designated as Nielsen Audio Metro markets, cross-ownership of a full-power radio station and a daily newspaper will be prohibited when: (1) The radio station and the community of publication of the newspaper are located in the same Nielsen Audio Metro market, and (2) the entire community in which the newspaper is published is encompassed within the service contour of the station, namely: (a) The predicted or measured 2 mV/m groundwave contour of an AM station, computed in accordance with § 73.183 or § 73.186; or (b) the predicted or measured 1 mV/m contour for an FM station, computed in accordance with § 73.313. Both conditions need to be met for the cross-ownership restriction to apply, except when both the community of publication of the newspaper and the community of license of the radio station are not located in a Nielsen Audio Metro market, then only the second condition need be met. Consistent with the Local Radio Ownership Rule, the Commission will rely on Nielsen to determine whether a radio station is in the same Nielsen Audio Metro market as the newspaper's community of publication. The Local Radio Ownership Rule relies, in part, on Nielsen Audio Metro markets in applying the radio ownership limits. In that context, the Commission has developed certain procedural safeguards to deter parties from attempting to manipulate Nielsen Audio market definitions to evade the Local Radio Ownership Rules. By relying on Nielsen Audio Metro markets, where available, the revised NBCO Rule is susceptible to similar manipulation by parties; accordingly, the Commission will apply the procedures adopted in the context of the Local Radio Ownership Rule to the adopted NBCO Rule. Specifically, for purposes of this rule, a radio station will be counted as part of the Nielsen Audio Metro market in which the station's community of license is geographically located and any other Nielsen Audio Metro market in which the station is listed by BIA as home to that market. This approach will ensure that a radio station is considered to be part of each Nielsen Audio Metro market in which that station is either geographically located or competes. The Commission believes Nielsen's determination of a radio market's boundaries is useful in considering whether particular communities rely on the same media voices. The Commission believes that such a determination, combined with the actual service areas of the respective facilities, gives a stronger picture of the relevant market and instances in which the Commission should prohibit common ownership. Therefore, the

Commission believes that including consideration of the Nielsen Audio Metro market (if one exists) in the determination of when the cross-ownership prohibition is triggered will help focus the restriction specifically on those circumstances where the newspaper and broadcast facility truly serve the same audience.

c. Exception for Failed and Failing Broadcast Stations and Newspapers

100. For the reasons expressed in the *FNPRM,* the Commission will not create an exception for failed/failing stations or newspapers and no commenters addressed this issue. The current approach will not preclude waiver applicants from attempting to show how such a commitment could enhance viewpoint diversity in the local market. However, applicants seeking a waiver in part or in whole on that basis should recall the Commission's previously stated concerns that such a commitment would be impracticable to enforce and arguably might require the Commission to make content-based assessments.

101. Consistent with its proposal in the *FNPRM,* the Commission will adopt an express exception for proposed combinations involving a failed or failing newspaper, television station, or radio station. For the reasons explained below in connection with the timing of a waiver request, the Commission will require television and radio licensees to file for an exception to the NBCO Rule before consummating the acquisition of a newspaper. It stands to reason that a merger involving a failed or failing newspaper or broadcast station is not likely to harm viewpoint diversity in the local market. If the entity is unable to continue as a standalone operation, and thus contribute to viewpoint diversity, then preventing its disappearance from the market potentially can enhance, and will not diminish, viewpoint diversity.

102. The Commission adopts failed/failing criteria consistent with those proposed in the *FNPRM,* which are similar to those used for the Local Television Ownership Rule and the Radio/Television Cross-Ownership Rule. That is, a failed newspaper or broadcast station must show that, as applicable, it had stopped circulating or had been dark due to financial distress for at least four months immediately before the filing of the assignment or transfer of control application, or that it was involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. To qualify as failing, the applicant would have to show that: (1) If a broadcast television station is the failing entity, that it has had a low all-day audience share (*i.e.,* 4 percent or lower); (2) the financial condition of the newspaper or broadcast station was poor (*i.e.,* a negative cash flow for the previous three years); and (3) the combination would produce public interest benefits. In addition, as with the exemption for satellite television stations pursuant to Note 5 of § 73.3555, in the event of an assignment of license or transfer of control of the broadcast/newspaper combination, the proposed assignee or transferee would need to make an appropriate showing demonstrating compliance with the elements of the failed/failing entity exception at the time of the assignment or transfer if it wishes to continue the common ownership pursuant to this exception. Further, although the Commission is not including this failed/failing exception in Note 7 of § 73.3555 of the Commission's rules (which addresses the failed/failing waiver criteria applicable to the local television ownership rule and the radio/television cross-ownership rule), given the similarities, the precedent established in the application of Note 7 shall apply to the application of the NBCO failed/failing criteria, as appropriate. In addition, the applicants must show that the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the failed or failing newspaper or station and that selling the newspaper or station to any out-of-market buyer would result in an artificially depressed price. One way to satisfy this requirement would be to provide an affidavit from an independent broker affirming that active and serious efforts had been made to sell the newspaper or broadcast station, and that no reasonable offer from an entity outside the market had been received.

103. Because the Commission is creating an exception to the NBCO Rule, rather than a waiver opportunity, applicants seeking a failed/failing entity exception need not show, either at the time of their application or during subsequent license renewals, that the tangible and verifiable public interest benefits of the combination outweigh any harms. As the Commission has concluded that the exception serves the public interest in diversity simply by preserving a media outlet, licensees need not demonstrate that the additional benefits outweigh the potential harms. Recognizing that an absolute ban on newspaper/broadcast cross ownership is overly broad, the Commission believes providing greater flexibility and certainty in the context of this rule is appropriate. Thus, the Commission believes a clear exception to the rule for failed and failing entities, rather than a waiver requiring a balancing of the harms and benefits, is appropriate to provide certainty for relief, as the Commission believes such combinations will have a minimal impact on viewpoint diversity.

d. Waiver Standard

104. Consistent with the tentative conclusion in the *FNPRM,* the Commission declines to adopt a bright-line rule that would exempt certain combinations from the newspaper/broadcast cross-ownership rule based on a certain set of criteria. Given the variability among local markets, the Commission maintains its view that blanket exemptions should not be built into the rule. As the Commission explained in the *FNPRM,* while a rule with built-in exemptions might lend greater certainty to parties considering a merger, it would not lead necessarily to the best result in an individual market. The Commission reiterates its concern that such a rule would be too blunt an instrument to be used for these types of mergers. Rather, the Commission believes that the more prudent way to ease the rule's application is through a case-by-case waiver process with a particular focus on the impact the proposed merger would have on viewpoint diversity in the market.

105. Therefore, consistent with other efforts to ease the rule's application, the Commission provides for the consideration of waiver requests of the NBCO Rule on a case-by-case basis. The Commission believes a case-by-case waiver approach will produce sensible outcomes and also improve transparency and public participation in the process. To facilitate public participation further, the Commission will require television and radio licensees to file a request for waiver of the NBCO Rule before consummating the acquisition of a newspaper, rather than at the time of the station's license renewal. As the Commission explained in the *FNPRM,* a broadcast licensee that triggered the NBCO Rule with the purchase of a newspaper previously was required, absent a waiver, to dispose of its station within one year or by the time of its next renewal date, whichever was longer. Alternatively, it could have pursued a waiver in conjunction with its license renewal, at which point interested parties could comment on the waiver request. As a result, the opportunity to comment on a licensee's acquisition of a newspaper might have arisen years after the purchase. The Commission's remedy will enable the public to comment on such acquisitions in a timely and effective manner before

the purchase is consummated. Moreover, by requiring prior approval, this approach will provide certainty to transaction participants that the proposed combination will not be subject to potential divestiture after the operations already have been integrated—a certainty that is not provided by the current approach. To alert interested parties to a proposed newspaper acquisition, the Commission will require that the Media Bureau place such waiver requests on public notice and solicit public comment on the proposed acquisition.

106. With regard to the two case-by-case options described in the *FNPRM* for considering waivers, the Commission adopts what is termed a pure case-by-case approach. That is, the Commission will evaluate waiver requests by assessing the totality of the circumstances for each individual transaction, considering each waiver request anew without measuring it against a set of defined criteria or awarding the applicant an automatic presumption based on a *prima facie* showing of particular elements. Waiver applicants will have the flexibility to present their most compelling reasons why strict application of the rule is not necessary to promote the goal of viewpoint diversity in that particular local market. Furthermore, consistent with its tentative conclusion in the *FNPRM,* the Commission declines to adopt the four-factor test that applied to waiver requests under the 2006 rule because the Commission concludes that the factors would be vague, subjective, difficult to verify, and costly to enforce. As the Commission stated in the *FNPRM,* evidence supporting considerations like those reflected in the four factors, although not required, is also not discouraged if a waiver applicant believes it would be useful in supporting its request. Thus, an applicant seeking a waiver under this approach will have to show that grant of the waiver will not unduly harm viewpoint diversity. Likewise, opponents of a transaction can respond with a range of arguments and evidence they consider most pertinent to that case. The Commission believes this approach will provide the Commission the flexibility needed to allow due consideration of all factors relevant to a case, without spending time and resources assessing presumptive criteria that may not be useful for a particular review. The 2006 rule required a waiver applicant attempting to overcome a negative presumption to show, with clear and convincing evidence, that the merged entity would increase diversity and competition. In the *FNPRM,* the Commission proposed not to incorporate the requirement into any presumptive waiver standard that the Commission might adopt. *FNPRM* commenters did not address the issue, and the Commission's concern remains that the requirement would impose an overly burdensome evidentiary standard. Although the issue arguably is mooted by the Commission's decision not to adopt a presumptive waiver standard, the Commission also will not incorporate that standard into the adopted waiver approach. Thus, the Commission can hone in quickly on the most important considerations of the proposed transaction and approach them with an openness that might not occur with a set framework. The Commission believes that, as a result, it will be able to determine more accurately and precisely whether a proposed combination will have an adverse impact on viewpoint diversity in the relevant local market. If a proposed combination does not present any undue harm to viewpoint diversity, which is the underlying purpose of the rule, then prohibiting the combination is not necessary in the public interest.

107. The Commission recognizes that a case-by-case approach with presumptive guidelines, such as the one described in the *FNPRM,* potentially could offer waiver applicants greater certainty and consistency. The criteria proposed in this proceeding, however, were widely criticized and rejected by commenters. Ultimately, the Commission is persuaded by the criticism in the record that the proposed presumptive guidelines should not be adopted. Moreover, the Commission is concerned that any presumptive approach could result in an unduly rigid evaluation of a waiver application. Instead, the Commission believes that the pure case-by-case approach is the appropriate way to assess requests for waiver of the NBCO Rule. For all the reasons that favor a pure case-by-case approach, plus those stated in the *FNPRM,* the Commission declines to adopt Cox's proposal for a two-part test that would measure every proposed transaction against the same set of fixed criteria. As the Commission stated in the *FNPRM,* it believes that the first part of Cox's proposed test would define independent media voices too broadly and that the second part of Cox's proposed test would be difficult to apply and enforce in an objective, content-neutral manner.

108. In addition, the Commission disagrees with Cox that a pure case-by-case approach is necessarily a retreat from a presumptive waiver standard. Rather, a pure case-by-case approach lifts the potential burden of having to overcome a negative presumption. Regardless, the Commission's intent in choosing a pure case-by-case approach over a presumptive waiver standard is not to increase or decrease the number of waiver approvals; it is to increase the likelihood of achieving the proper result in each individual case. Applying presumptive criteria can work well in other contexts and for other rules, but, under the current record and given the nature of viewpoint diversity and its dependency on the particular facts and circumstances of a specific market, the Commission finds that a pure case-by-case approach is best suited for handling requests for waiver of this rule.

109. The Commission also disagrees with Cox that a pure case-by-case approach is the equivalent of not having a waiver standard. To be clear, the Commission's standard requires applicants seeking a waiver of the NBCO Rule to show that their proposed combination would not unduly harm viewpoint diversity in the local market. The pure case-by-case approach describes the method by which the Commission will determine whether this standard is met. The method of examining the totality of the circumstances may entail a broad review, but the standard to be met is narrowly focused on the impact on viewpoint diversity. The Commission anticipates that the precedent that evolves from future waiver decisions will provide further guidance to entities considering a merger.

110. The Commission clarifies that this waiver standard is distinct from the traditional waiver standard under section 1.3, which requires a showing of good cause and applies to all Commission rules. By specifically allowing for a waiver of the NBCO Rule in cases where applicants can demonstrate that the proposed combination will not unduly harm viewpoint diversity, the Commission signals its recognition that there may be instances where enforcing the prohibition against ownership of a newspaper and broadcast station is not necessary to serve the rule's purpose of promoting viewpoint diversity in the local market. Indeed, the Commission's determination herein is that the public interest would not be served by restricting specific combinations that do not unduly harm viewpoint diversity. While in the context of section 1.3 waiver requests the Commission has considered showings of undue hardship, the equities of a particular case, or other good cause, in this particular context an applicant is

required to make a narrower showing, and a waiver will be granted so long as the applicants can demonstrate that viewpoint diversity will not be unduly harmed as a result of the proposed combination. The NBCO waiver standard does not replace or limit a waiver applicant's available options under section 1.3. Indeed, while the NBCO waiver standard articulated focuses specifically on the impact of the proposed merger on viewpoint diversity in the local market and requires applicants to make a showing as to such impact, waiver requests under section 1.3 could include a broader public interest showing, under which parties can assert any variety of considerations they believe warrant waiver of the rule consistent with established precedent. Waiver of the Commission's policies or rules under section 1.3 is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest. Under this section, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. Although the Commission must give waiver requests a hard look, an applicant for waiver under section 1.3 faces a high hurdle even at the starting gate and must support its waiver request with a compelling showing.

111. *FNPRM* commenters did not address the Commission's question whether a case-by-case approach should incorporate, or disavow, these waiver criteria, which remain in effect along with the current rule. Accordingly, because of the lack of comment on these criteria (for or against), and for the reasons discussed above, the Commission is adopting a new waiver standard that replaces these earlier divestiture waiver criteria.

e. Grandfathering

112. The Commission will grandfather, to the extent required, any existing newspaper/broadcast combinations that no longer comply with the NBCO Rule as a result of the changes to the scope of the rule. In addition, as stated in the *FNPRM,* the Commission will continue to allow all combinations currently in existence that have been grandfathered or approved by permanent waiver to the extent that grandfathering/permanent waivers are still necessary to permit common ownership. As the Commission explained, it leaves in place any filing deadlines the Commission has imposed previously on specific parties related to cross-ownership proceedings. Consistent with Commission precedent, grandfathered combinations, including those subject to permanent waivers, are not transferrable. The Commission disagrees with assertions that, contrary to longstanding Commission precedent, grandfathered and approved combinations should be freely transferable in perpetuity. As stated in the *FNPRM,* the Commission will continue to allow grandfathered status to survive *pro forma* changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee. The Commission's approach strikes the appropriate balance between avoiding imposition of the hardship of divestiture on owners of existing combinations that have owned a combination in reliance on the rules and moving the industry toward compliance with current rules when owners voluntarily decide to sell their properties. A transferee or assignee of the properties must comply with the NBCO Rule in effect at the time of the transaction or obtain a new waiver. This requirement applies to the transfer of existing combinations already grandfathered or approved and to the transfer of combinations grandfathered as a result of becoming non-compliant due to the changes to the scope of the rule.

f. Minority and Female Ownership

113. The Commission has declined to adopt the potential rule changes that commenters argue could lead to increased consolidation to the possible detriment of minority- and women-owned businesses. Instead, the adopted rule generally prohibits common ownership of a broadcast station and daily newspaper in the same local market but provides for a modest loosening of the previous ban on cross-ownership through revisions to the rule's geographic scope, creation of an exception for failed/failing entities, and adoption of a viewpoint diversity-based waiver standard. The Commission does not believe that these modest revisions are likely to result in significant new combinations, nor does the record establish that significant demand exists for newspaper/broadcast combinations; indeed, the trend is in the opposite direction, as cross-owned combinations are being severed. Moreover, as discussed in the *FNPRM,* the Commission finds that the record fails to demonstrate that the modifications to the adopted NBCO Rule are likely to result in harm to minority and female ownership. Additionally, the study that Free Press proposes, which involves examining grandfathered combinations separately from waived combinations, would be unlikely to provide useful results given the small sample size available for each of those categories (Free Press's own criticisms of the MMTC Cross-Ownership Study are instructive in this regard). Nor is such a study necessary given the existing record evidence and the modest revisions adopted.

114. Ultimately, while the Commission adopts the revised NBCO Rule based on its viewpoint diversity goal, and not with the purpose of preserving or creating specific amounts of minority and female ownership, the Commission finds that this rule nevertheless helps to promote opportunities for diversity in broadcast television and radio ownership. The rule helps to increase the likelihood of a variety of viewpoints and to preserve potential ownership opportunities for new voices.

D. Radio/Television Cross-Ownership Rule

1. Introduction

115. The Radio/Television Cross-Ownership Rule prohibits an entity from owning more than two television stations and one radio station within the same market, unless the market meets the following size criteria. The rule applies only to commercial stations. If at least 10 independently owned media voices would remain in the market post-merger, an entity may own up to two television stations and four radio stations. If at least 20 independently owned media voices would remain in the market post-merger, an entity may own either: (1) Two television stations and six radio stations, or (2) one television station and seven radio stations. In all instances, entities also must comply with the local radio and local television ownership limits. The market is determined by looking at the service contours of the relevant stations. The rule specifies how to count the number of media voices in a market, including television stations, radio stations, newspapers, and cable systems.

116. After consideration of the full record, including the further comments received in response to the *FNPRM,* the Commission concludes that the Radio/Television Cross-Ownership Rule continues to be necessary given that radio stations and television stations both contribute in meaningful ways to promote viewpoint diversity in local markets. The Commission's finding is consistent with its decision in the *2006 Quadrennial Review Order* to retain the rule, which the Third Circuit upheld. In the *NPRM* and *FNPRM,* the Commission asked whether the rule continues to serve the public interest by preserving

viewpoint diversity in local markets or whether the local radio and television ownership rules alone would protect these goals adequately. The Commission has concluded that the rule continues to play an independent role in serving the public interest separate and apart from the local radio and television ownership rules, which are designed primarily to promote competition. Accordingly, given the important policy interests at stake, the Commission will retain the cross-ownership rule to ensure that consumers continue to have access to a multiplicity of media voices.

2. Discussion

117. The Commission concludes that the Radio/Television Cross-Ownership Rule should be retained because it finds that radio stations are meaningful contributors to viewpoint diversity within their communities. The Commission finds that broadcast radio and television stations are valuable mediums for viewpoint expression such that losing a distinct voice through additional consolidation could disserve the public interest. The Commission recognizes that the current rule permits a degree of common ownership, especially in larger markets, but that latitude is not a sufficient reason to ignore the potential harms to viewpoint diversity that may result from further consolidation. The Commission believes that a significant risk of harm exists in potentially reducing the number of diverse and antagonistic information sources within a market. Therefore, the Commission retains the Radio/Television Cross-Ownership Rule, with modifications limited to updating its obsolete references to analog television service contours, to protect viewpoint diversity in local markets. Consistent with Commission analysis in the NBCO context, it finds that Radio/Television Cross-Ownership Rule is not necessary to promote competition or localism in local markets. In the *FNPRM,* the Commission recognized that cross-ownership can create efficiencies that may result in public interest benefits, such as localism. However, there is no guarantee that owners will use any gains produced by such efficiencies to benefit consumers.

118. *Retaining the Rule.* While broadcast television stations and newspapers may be the primary sources of viewpoint diversity in local markets, the current record shows that broadcast radio contributes to viewpoint diversity in meaningful ways. Moreover, platforms such as the Internet or cable do not contribute significantly to viewpoint diversity in local markets and therefore do not meaningfully protect against the potential loss of viewpoint diversity that would result from increased radio/television cross-ownership. The Commission is cognizant of the fact that consumers' reliance on radio for local news and information has declined over time, as has the number of all-news commercial radio stations. While broadcast radio stations have historically been a less significant source of viewpoint diversity than newspapers and broadcast television stations, the Commission has still been justified in its efforts to regulate cross-ownership. Nonetheless, the Commission finds that it would be inconsistent with the goal of preserving viewpoint diversity to rescind the Radio/Television Cross-Ownership Rule and allow greater consolidation to diminish the viewpoint diversity available in local markets.

119. As acknowledged in the *FNPRM,* the existing rule already permits various levels of cross-ownership, based on the size of the market. The Commission sought comment in the *FNPRM* on the extent to which the rule constrains consolidation beyond what is permitted under the local television and local radio ownership rules and whether those rules would be sufficient to protect Commission policy goals absent the Radio/Television Cross-Ownership Rule. The Commission tentatively concluded that eliminating the rule would have no effect on the number of television stations an entity could own in a market and would permit the acquisition of only one or two additional radio stations in large markets. As the Commission has found previously, however, the existing limits strike an appropriate balance between the protection of viewpoint diversity and the potential public interest benefits that could result from the efficiencies gained by common ownership of radio and television stations in a local market. While relying solely on the local television and local radio ownership rules, each designed to promote competition, might result in only limited additional consolidation, there would still be a loss to viewpoint diversity if the Radio/Television Cross-Ownership Rule were eliminated. Although the Commission continues to find that, in general, newspapers and television stations are the main sources that consumers turn to for local news and information, and the Commission previously has held that radio generally plays a lesser role in contributing to viewpoint diversity, it nevertheless concludes that radio contributes meaningfully to viewpoint diversity. The record shows that broadcast television and radio are both important sources of viewpoint diversity in local markets; accordingly, the Commission finds that the public interest is best served by retaining the existing rule to protect viewpoint diversity in these markets. The *FNPRM* referenced *Prometheus I* for the proposition that mergers involving media that are not significant sources of local news do not pose a serious threat to viewpoint diversity. The cited discussion in *Prometheus I* does not contradict the Commission's conclusion that radio's contributions to viewpoint diversity are significant enough to warrant the rule's retention. Rather, *Prometheus I* supports the Commission's current view that cable and satellite television and the Internet are not significant sources of independently produced local news and information.

120. Finally, the Commission asked in the *NPRM* how the results of Media Ownership Studies 8A and 8B, which found little to no correlation between radio/television cross-ownership and viewpoint diversity, should inform its analysis. As explained in the *FNPRM,* Media Ownership Study 8A analyzes the impact of radio/television cross-ownership on viewpoint diversity available in local markets by examining how consumers react to content. Media Ownership Study 8B examines the impact of media ownership, including radio/television cross-ownership, on the amount of programming provided in television news programs in three categories: Politics, local programming, and diversity in coverage of news topics. The Commission did not receive meaningful comment on how the results of these studies should inform its analysis. Based on Commission review, these studies provide some evidence that common ownership does not always limit viewpoint diversity. The Commission already has recognized that some evidence exists that cross-ownership does not always limit viewpoint diversity. However, the Commission also has found that the possibility of a connection between ownership and viewpoint is not disproved by evidence that a connection is not always present. Indeed, the Commission has noted previously the existence of ample evidence that ownership can affect viewpoint. As noted in the context of the NBCO Rule, the Commission believes the best way to promote viewpoint diversity is by maximizing the number of independently owned stations in a market, not by relying on a hope or expectation that cross-owned properties will maintain distinct voices. The

Commission finds, however, that the conclusions in these studies are too limited to serve as a basis for a rule change. The authors of Media Ownership Study 8A caution that their evidence does not provide any conclusive basis for policymaking, that they do not make any claims of causality, and that their findings are based on limited data. The authors of Media Ownership Study 8B, while forming more detailed conclusions than in Media Ownership Study 8A, concede that they were forced to rely on limited variation in many policy variables, a constraint that leads to less precise estimates, making it difficult to identify the effects of interest. Ultimately, while the studies do present interesting findings based on indirect means of measuring viewpoint diversity, the Commission does not find that the results—standing in contrast to the record evidence demonstrating the importance of broadcast radio and television stations to viewpoint diversity in local markets—justify elimination of the Radio/Television Cross-Ownership Rule.

121. *Contour Modifications.* In the *NPRM,* the Commission sought comment on how the Radio/Television Cross-Ownership Rule could be modified to account for the fact that the analog broadcast television contours upon which the rule relies became obsolete with the transition to digital television service. The Commission observed that the digital NLSC approximates the Grade B contour but that the Grade A contour does not have a digital equivalent. Given that the Commission is retaining the rule and did not receive any comments on this issue in the context of this rule, the Commission will draw from the relevant discussions and comments in the context of other rules to make the modifications necessary to update the Radio/Television Cross-Ownership Rule.

122. The first of these modifications updates the television contour used to determine when the rule is triggered. The digital PCC, as defined in § 73.625 of the Commission's rules, will replace the analog Grade A contour when assessing whether a television station's contour encompasses a radio station's community of license. This change is consistent with the Commission's replacement of the Grade A contour for purposes of the NBCO Rule. Additionally, as stated in the *FNPRM,* a television station's PCC ensures reliable service for the community of license, is already defined in the Commission's rules, and can be verified easily in the event of a dispute.

123. The second modification updates the use of a television station's Grade B contour for purposes of determining how many media voices would remain in a market following a station acquisition. A television station's digital NLSC, the digital approximate of the Grade B contour, will replace that analog measurement. Therefore, the Commission will count as media voices those independently owned and operating full-power broadcast television stations within the DMA of the television station's (or stations') community (or communities) of license that have digital NLSCs that overlap with the digital NLSC(s) of the television station(s) at issue. This digital NLSC substitution is consistent with the Commission's replacement of the Grade B contour in the Local Television Ownership Rule.

124. *Grandfathering.* Due to the contour modifications the Commission adopts herein, there may be circumstances in which an existing combination now will be impermissible under the revised rule. Consistent with the Commission's approach in adopting technical modifications to the Local Television Ownership Rule and the NBCO Rule, the Commission will grandfather any existing combinations, so long as they are held by their current owners, to avoid imposing the hardship of divestiture on owners previously compliant with the rules. However, subsequent purchasers must either comply with the rule in effect at that time or obtain a waiver. Thus, stations that are subject to license assignment or transfer of control applications will be required to comply with the applicable rules, except that grandfathering will continue to apply to stations that are subject to *pro forma* changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee.

125. *Minority and Female Ownership.* While the Commission retains the existing Radio/Television Cross-Ownership Rule (with minor contour modifications) based on its viewpoint diversity goal, and not with the purpose of preserving or creating specific amounts of minority and female ownership, the Commission finds that retaining the existing rule nevertheless helps to promote opportunities for diversity in broadcast television and radio ownership. The rule helps to increase the likelihood of a variety of viewpoints and to preserve ownership opportunities for new entrants.

E. Dual Network Rule

1. Introduction

126. Based on the record compiled in the 2010 and 2014 Quadrennial Review proceedings, the Commission finds that the Dual Network Rule, which permits common ownership of multiple broadcast networks but prohibits a merger between or among the top-four networks (specifically, ABC, CBS, Fox, and NBC), continues to be necessary to promote competition and localism and should be retained without modification. The rule provides that a television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations *unless* such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were networks as defined in § 73.3613(a)(1) of the Commission's regulations. The Third Circuit upheld the Commission's decision in the *2006 Quadrennial Review Order* to retain the dual network rule to promote competition and localism. The Commission finds that, in comparison to other broadcast and cable networks, the top-four broadcast television networks have a distinctive ability to attract larger primetime audiences on a regular basis, which enables the top-four networks to earn higher rates from those advertisers seeking to reach large, national mass audiences consistently. By reducing the number of choices available to such advertisers, a combination among top-four broadcast networks could substantially lessen competition and lead the networks to pay less attention to viewer demand for innovative, high-quality programming. The Commission also finds that the Dual Network Rule remains necessary to preserve the ability of affiliates to influence network decisions in a manner that best serves the interests of their local communities, thereby maintaining the balance of bargaining power between the top-four networks and their affiliates. The Commission concludes that the benefits of retaining the rule outweigh any potential burdens.

2. Discussion

127. *Competition.* The Commission concludes that the Dual Network Rule continues to be necessary in the public interest to foster competition in the provision of primetime entertainment programming and the sale of national advertising time. The Commission continues to believe that at present these four major networks continue to constitute a strategic group in the national advertising marketplace and

compete largely among themselves for advertisers that seek to reach comparatively large, national audiences. Accordingly, the Commission finds that a top-four network merger would substantially lessen competition for advertising dollars in the national advertising marketplace, which would, in turn, reduce incentives for the networks to compete with each other for viewers by providing innovative, high-quality programming. Based on their distinctive characteristics relative to other broadcast and cable networks, the Commission concludes that the top-four broadcast networks continue to serve a unique role in the provision of primetime entertainment programming and the sale of national advertising time that justifies the retention of this rule specific to them.

128. The Commission finds that the top-four broadcast networks continue to attract primetime audiences that are more consistent and larger than those achieved by other broadcast or cable networks, as measured both by the audience size for individual programs and by the audience size for each network as a whole. The primetime entertainment programming supplied by the top-four broadcast networks generally is designed to appeal to a mass audience, and financing such programming on the scale needed for a consistent primetime lineup, in turn, requires investment of substantial revenues that only a consistently large, mass audience can provide. Thus, the primetime entertainment programming that the top-four networks provide to their affiliated local stations is intended to attract on a regular basis both mass audiences and the advertisers that want to reach them. This is in contrast to other broadcast networks, and many cable networks, which tend to target more specialized, niche audiences. Due to their targeted approaches, programming on these networks attracts smaller audiences than the top-four networks.

129. The Commission notes that in recent years some cable networks may have modified their primetime lineups to more closely resemble those of broadcast networks and that some online video providers have started offering original programming that may also attract sizable audiences. Nonetheless, at this time the Commission does not believe that cable networks or online providers have assembled a platform of programming that is consistently of the same broad appeal and audience share, on the whole, as the primetime entertainment programming provided by the top-four broadcast networks.

130. Commission staff review of more recent data shows that, while certain cable networks have continued to air a discrete number of individual programs or episodes that have become increasingly capable of attracting primetime audiences on par with, or even greater than, the top-four broadcast networks, no one cable network—let alone several—has been able to consistently deliver such audiences beyond individual programs or episodes.

131. This conclusion is also supported by data on the average primetime audience size of individual broadcast and cable networks, as measured at the network level. Even though an increasing number of individual cable primetime entertainment programs or episodes have achieved audiences of a similar size to their broadcast network counterparts, on average the primetime audience size for each of the top-four broadcast networks has remained significantly larger than the audience size for even the most popular cable networks. Accordingly, the Commission concludes that the primetime entertainment programming provided by the top-four broadcast networks continues to be a distinct product capable of attracting large audiences of a size that individual cable networks cannot consistently replicate, despite the ability of a few primetime cable network programs to achieve similarly large audiences on an individual basis.

132. In addition, there continues to be a wide disparity in the advertising rates earned by the top-four broadcast networks and the advertising rates charged by other broadcast and cable networks, which further indicates that the top-four broadcast networks are distinct from other networks.

133. Data on net advertising revenues provide further indication that the top-four broadcast networks are particularly appealing to advertisers seeking consistent, large national audiences. The Commission finds that the data further support its conclusion that the top-four broadcast networks comprise a strategic group in the national advertising marketplace and compete largely among themselves for advertisers that seek to reach large, national mass audiences consistently.

134. Therefore, the Commission retains the existing Dual Network Rule without modification to promote competition in the sale of national advertising time. The Commission also agrees with comments that the rule remains necessary to promote competition in the marketplace for primetime programming. Specifically, the Commission finds that the top-four broadcast networks have a distinctive ability to attract, on a regular basis, larger primetime audiences than other broadcast and cable networks, which enables them to earn higher rates from those advertisers that are willing to pay a premium for such audiences. Thus, a combination between two top-four broadcast networks would reduce the choices available to advertisers seeking large, national audiences, which could substantially lessen competition and lead the networks to pay less attention to viewer demand for innovative, high-quality programming. The Commission therefore concludes that the primetime entertainment programming provided by the top-four broadcast networks and national television advertising time are each distinct products—the availability, price, and quality of which could be restricted, to the detriment of consumers, if two of the top-four networks were permitted to merge. Accordingly, the Commission finds that the Dual Network Rule remains necessary to foster competition in the sale of national television advertising time and the provision of primetime entertainment programming.

135. *Localism.* In addition to furthering its competition goal, the Commission concludes that, consistent with past Commission findings, the Dual Network Rule also continues to be necessary to foster localism. Specifically, the Commission finds that eliminating the rule could increase the bargaining power of the top-four broadcast networks over their affiliate stations, thereby reducing the ability of the affiliates to influence network programming decisions in a manner that best serves the interests of their local communities. Typically, a critical role of a broadcast network is to provide its local affiliate stations with high-quality programming. Because this programming is distributed nationwide, broadcast networks have an economic incentive to ensure that the programming both appeals to a mass, nationwide audience and is widely shown by affiliate stations. By contrast, a network's local affiliate stations provide local input on network programming decisions and air programming that serves the specific needs and interests of that specific local community. As a result, the economic incentives of the networks are not always aligned with the interests of the local affiliate stations or the communities they serve.

136. In the context of this complementary network-affiliate relationship, the Commission agrees with network affiliate commenters that

a top-four network merger would reduce the ability of a network affiliate station to use the availability of other top, independently owned networks as a bargaining tool to exert influence on the programming decisions of its network, including the affiliate's ability to engage in a dialogue with its network over the suitability for local audiences of either the content or scheduling of network programming. Elimination of the Dual Network Rule would increase the economic leverage of the top-four networks over their affiliate stations, which would harm localism by diminishing the ability of the affiliates to serve their communities. The Commission has recognized that affiliate stations play an important role in assuring that the needs and tastes of local viewers are served. The Commission also agrees with network affiliate commenters that the Dual Network Rule is an important structural principle that helps to maintain equilibrium between the top-four networks and their affiliate stations. Accordingly, the Commission concludes that the Dual Network Rule remains necessary to foster localism. In the *NPRM,* the Commission also sought comment on whether antitrust laws and its public interest standard are sufficient to address any harms to competition or localism that might result from a top-four network merger. The Commission's concern here is that a merger of two or more top-four networks would restrict the availability, price, and quality of primetime entertainment programming and the bargaining power and influence of network affiliate stations, harming consumers and localism. Because these harms to consumers and localism are not typically considered in a structural antitrust analysis, the Commission does not believe that antitrust enforcement would adequately protect against these harms.

137. *Dual Affiliation.* As noted previously, some commenters have urged the Commission to prohibit a TV station from affiliating with two or more top-four broadcast networks in a single market, claiming that dual affiliation allows a broadcaster to do locally what the networks are forbidden from doing nationally, which is to consolidate the bargaining power of multiple top-four network signals under the control of a single entity. The Commission finds, however, that dual affiliation does not implicate the Dual Network Rule and that the rule should not be expanded to address dual affiliation practices. The Dual Network Rule addresses harms to competition and localism that would result from a decrease in the number of networks competing for national advertisers and the reduced ability of local affiliate stations to use the availability of other top, independently owned networks as a bargaining tool to influence network programming decisions. Because dual affiliation does not reduce the number of network owners, the Commission believes that dual affiliation does not give rise to either of these harms. Accordingly, arguments related to dual affiliation are not relevant to the Commission's consideration of the Dual Network Rule.

138. *Minority and Female Ownership.* In this proceeding, the Commission sought comment on the impact of its media ownership rules on minority and female ownership of broadcast stations. No commenters, however, addressed the potential impact of the Dual Network Rule on minority and female ownership. Given the distinct nature of the Dual Network Rule and its focus on mergers involving the top-four broadcast networks, and not ownership limits in local markets, the Commission does not believe that this rule would be expected to have any meaningful impact on minority and female ownership levels.

IV. Diversity Order Remand

139. In addition to assessing each of the broadcast ownership rules subject to quadrennial review pursuant to Section 202(h), the Commission is considering in this proceeding the Third Circuit's remand of the Commission's 2008 *Diversity Order,* in particular the decision in that order to adopt a revenue-based eligible entity definition as a race-neutral means of facilitating ownership diversity. In *Prometheus III,* the Third Circuit ordered the Commission to act promptly to bring the eligible entity definition to a close by making a final determination as to whether to adopt a new definition. The court stated that it did not intend to prejudge the outcome of this analysis.

140. The *Order* discusses below the actions that the Commission believes are appropriate in response to the Third Circuit's remand. As a threshold matter, the *Order* discusses the Commission's ongoing initiatives to promote diversity of ownership among broadcast licensees and to expand opportunities for minorities and women to participate in the broadcast industry. The *Order* also discusses the Commission's ongoing improvements to the collection of data and other empirical evidence that are relevant to minority and female ownership issues. Next, the *Order* discusses the measures the Commission adopted to enhance ownership diversity. Based on the record in this proceeding, the Third Circuit's remand instructions, and Commission analysis of the preexisting eligible entity standard and the measures to which it applied, the Commission concludes that it should reinstate the revenue-based eligible entity standard and apply the standard to the regulatory policies set forth in the *Diversity Order.* The Commission concludes that reinstating the previous revenue-based standard will serve the public interest by promoting small business participation in the broadcast industry and potential entry by new entrepreneurs. The Commission finds that small businesses benefit from flexible licensing policies and that easing certain regulations for small business applicants and licensees will encourage innovation and enhance viewpoint diversity. The Commission also believes that the benefits of reinstating the eligible entity standard and applying it to the regulatory measures set forth in the *Diversity Order* outweigh any potential costs of the Commission's decision to do so. Accordingly, the Commission concludes that this action will advance the policy objectives that traditionally have guided the Commission's analyses of broadcast ownership issues.

141. This action does not, of course, preclude Commission consideration of other or additional eligibility standards that have been put forward as means to promote minority and women ownership of broadcast stations. The Commission has carefully studied the record, and the evidence does not establish a basis for race-conscious remedies. Thus, the Commission does not believe that such measures would withstand review under the equal protection component of the Due Process Clause of the Constitution. The Supreme Court held in *Adarand Constructors, Inc.* v. *Peña,* 515 U.S. 200 (1995) (*Adarand*), that any federal program in which the government treats any person unequally because of his or her race must satisfy the strict scrutiny constitutional standard of judicial review. Finally, the Commission evaluates additional measures that commenters have proposed as potential means of promoting diversity of ownership, aside from the measures that the Third Circuit remanded in *Prometheus II,* including a proposal that the Commission adopt an Overcoming Disadvantage Preference (ODP) standard.

A. Commission Diversity Initiatives and Data Collection Efforts

1. Continuing Diversity Initiatives

142. *Diversity Rules and Policies.* The Commission strongly believes that a

diverse and robust marketplace of ideas is essential to democracy. As the Supreme Court has recognized *Metro Broadcasting, Inc.* v. *FCC,* 497 U.S. 547, 567 (1990), safeguarding the public's right to receive a diversity of views and information over the airwaves is an integral component of the FCC's mission. The Commission has established numerous policies and rules intended to further the proliferation of diverse and antagonistic sources. Furthermore, as noted by the Third Circuit in *Prometheus III,* the Commission has a congressional mandate to disseminate spectrum licenses among a wide variety of applicants, including businesses owned by members of minority groups and women. This statutory directive, however, does not mandate race- or gender-conscious initiatives.

143. The Commission and Congress previously adopted race- and gender-conscious measures intended specifically to assist minorities and women in their efforts to acquire broadcast properties, such as tax certificates and distress sale policies. Following the *Adarand* decision, however, the Commission discontinued those policies and programs. Congress repealed the tax certificate policy in 1995 as part of its budget approval process. Subsequently, the Commission continued its efforts to promote viewpoint diversity through a variety of race- and gender-neutral initiatives intended to promote diversity of broadcast ownership, and the Commission currently has a number of such rules and initiatives in place. The Commission addresses the concerns raised by the court in *Prometheus II* and finds that reinstating the revenue-based eligible entity standard and the related regulatory policies will serve its broader goal of diversity of ownership, and thus viewpoint diversity, by facilitating small business and new entrant participation in the broadcast industry. In addition to these measures, the Commission also took a number of other actions in the *Diversity Order* to promote viewpoint diversity through diversity of ownership. Beyond fostering viewpoint diversity, the Commission has taken steps to facilitate the entry of new participants into the broadcasting industry to promote innovation in the field also. Because the Third Circuit expressly upheld those other actions, they remain in place. Those actions include, among others, a ban on discrimination in broadcast transactions, a zero tolerance policy for ownership fraud, and a requirement that non-discrimination provisions be included in advertising sales contracts. The Commission has revised its Form 303–S license renewal application form to include this certification requirement. The court also expressly upheld several other measures adopted by the Commission in the *Diversity Order,* including the commissioning of longitudinal research on minority and women ownership trends, enabling the Commission's Office of Communications Business Opportunities (OCBO) to coordinate with the Small Business Administration to encourage local and regional banks to make loans through SBA's guaranteed loan programs, the holding of Access to Capital conferences, and the creation of a guidebook on diversity. Similarly, the *Prometheus II* opinion did not question the Commission's decision to reinstate the failed station solicitation rule (FSSR), which is intended to provide out-of-market buyers, including minorities and women, with notice of a sale and an opportunity to bid on stations before the seller seeks a waiver of certain ownership rules. The FSSR provides that, before selling a station to an in-market buyer, an applicant for a failed or failing station waiver of the local television ownership rule or the radio/television cross-ownership rule must demonstrate that the in-market buyer is the only entity ready, willing, and able to operate the station and that sale to a buyer outside the market would result in an artificially depressed price. In the *2002 Biennial Review Order,* the Commission eliminated the FSSR, finding that the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. The *Prometheus I* court remanded the issue on the basis that the Commission did not consider the potential impact on minority owners when it eliminated the rule. In the *2006 Quadrennial Review Order,* the Commission reinstated the FSSR. Accordingly, this measure has remained in place and is retained as part of this *Order* on the local television ownership rule. In addition, the Commission notes that anecdotal evidence suggests that JSAs may have had the effect of enabling large station owners to foreclose entry into markets and that the Commission's decision to attribute JSAs has actually led to greater ownership diversity.

144. *OCBO Initiatives.* Additionally, OCBO promotes diversity by serving as the principal advisor to the Chairman and the Commissioners on issues, rulemakings, and policies affecting small, women-owned, and minority-owned communications businesses. OCBO also hosts workshops and conferences designed to help promote small business and minority participation in the communications marketplace. OCBO's efforts to promote small business participation and ownership diversity—in broadcast, telecommunications, and new media—have continued since the release of the *FNPRM.*

145. *Foreign Ownership.* The Commission has taken steps to help facilitate investment in the broadcast industry, which a number of commenters suggest would help to facilitate ownership diversity. Recently, the Commission released a Notice of Proposed Rulemaking proposing to extend to broadcast licensees the same streamlined procedures and rules used to review foreign ownership in common carrier licensees, with certain tailored modifications. These proposed changes, if adopted, could facilitate investment from new sources of capital at a time of growing need for investment in the broadcast sector. Further, MMTC and others believe that these proposed changes could potentially benefit minority-owned broadcasters and facilitate diverse programming.

146. *Tax Certificate Legislation.* Consistent with comments in the record, the Commission's most recent Section 257 Report to Congress includes a recommendation that Congress pass tax deferral legislation. The report states that such a program could permit tax credits for sellers of communications properties who offer financing to small firms.

147. *AM Revitalization.* As discussed in the *FNPRM,* several of the Diversity and Competition Supporter's (DCS) proposals involve modifications to the AM broadcast service, and the *AM Revitalization NPRM* (78 FR 69629, Nov. 20, 2013, FCC 13–139, rel. Oct. 29, 2013) solicited comment on a number of the technical issues that DCS raised in this proceeding. Given the nature of these proposals, they must be considered in the broader context of the Commission's efforts to revitalize the AM service. Since the release of the *FNPRM,* the Commission has adopted the six proposals set forth in the *AM Revitalization NPRM.* The Commission believes that its actions in the *AM Revitalization Order* (81 FR 2751, Jan. 19, 2016, FCC 15–142, rel. Oct. 23, 2013) will assist AM broadcasters to better serve the public, thereby advancing the Commission's fundamental goals of diversity, competition, and localism in broadcast media. These actions address some of the technical issues that DCS has raised

in this proceeding about the AM broadcast service. The Commission notes that some commenters regard the AM radio service as a critical point of entry for women and minorities seeking to become broadcasters.

148. *Hispanic Television Study.* In addition, the Commission conducted a study of Hispanic television viewing. The study is the Commission's first systematic examination of the Hispanic television marketplace, which comprises a growing segment of the nation's population. Specifically, the study considers: (1) The impact of Hispanic-owned television stations on Hispanic-oriented programming and Hispanic viewership in selected local television markets; and (2) the extent of Hispanic-oriented programming on U.S. broadcast television. The results of the study's regression analysis indicate that, among other things, Hispanic viewers favor the major Spanish-language networks, especially Univision (which is not Hispanic-owned); watch local, Spanish-language news at higher levels than English-language news; and watch more telenovelas than other program types.

149. The Commission recognizes, however, that no one study, including the *Hispanic Television Study,* will be responsive to the many and varied concerns raised by commenters. The objective of the study was to attempt to examine the nexus, if any, between Hispanic ownership of broadcast television stations and Hispanic-oriented program content.

2. Continuing Improvements to Data Collection

150. *Collection of Biennial Ownership Data.* The Commission has improved its collection and analysis of broadcast ownership information. Indeed, its recent efforts have largely addressed the concerns expressed by certain commenters. The Commission has been engaged in a sustained effort to improve the quality, utility, and reliability of broadcast ownership data it collects on FCC Forms 323 and 323–E.

151. To improve the quality of its broadcast ownership data, the Commission adopted several significant changes to Form 323 in the *323 Order* (74 FR 25163, May 27, 2009, FCC 09–33, rel. May 5, 2009). The Commission established a new, machine-readable Form 323, expanded the filing requirement to sole proprietors, partnerships of natural persons, low power television (LPTV), and Class A television licensees and established a uniform filing deadline of November 1 for biennial ownership reports on Form 323. Most recently, the Commission in 2016 adopted a number of additional enhancements to its broadcast ownership data collection to further improve the comprehensiveness and reliability of the data. In particular, the Commission implemented a Restricted Use FCC Registration Number (Restricted Use FRN)—a new identifier within the Commission's Registration System (CORES)—that will allow for unique identification of individuals listed on broadcast ownership reports, without necessitating the disclosure to the Commission of individuals' full Social Security Numbers. The Commission also eliminated the availability of the interim Special Use FRN for individuals reported on broadcast ownership reports, except in certain limited circumstances.

152. In addition, the Commission revised Form 323–E to collect race, gender, and ethnicity information for attributable interest holders; to require that CORES FRNs or Restricted Use FRNs be used; and to conform the biennial filing deadline for NCE station ownership reports to the biennial filing deadline for commercial station ownership reports. Together, the further enhancements that the Commission adopted in the *Form 323/CORES Report and Order* (81 FR 19432, Apr. 4, 2016, FCC 16–1, rel. Jan. 20, 2016) will enable the Commission to obtain data providing a more useful, accurate, and thorough picture of minority and female broadcast station ownership, while reducing filing burdens.

153. *Improving Response Rates and Data Quality.* In addition to substantially revising Forms 323 and 323–E, the Commission has made ongoing outreach efforts to assist filers in an effort to improve response rates and to reduce common filing errors. Prior to the 2011, 2013, and 2015 biennial filing periods for Form 323, the Media Bureau released public notices to remind commercial licensees of their obligation to file a biennial ownership report. To assist both novice and experienced filers, the Bureau has hosted information sessions regarding the filing of biennial ownership reports on Form 323, which are also available on the Commission's Web site.

154. *Analysis of Ownership Data.* To assist parties in their ability to access and analyze the ownership data, the Commission has ensured that the data submitted on Form 323 are incorporated into a relational database, the most common database format, which is standard for large, complex, interrelated datasets. Complete raw data from the Commission's broadcast ownership filings, both current and historical, are available for download from the Commission's Web site, and the data are updated on a daily basis to account for new and amended filings. Researchers and other parties may download the data files from the Commission's Web site at any time and study, search, and manipulate the data in a wide variety of ways. The Commission has made explanatory documents publicly available and easy to find. Also, in response to requests from outside parties, the Commission now provides spreadsheets that contain additional ownership data, such as call signs, broadcast location, and market information. These spreadsheets are released with the 323 Reports to help present a broader picture of the biennial Form 323 data.

155. In addition, the Media Bureau hosted an all-day public workshop in September 2015 to assist individuals and organizations that wish to use and study the large amount of broadcast ownership data that is available to the public on the Commission's Web site. The workshop addressed a number of topics concerning access to, and use of, the Commission's commercial broadcast ownership data, including relevant data that the Commission collects, how members of the public can access those data, and mechanisms for querying, studying, and visualizing the data, including in combination with data available from non-FCC sources. The workshop, a video of which is available online, provides researchers with the tools and understanding to electronically search, aggregate, and cross reference the data to prepare their own analysis.

B. Remand Review of the Revenue-Based Eligible Entity Standard

156. The Commission concludes that its prior revenue-based eligible entity definition should be reinstated and applied to the regulatory policies set forth in the *Diversity Order.* The Commission finds that reinstating the eligible entity definition and the measures to which it applied will serve the public interest by promoting small business participation in the broadcast industry and potential entry by new entrepreneurs. Accordingly, the Commission reinstates its previous revenue-based eligible entity definition and the measures adopted in the *Diversity Order* that were vacated and remanded by the Third Circuit in *Prometheus II.*

157. The Commission concludes that the revenue-based eligible entity standard is a reasonable and effective means of promoting broadcast station ownership by small businesses and potential new entrants. The Commission

continues to believe that small business applicants and licensees often have financial and operational needs that are distinct from those of larger broadcasters, and that they require greater flexibility with regard to licensing, construction, auctions, and transactions. By easing certain regulations for small business applicants and licensees, the Commission believes it will increase station ownership opportunities for small businesses and new entrants, to the benefit of the public interest.

158. Moreover, the Commission concludes that its traditional policy objectives will be served by enhancing opportunities for small business participation in the broadcast industry via the eligible entity standard. The Commission continue to believe that enabling more small businesses to participate in the broadcast industry will encourage innovation and promote competition and viewpoint diversity. As the Commission has noted previously in the *2002 Biennial Review Order,* greater small business participation in communications markets will expand the pool of potential competitors and should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets. The Commission continues to believe that this is true. Furthermore, increasing opportunities for small businesses to participate in the broadcast industry will foster viewpoint diversity by facilitating the dissemination of broadcast licenses to a wider variety of applicants than would otherwise be the case. Competition and viewpoint diversity are two primary policy objectives that have traditionally guided the Commission's analysis of broadcast ownership issues.

159. The record supports these conclusions. Commenters, including AWM and NAB, agree that re-adopting the revenue-based eligible entity standard is an appropriate means of enhancing ownership opportunities for small businesses and new entrants. Although public interest commenters criticize the Commission's proposal to reinstate the revenue-based standard, they also acknowledge the data cited in the *FNPRM* to support the Commission's conclusion that the standard promotes viewpoint diversity. Public interest commenters that criticize the revenue-based eligible entity standard do so based on their view that the standard is not an effective means of increasing ownership specifically by women and minorities. However, this has no bearing on the Commission's conclusion that the standard will help promote small business and new entrant participation in the broadcast industry.

160. The Native Public Media and the National Congress of American Indians (NPM/NCAI) argue that, pending further action on a race- and gender-conscious eligible entity standard, the Commission can take another significant step towards overcoming the underrepresentation of Native Americans in broadcast station ownership by expanding the definition of eligible entity to include Native Nations. The Commission does not believe expanding its revenue-based eligible entity definition to include Tribes and Tribal Applicants to enable more small businesses to participate in the broadcast industry is necessary. Moreover, as NPM/NCAI point out, the Commission has adopted measures in a separate proceeding that are intended to expand broadcast opportunities for Tribal Nations and Tribal entities. To the extent that their proposal is intended to increase broadcast service to Tribal lands, the Commission believes it is outside the scope of this quadrennial review proceeding. The Commission notes that, in a proceeding concerning rural radio, the Commission adopted a Tribal Radio Priority to expand the number of radio stations owned or majority controlled by federally recognized American Indian Tribes and Alaska Native Villages, or Tribal consortia, broadcasting to Tribal lands.

161. The Commission's decision to reinstate the revenue-based eligible entity standard is also supported by the Commission's own records, which indicate that a significant number of broadcast licensees and permittees availed themselves of policies based on the revenue-based eligible entity standard between the implementation of that standard and its suspension following *Prometheus II.* One of those policies was to allow an eligible entity that acquired an expiring broadcast construction permit to obtain additional time to build out its facilities in certain circumstances.

162. The data clearly suggest that providing additional time to construct broadcast facilities has facilitated market entry by small broadcasters. Further, the Commission notes that the data reflect the use of the prior eligible entity standard in a limited context and do not reflect the total number of applicants and permittees that benefited from all the various broadcast policies that relied on the revenue-based eligible entity standard. Even so, this information supports the Commission's conclusion that the revenue-based eligible entity standard has been used successfully by a significant number of small firms and has not only aided their entry, but also contributed to the sustained presence of small firms in broadcasting in furtherance of the Commission's public interest goals.

163. In addition to reinstating the revenue-based eligible entity standard, the Commission believes applying the standard to the full range of construction, licensing, transaction, and auction measures to which it previously applied is in the public interest. Commenters that have argued against reinstatement have done so based on whether the measures will specifically increase minority and female ownership of broadcast stations, which has no bearing on whether the measures will promote small business participation in the broadcast industry. Accordingly, the Commission hereby re-adopts each measure relying on this definition that was remanded in *Prometheus II.* Specifically, the Commission reinstates the following measures: (1) Revision of Rules Regarding Construction Permit Deadlines; (2) Modification of Attribution Rule; (3) Distress Sale Policy; (4) Duopoly Priority for Companies that Finance or Incubate an Eligible Entity; (5) Extension of Divestiture Deadline in Certain Mergers; and (6) Assignment or Transfer of Grandfathered Radio Station Combinations. In reinstating this measure, the Commission emphasizes that this exception to its strict broadcast station construction policy is limited to one 18-month extension based on one assignment to an eligible entity. In addition, pursuant to the new entrant bidding credits available under the Commission's broadcast auction rules, the modified EDP attribution standard was available to interest holders in eligible entities that are the winning bidders in broadcast auctions. The Commission also reinstates this application of the modified EDP standard. Moreover, to ensure realization of the Commission's policy goals, in reviewing the sale of a permit to an eligible entity, the Commission will assess the *bona fides* of both the arms-length structure of the transaction and the assignee's status as an eligible entity as proposed in the *FNPRM.* In addition, the Commission clarifies that this exception to its broadcast station construction policy applies both to original construction permits for the construction of new stations and to construction permits for major modifications of authorized broadcast facilities. The Commission also lifts any prior suspension of Commission rules implementing these measures and applying the eligible entity standard,

including 47 CFR 73.3555, Note 2(i)(2); 73.3598(a); and 73.5008(c)(2). As of the effective date of the reinstated Eligible Entity measures, the suspension will no longer be in effect.

164. Consistent with the Commission's pre-existing eligible entity definition, the Commission defines an eligible entity as any entity—commercial or noncommercial—that would qualify as a small business consistent with SBA standards for its industry grouping, based on revenue. As the Commission previously held, going forward it will include both commercial and noncommercial entities within the scope of the term eligible entity to the extent that they otherwise meet the criteria of this standard. In the *FNPRM,* the Commission sought comment on whether to use different eligible entity definitions for commercial and noncommercial entities, and no commenters have urged the Commission to do so. For all SBA programs, a radio or television station with no more than $38.5 million in annual revenue currently is considered a small business. The definition of small business for the radio industry is listed in North American Industry Classification System (NAICS) code 515112, and the definition of a small business for the television industry is listed in NAICS code 515120. To determine qualification as a small business, the SBA considers the revenues of domestic and foreign affiliates, including the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations. The Commission will also require an eligible entity to satisfy one of several control tests to ensure that ultimate control rests in an entity that satisfies the revenue criteria. Specifically, the eligible entity must hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interest; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company. When the Commission, in the *2002 Biennial Review Order,* ruled that licensees would be allowed to transfer grandfathered station combinations to eligible entities, it required that control of the eligible entity purchasing the grandfathered combination must meet one of several control tests to meet the Commission's public interest objectives and ensure that the benefits of the exception flowed as intended. The Commission readopts these requirements for the same reasons.

C. Remand Review of a Race- or Gender-Conscious Eligible Entity Standard

165. The Commission's adoption of a revenue-based definition of eligible entity to promote small business participation in the broadcast industry does not, of course, preclude the Commission from considering whether to adopt an additional standard designed specifically to promote minority and female ownership of broadcast stations.

166. However, the Commission declines to adopt an SDB eligibility standard or other race- or gender-conscious eligible entity standard. While the Commission finds that a reviewing court could find the Commission's interest in promoting a diversity of viewpoints over broadcast media compelling, the Commission does not believe that the record evidence sufficiently demonstrates that adoption of race-conscious measures would be narrowly tailored to further that interest. In particular, the Commission finds that the evidence in the record, including the numerous studies that have been conducted or submitted, does not demonstrate a connection between minority ownership and viewpoint diversity that is direct and substantial enough to satisfy strict scrutiny. The two recent studies that directly address the impact of minority ownership on viewpoint diversity, Media Ownership Studies 8A and 8B, find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity. Other studies in the record examine the relationship between minority ownership and other aspects of the Commission's diversity goal, such as programming or format diversity, rather than the viewpoint diversity that the Supreme Court has recognized as an interest of the highest order and that the Commission believes is most central to First Amendment values. Many of the studies, too, demonstrate at most a limited relationship between minority ownership and other aspects of the Commission's diversity goal.

167. In addition, the Commission does not believe that the record evidence establishes a sufficiently strong relationship between diversity of viewpoint and female ownership of broadcast stations that would satisfy the constitutional standards for gender-based classifications. The Commission finds that the evidence in the record does not reveal that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations. Because the studies in the record do not indicate that increased female ownership will increase viewpoint diversity, the Commission believes that they do not provide a rationale for adopting gender-based diversity measures.

168. Moreover, the Commission does not believe that the record evidence is sufficient to establish a compelling interest in remedying past discrimination. The Commission finds that no evidence exists in the record demonstrating a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms, and the Commission lacks a plausible way to determine the number of qualified firms owned by minorities and women. The Commission believes that it cannot demonstrate a compelling interest in remedying discrimination in the Commission's licensing process in the absence of such evidence. Because the only statistical evidence in the record pertains to discriminatory access to capital and the rest is anecdotal evidence that is of more limited value for purposes of satisfying heightened scrutiny, the Commission finds that the record evidence of past discrimination in the broadcast industry—both by the Commission itself and by private parties with the Commission acting as a passive participant—is not nearly as substantial as that accepted by courts in other contexts as satisfying strict scrutiny. Based on its evaluation of the record evidence, the Commission also concludes that it is not of sufficient weight to support gender-based remedial action. Accordingly, the Commission cannot adopt rules that explicitly rely on race or gender. The *FNPRM* also contains a detailed and thorough analysis of these issues, and it reflects the Commission's extensive efforts to evaluate the current constitutional considerations and available evidence regarding the adoption of race- and gender-conscious measures.

1. Enhancing Viewpoint Diversity

169. *Race-Based Diversity Measures.* In the *FNPRM,* the Commission expressed its belief that the Commission's interest in promoting viewpoint diversity could be deemed

sufficiently compelling to survive the first prong of the strict scrutiny test, and the Commission sought comment on this analysis. In response to the *FNPRM,* many commenters agree that the Commission's interest in promoting viewpoint diversity could be deemed sufficiently compelling under strict scrutiny, and the Commission affirms this belief. The U.S. Supreme Court to date has accepted only two justifications for race-based action as compelling for purposes of strict scrutiny: Student body diversity in higher education and remedying past discrimination. In *Metro Broadcasting,* the Court held, based on the application of intermediate constitutional scrutiny, that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective. In reaching its determination that broadcast diversity is, at the very least, an important governmental objective, the Court stated that safeguarding the public's right to receive a diversity of views and information over the airwaves is . . . an integral component of the FCC's mission and that the Commission's public interest' standard necessarily invites reference to First Amendment principles. In *Adarand,* the Court overruled the application of intermediate scrutiny in *Metro Broadcasting* but did not disturb other aspects of that decision, including the recognition of an important governmental interest in broadcast diversity. However, the D.C. Circuit held in *Lutheran Church-Missouri Synod* v. *FCC,* 141 F.3d 344, 354–55 (D.C. Cir. 1998) that broadcast diversity does not rise to the level of a compelling governmental interest. Also, in 2007, the Supreme Court in *Parents Involved in Community Schools* v. *Seattle School District No. 1,* 551 U.S. 701 (2007), declined to recognize a compelling interest in diversity outside of the context of higher education. In the *FNPRM,* the Commission tentatively found that the case law nevertheless supports its position that viewpoint diversity would be found to be compelling—even though the law is unsettled. Regardless of whether viewpoint diversity is a compelling interest, however, the Commission finds that it still cannot adopt an SDB eligibility standard or other race- or gender-conscious eligibility standard.

170. Assuming a reviewing court could be convinced that diversity of viewpoint is a compelling governmental interest, the Commission finds that the record in this proceeding fails to satisfy the second prong of the strict scrutiny test, *i.e.,* that a sufficient nexus exists between minority ownership of broadcast stations and viewpoint diversity. As explained in the *FNPRM,* the two recent studies in the record that directly address the impact of minority ownership on viewpoint diversity find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity. Also, consistent with the *FNPRM,* the Commission finds that the body of evidence contained in the other 2010 Media Ownership Studies and the studies that commenters submitted in this proceeding largely concerns program or format diversity rather than viewpoint diversity, which the Commission believes is the only kind of diversity likely to be accepted as a compelling governmental interest under strict scrutiny. As stated in the *FNPRM,* the Supreme Court's prior recognition of broadcast diversity as an interest of the highest order seems to pertain to viewpoint diversity. Moreover, as explained in the *FNPRM,* many of those studies support only limited conclusions. Although the Commission invited commenters to provide additional evidence and other information that might be relevant to its analysis, some commenters merely dispute the assessment of known evidence, rather than submit additional information that the Commission did not consider in the *FNPRM.* However, these commenters generally seem to accept the Commission's view that the record evidence does not provide a sufficient basis for the Commission to adopt race-conscious measures that will withstand strict scrutiny. The Commission rejects claims that, in tentatively finding that the evidence in the record does not demonstrate the requisite connection between minority ownership and viewpoint diversity, the Commission relied on dissenting opinions to establish an artificial and unofficial standard for narrow tailoring or evaluated the record evidence inconsistently to minimize evidence of a connection between minority ownership and viewpoint diversity. The Commission disagrees with assertions that it is premature for the Commission to reach any conclusions on narrow tailoring. The Third Circuit directed the Commission to consider the SDB eligibility standard and other eligible entity definitions proposed in the *Third Diversity FNPRM* (73 FR 28400, May 16, 2008, FCC 07–217, rel. March 5, 2008), and the Commission is complying with the court's instruction based on an extensive analysis of applicable judicial precedent and available empirical evidence. In addition to criticizing the *FNPRM's* assessment of the record evidence and the applicable evidentiary standard, public interest commenters also criticize the *FNPRM* for asking whether a theory of viewpoint diversity or remediation is viable, when in fact the Commission would likely need to pursue several legal theories jointly to succeed. As the Commission explained in the *FNPRM* and continues to believe, it does not believe that any interest other than viewpoint diversity or remediation of discrimination (if established by the record) would be found to be a compelling governmental interest sufficient to satisfy the first prong of the strict scrutiny test. And the Commission knows of no case law, nor do the commenters cite any, which analyzes justifications for race-conscious action on a cumulative basis. Consequently, the Commission rejects this suggestion from the commenters.

171. The Commission's narrow tailoring analysis included a discussion of relevant judicial precedent, and its tentative findings were based on a careful reading of that precedent, taken as a whole, and its assessment of the body of evidence in this proceeding. The Commission finds no reason in the present record to depart from that analysis. Other commenters suggest additional topics that they believe the Commission should study but do not propose specific, executable studies or claim that the additional inquiries they propose would establish the requisite nexus between minority ownership and viewpoint diversity.

172. Moreover, while the Commission finds that the *Hispanic Television Study* is an important contribution to the study of the impact of ownership on programming and viewership, the Commission does not believe that the study's findings materially impact the Commission's constitutional analysis. The Commission does not believe that the study changes the Commission's constitutional analysis, though it has helped inform the study of these issues. Indeed, commenters generally agree with the Commission's assessment that the study has not provided a basis for the Commission to adopt race-conscious measures.

173. Some commenters disagree with the Commission's analysis of case law involving judicial review of race-based classifications, but they do not cite any precedent that the Commission did not consider in the *FNPRM.* As explained in the *FNPRM,* the Commission believes that empirical evidence of a stronger nexus between minority ownership and viewpoint diversity than was demonstrated in *Metro Broadcasting* would be required in order for a race-

conscious rule to withstand strict scrutiny. The Commission is not persuaded by assertions to the contrary, which it believes are substantially the same as those it considered and rejected in the *FNPRM,* and commenters do not cite any additional judicial precedent to support their argument here. And while some commenters disagree with the sufficiency of the Commission's efforts to study the connection between minority ownership and viewpoint diversity, the evidence in the record, the Commission's assessment of the evidence, and the applicable evidentiary standard in this proceeding, they generally seem to accept the view that the evidence is not sufficient to enable the Commission to adopt race-based measures. Other commenters also seem to concede, implicitly or explicitly, that the evidence in the present record is insufficient to support race-conscious action by the Commission.

174. In addition, the Commission continues to believe that implementing a program for awarding or affording preferences related to broadcast licenses based on the individualized review that the Supreme Court has required under strict scrutiny would pose a number of significant administrative and practical challenges for the Commission and would not be feasible. As explained in the *FNPRM,* where race-conscious governmental action is concerned, the Supreme Court previously has found that narrow tailoring requires individualized review, serious, good-faith consideration of race-neutral alternatives, minimal adverse impacts on third parties, and temporal limits. In particular, the Court found that narrow tailoring demands that race be considered in a flexible, non-mechanical way alongside other factors that may contribute to diversity and that consideration of race was permissible only as one among many disparate factors to evaluate individual applicants for admission to an educational institution. The Commission finds that the manner in which it allocates broadcast licenses differs from university admissions in many important respects. The process of acquiring a new commercial broadcast license is dictated by statute and involves a highly structured, open, and competitive bidding process. Individuals or entities must enter bids for broadcast allotments—a market-based regime—and must offer the highest monetary value for the allotment to acquire a construction permit. As explained in the *FNPRM,* the Commission believes that this framework does not lend itself to the type of case-by-case consideration envisioned by the Court. Although the *FNPRM* sought comment on potential ways in which an individualized review process could be incorporated feasibly, effectively, and efficiently into any race-conscious measures adopted by the Commission, no commenter has offered such a proposal, nor has the Commission been able to develop one. Therefore, the Commission concludes that the record reveals no feasible means of carrying out the type of individualized consideration that the Supreme Court has required under strict scrutiny. The Commission disagrees with the assertion that the *FNPRM* confines its consideration of the proposed ODP standard to the Commission's viewpoint diversity interest without considering whether the proposed ODP standard could be applied as a remedial measure. The administrative, practical, and First Amendment issues that the Commission has identified would need to be resolved before the implementation of an ODP standard regardless of whether that standard is used to further the Commission's interest in viewpoint diversity or remedy past or present discrimination. Contrary to the assertions of some public interest commenters, the *FNPRM* did not tentatively conclude that the Commission must emulate university admissions to pursue viewpoint diversity. Rather, the *FNPRM* noted that the Supreme Court relied in part on the concept of critical mass to find the requisite nexus between student body diversity and race-based admissions and that this concept is not easily transferable to broadcasting.

175. *ODP Proposal.* As the Commission noted in the *FNPRM,* whether the proposed ODP standard would be subject to heightened constitutional scrutiny is not entirely clear. The Commission disagrees with MMTC's assertion that the *FNPRM* mischaracterized the ODP standard as a race-conscious measure that would be subject to heightened scrutiny. The *FNPRM* did not describe the proposed ODP standard as a race-conscious measure. Rather, the *FNPRM* noted that whether the proposed ODP standard would be subject to heightened constitutional scrutiny is not entirely clear. The Commission explained that an ODP standard that does not facially include race-conscious criteria, yet is constructed for the purpose of promoting minority ownership, might be subject to heightened scrutiny. Even assuming that it is not subject to heightened review under the equal protection component of the Due Process Clause, the Commission declines to adopt the proposed ODP standard in the absence of a feasible means of implementing such a standard without running afoul of First Amendment values. Several commenters express general support for the proposed ODP standard but none have proposed a method for the Commission to provide the type of individualized consideration that an ODP standard would require without being unduly resource-intensive and inconsistent with First Amendment values. Commenters also have not addressed other specific issues that the *FNPRM* indicated would need to be resolved before implementation of the ODP proposal. In particular, no commenter has proposed a means for the Commission to validate claims of eligibility for ODP status. Based on available information about the proposal, the Commission believes that validating a claim of eligibility for ODP status would require a finding that the applicant has faced and overcome a substantial disadvantage—a determination that inherently would be prone to some degree of subjectivity—as well as a finding that the applicant would likely contribute to viewpoint diversity by virtue of him or her facing and overcoming a substantial disadvantage. The Commission does not believe that a means exists for the Commission to administer such a program in a manner that is sufficiently objective and consistent, and that would ensure that the Commission does not evaluate applicants based on a subjective determination as to whether a particular applicant would be likely to contribute to viewpoint diversity. In addition, no commenter has offered input on (1) what social or economic disadvantages should be cognizable under an ODP standard, (2) whether applicants should bear the burden of proving specifically that they would contribute to diversity as a result of having overcome certain disadvantages, (3) how the Commission could measure the overcoming of a disadvantage if an applicant is a widely held corporation rather than an entity with a single majority shareholder or a small number of control persons, and (4) how the Commission could evaluate the effectiveness of the use of an ODP standard. In its recommendation concerning a preference for overcoming disadvantage, the Diversity Advisory Committee identified a non-exhaustive list of disadvantages which, if substantial, would likely qualify an individual for a preference. No

commenters in this proceeding have offered additional input on the social or economic disadvantages that should be cognizable under an ODP standard. Accordingly, the Commission is not adopting the proposed ODP standard.

176. *Gender-Based Diversity Measures.* Gender-based measures are subject to a less restrictive Constitutional standard—intermediate scrutiny—than race-based measures. Under intermediate scrutiny, a gender-based classification must be substantially related to the achievement of an important objective. While *Metro Broadcasting* established that viewpoint diversity is at least an important government objective, *Lamprecht* v. *FCC,* 958 F.2d 382 (D.C. Cir. 1992), found that available evidence failed to demonstrate a statistically meaningful link between ownership of broadcast stations by women and programming of any kind. As a result, the D.C. Circuit, in *Lamprecht,* overturned the Commission's former gender preference policy. To overcome *Lamprecht,* the Commission must be able to establish the requisite connection between viewpoint diversity and ownership by women; however, in the *FNPRM,* the Commission stated that, based on its evaluation of relevant studies, the Commission did not believe there was evidence to demonstrate that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations.

177. In response to the *FNPRM,* commenters did not provide any additional evidence, studies, proposed study designs, or other information that is relevant to the Commission's analysis of this issue. The Commission has similarly been unable to identify such evidence or devise study designs that are likely to provide such evidence. In its efforts to create specific study designs (which includes reaching out to experts in the field), the Commission has identified a number of issues that significantly impede study of the connection between ownership and viewpoint diversity. These issues include the lack of a reliable measure of viewpoint; small sample size; accounting for potential variations from differences in the way the data were collected rather than actual changes in the marketplace when combining old and new sets; and the lack of relevant data sets from before and after policy changes or marketplace developments (if any can be identified) that would help demonstrate causation regarding the impact of ownership on viewpoint diversity. While commenters still express general support for gender-based initiatives, such support is not sufficient absent evidence to establish a connection between viewpoint diversity and ownership by women. And while the Commission acknowledges that the data show that women-owned stations are not represented in proportion to the presence of women in the overall population, the Commission does not believe that the evidence reveals that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations. As explained in the *FNPRM,* the only study included in the record of this proceeding that analyzes the relationship between female ownership and broadcast content is the Turner Radio Study, which finds that markets that contain radio stations with either female or minority ownership are more likely to broadcast certain progressive and conservative talk shows. The Commission does not believe that this study demonstrates a causal relationship between female or minority ownership and the diversity of viewpoints or content available, as it does not control for other factors that may explain both the presence of a greater diversity of talk shows and a higher percentage of female or minority ownership in certain markets. Other studies in the record establish that female ownership of broadcast stations is well below the proportion of women in the population, a fact that is not in dispute in this proceeding. Therefore, the Commission concludes that there is insufficient evidence to satisfy the constitutional standards that apply to gender-based measures.

2. Remedying Past Discrimination

178. Similarly, the Commission concludes that, although it has studied extensively the question, no strong basis exists in evidence of discrimination in the award of broadcast licenses or other discrimination in the broadcast industry in which the government has actively or passively participated that would satisfy the constitutional standards that apply to race- or gender-based remedial measures. Less evidence is required for gender-based measures than for race-based measures, although an exceedingly persuasive justification is still necessary. The question of whether governmental participation is required is unsettled. Some courts have held that private discrimination need not be linked to governmental action under intermediate scrutiny. As discussed in this section, the Commission also concludes that the record evidence is not of sufficient weight to support gender-based remedial action. In the *FNPRM,* the Commission noted that it never has asserted a remedial interest in race-or gender-based broadcast regulation. The Commission explained that the evidence of discrimination offered in the studies that commenters cited, while informative, was not nearly as substantial as that accepted by courts in other contexts. In response, commenters are generally critical of the Commission's analysis but most do not cite any additional relevant precedent or data that the Commission did not discuss in the *FNPRM.* Although commenters identify additional information that they believe is relevant to an analysis of the Commission's interest in remedying past discrimination, they do not assert that such information is sufficient to satisfy the relevant constitutional requirements. There is no inconsistency, as some comments claim, between the Commission's conclusion in this proceeding that it lack the strong basis in evidence of racial discrimination in the broadcast industry in which the Commission has been complicit that is necessary to adopt *race-conscious remedial action* and the Commission's adoption of bans on discrimination in advertising contracts and in private transactions. The latter actions are not race-conscious measures and therefore did not require an evidentiary foundation sufficient to withstand strict scrutiny. They were simply measures designed to combat private discrimination in the marketplace. The Commission has evaluated the evidence in the record and finds that it is not of sufficient weight to support race- or gender-based remedial measures.

179. The Commission disagrees with the assertion that it raised the bar in its remedial interest tentative conclusions and that it incorrectly rejected or ignored evidence of discrimination in the broadcast industry. Rather than rejecting evidence because it does not prove that the Commission itself has engaged in discrimination, the *FNPRM* tentatively found that existing evidence of past discrimination is not nearly as substantial in this case as the evidence that courts have required in other contexts. In particular, the Commission noted the absence of evidence demonstrating a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms. The Commission asked commenters to address whether evidence of a

statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms is ascertainable. In the *FNPRM,* the Commission also observed that the only statistical evidence of discrimination in the record at the time pertained to discriminatory access to capital and that the rest of the evidence was anecdotal and therefore of more limited value because of the heightened evidentiary requirements of strict scrutiny. As the Commission explained there, the Capital Markets Study found statistical evidence of discrimination in U.S. capital markets, but the study indicates that its results are not fully conclusive. Also, its focus on wireless auctions and other non-broadcast industry information makes it less probative of discrimination in the broadcast licensing process. In *Richmond* v. *J.A. Croson Co.,* 488 U.S. 469 (1989), the Supreme Court found that the factual predicate for race-based action was deficient where, among other things, the government failed to make findings specific to the market to be addressed by the remedy. Because broadcasting is the industry that would be addressed if the Commission were to adopt remedial measures here, and neither the 2000 Capital Markets Study nor the Auction Utilization Study contains conclusive findings that reveal a governmental role in discrimination in the broadcast industry, the Commission does not believe these studies establish a factual predicate for race-based action that the Court would deem sufficient. Even considering the Capital Markets Study together with available anecdotal evidence in other studies, the Commission finds that the evidence of past discrimination in the Commission's broadcast licensing process is not nearly as substantial as that accepted by courts in other contexts. In *Adarand* v. *Slater,* 228 F.3d 1147 (10th Cir. 2000), a leading public contracting case in which the Tenth Circuit found the requisite strong basis in evidence, the record contained 39 studies revealing an aggregate 13 percent disparity between minority business availability and utilization in government contracting, a figure which the court found to be significant, if not overwhelming, evidence of discrimination. In reaching that determination, the court relied on evidence of private discrimination. The evidence was similar in nature to the evidence in this case—denial of access to capital, as well as the existence of exclusionary old boy networks and union discrimination that prevented access to the skills and experience needed to form a business—but it was substantially greater in extent and weight. The court had the benefit of a Department of Justice report, prepared in response to the Supreme Court's decision in *Adarand,* summarizing 30 congressional hearings and numerous outside studies providing both statistical and anecdotal evidence of such private discrimination.

180. The Commission also disagrees with suggestions that it is legally permissible for the Commission to infer past discrimination based on the disparity between the number of minority- and women-owned broadcast stations and the number of minorities and women in the general population. As explained in the *FNPRM,* the Supreme Court has held that an inference of discrimination may arise when a significant statistical disparity between the number of *qualified* minority contractors willing and able to perform a particular service and the number of such contractors actually engaged arises. Although public interest commenters suggest that no special qualifications are necessary to own a broadcast station, the Commission has long required that broadcast applicants meet certain character, financial, and other qualifications to operate a station. And, of course, not all members of the population are interested in operating a broadcast station. Accordingly, the Commission does not believe that evidence of a significant statistical disparity between the number of minority- and women-owned broadcast stations and the number of minorities and women in the general population would be sufficient by itself to overcome the constitutional hurdle that has been established for race- and gender-based remedial measures. Instead, the Commission continues to believe that, absent evidence showing a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms, the Commission cannot demonstrate a compelling interest in remedying discrimination in the Commission's broadcast licensing process.

181. Some commenters assert that the Commission is required to fund research to identify whether such disparities exist. According to these commenters, the Commission should refrain from making any tentative conclusions until its work is complete, including examining its own records and history to evaluate evidence to show that remedying past racial (or gender) discrimination is a compelling (or substantial) governmental interest. Based on its review of existing disparity studies, the Commission does not believe that is true. In particular, commenters identify no method of studying this question that would produce meaningful results in the broadcast context. For existing studies, often employed in government contracting cases, there is generally a ready database of minority or female contractors that are willing and able to perform a particular service—or an established methodology to identify such contractors—that can be compared to the number of such contractors that are actually engaged by the government. Indeed, in most industries one need not be a government contractor to operate a business that provides the services that the government seeks (*e.g.,* construction or advertising). This provides an ample pool of available contractors for the researchers to identify, both nationally and locally, depending on the nature of the program. And Supreme Court precedent instructs that the appropriate comparison is to the number of qualified firms that would be interested in being engaged by the government. However, there are no broadcast station owners other than those already licensed to be broadcasters, and the record does not reveal any method for identifying otherwise qualified firms that are not already broadcast licensees. In these circumstances, no pool of qualified non-licensee minority- or women-owned broadcast firms exists to compare against existing minority- or women-owned broadcast stations. Without such evidence or a methodology for ascertaining such evidence, the Commission finds that a disparity study similar to those relied on by other agencies for government contracting purposes is not feasible in the broadcast context. Given the Commission's determination of the infeasibility of this research, the lack of any support in the record indicating that it would be feasible, and the very substantial funds and time it would take to conduct it—likely millions of dollars and several years—the Commission does not believe that the Commission undertaking a disparity study is in the public interest.

3. Other Issues

182. Several commenters state that the *FNPRM* falls short of what these commenters assert to be the Third Circuit's directive that the Commission gather relevant ownership data and develop policies to address the paucity of female and minority owners among broadcast licensees. As stated previously, the Commission disagrees with arguments that the *Prometheus II*

decision requires that it adopt a race- or gender-conscious eligible entity standard in this quadrennial review proceeding or that the Commission continue this proceeding until the it has completed whatever studies or analyses that will enable it to take race- or gender-conscious action in the future consistent with current standards of constitutional law. By evaluating the feasibility of implementing a race- or gender-conscious eligibility standard based on an extensive analysis of the available evidence, the Commission has followed the Third Circuit's direction in *Prometheus II* and *Prometheus III.* The Commission notes that over the course of this proceeding, it has performed or commissioned a dozen studies. The *FNPRM* provides a detailed analysis of the relevant studies that were available at the time, and the Commission discusses herein more recent evidence and pertinent information that commenters submitted in response to the *FNPRM.* The Third Circuit court in *Prometheus III* stated that it did not intend to prejudge the outcome of the Commission's analysis of the evidence or the feasibility of implementing a race- or gender-conscious standard that would be consistent both with applicable legal standards and the Commission's practices and procedures.

183. Moreover, the Commission does not believe that any relevant statutory directive requires the adoption of race- or gender-conscious measures to promote ownership diversity. The Commission has previously determined that it has a general mandate to promote ownership diversity under section 257 of the 1996 Act and section 309(j) of the Act, which includes promoting ownership by small businesses, new entrants, and minority- and women-owned businesses. But this authority does not mandate specific outcomes or ownership levels or race- or gender-conscious action to foster diversity, nor does it permit the adoption of rules and policies that are not supported by the record or that conflict with the Constitution. Therefore, the Commission finds the suggestion that either the Third Circuit or the statute compels it to adopt race- or gender-conscious measures to be untenable. The Third Circuit ordered the Commission to make a final determination as to whether to adopt a new eligible entity definition (including consideration of SDB- and ODP-based definitions), and the Commission has done so. As discussed herein, the Commission continues to take significant steps to improve its ownership data and to promote ownership diversity, and its determination that it cannot take race- or gender-conscious action at this time does not mean that the Commission has failed to act appropriately in furtherance of its goal to promote ownership diversity.

184. Some commenters criticize the Commission based on their perception that the Commission has not made a substantial effort to gather evidence that would support race- and gender-conscious measures. Free Press notes that an analysis of ownership diversity would be useful even if it fell short of justifying race- and gender-based policies. One basic assessment that the Commission has not made is a study of the types of market and ownership structures that correlate with women's and people of color's entry into the market, success in the market, or exit from the market. The Commission disagrees and notes that it has made significant efforts to analyze issues of ownership diversity and market structure. Other public interest commenters assert that the Commission inappropriately places the burden of providing additional evidence on commenting parties without describing what it believes is necessary to withstand strict scrutiny. However, the Commission has not only commissioned a number of studies, none of which provided it a constitutional basis to take race- or gender-conscious action; it has also taken a number of steps to improve the quality of its broadcast ownership data and to facilitate future additional studies that commenters, academics, or others believe might provide a constitutional basis to adopt race- and gender-conscious measures. Further, the Commission has provided a detailed and thorough analysis of what is necessary to meet the relevant constitutional standards and identified the reasons it believes that, having studied the question, it does not have evidence that would allow it to meet those standards.

185. In addition, while some commenters have suggested study topics or broad research frameworks, none has provided actionable study designs that the Commission or private researchers could execute. The Commission has expended considerable time and effort throughout the course of this proceeding in an effort to create such study designs; and it has commissioned or performed a dozen studies that it was able to develop over the course of the proceeding. General calls to conduct *Adarand* studies or to study the impact of the Commission's rules on ownership diversity do not help advance the Commission's research in these areas. At present, neither the record in this proceeding nor the Commission's own efforts have produced additional study designs that the Commission expects would develop the evidence necessary to support race- and/or gender-conscious measures. Therefore, the Commission's decision in this *Order* that the record does not support the adoption of race- or gender-conscious measures reflects the inability of the Commission and commenters—including many groups and individuals experienced in research methodology—to identify relevant study designs that, if implemented, would be likely to support such measures. While the Commission believes it worthwhile to continue to explore these issues and to monitor the relevant constitutional jurisprudence, the Commission exercises in this *Order* its responsibility to pass on the race- and gender-based proposals before it at this time. The Commission's action in this *Order* does not prevent the Commission from reassessing these measures in the future if changed circumstances suggest a different outcome. Indeed, this decision does not preclude a different finding in the future, including the adoption of a race- and/or gender-conscious measure, based on new information. Additionally, the Commission will be on alert to any such data that may support such a finding and/or that may suggest steps that may lead to the collection of other relevant data.

D. Additional Proposals Related to Minority and Female Ownership

186. As discussed in the *FNPRM,* several commenters asked the Commission to consider additional measures that they believed would foster ownership diversity. Those measures include: (1) Relaxing the foreign ownership limitations under section 310(b)(4) of the Communications Act; (2) encouraging Congress to reinstate and update tax certificate legislation; (3) granting waivers of the local radio ownership rule to parties that incubate qualified entities; and (4) migrating AM radio to VHF Channels 5 and 6. The Commission also sought comment on various proposals that the Alliance for Women in Media (AWM) asserted would help to promote ownership opportunities for women. The Commission noted that some of these measures have already been implemented and tentatively concluded that the other measures would raise public interest concerns, might not provide meaningful assistance to the intended beneficiaries, or are outside the scope of this proceeding.

187. Since the release of the *FNPRM,* the Commission has implemented more of these measures, including several of the proposals regarding the AM band. The Commission also notes that the 2008 *Diversity Order* considered a number of DCS's earlier diversity proposals and adopted a dozen of those proposals, some with modifications. The specific proposals are discussed below.

1. Incubation

188. In the *FNPRM,* the Commission stated its concern that proposals like DCS's incubation proposal, which would allow blanket waivers of the local radio ownership rule to broadcasters that finance or incubate an SDB or valid eligible entity, would allow for more consolidation in local radio markets than the Commission's rules currently permit without sufficient offsetting benefits. In addition, the Commission stated that implementation of an incubator program would pose other concerns and administrative challenges, including challenges relating to the need to monitor over time the types of complex financing and other arrangements that would qualify an entity for an incubation waiver under DCS's incubation proposal.

189. The Commission does not believe that its concerns are addressed by the incubator program that NAB proposes, which would rely on an ODP standard to define the class of entities eligible to benefit from incubation. The Commission finds that the type of individualized consideration that would be required under an ODP standard would be administratively inefficient, unduly resource-intensive, and potentially inconsistent with First Amendment values. Therefore, limiting the incubator program in the manner that NAB suggests would not address the Commission's concern that implementation of an incubator program would pose administrative challenges, such as the need to monitor continually the complicated legal and financial agreements between broadcasters and the entities they seek to incubate. Other commenters that urge the Commission to adopt an incubator program similarly do not address the policy and practical concerns identified above. Therefore, the Commission declines to adopt an incubator program as proposed by NAB and others.

2. Migration of AM Radio to VHF Channels 5 and 6

190. In the *FNPRM,* the Commission sought comment on its tentative conclusion not to adopt the proposal that most AM radio be migrated to VHF Channels 5 and 6 in this proceeding. In response to the *FNPRM,* commenters did not express opposition to this tentative conclusion. No commenters dispute that implementation of this proposal would involve extensive changes to the Commission's current licensing rules and spectrum policies. As noted in the *FNPRM,* Congress directed the Commission to conduct an incentive auction of broadcast television spectrum—which is ongoing—to make additional spectrum available for wireless use. The Commission finds that implementation of the Channel 5 and 6 proposal has a realistic potential to interfere with the Commission's implementation of the incentive auction and is therefore contrary to the spectrum policies established by Congress. Accordingly, the Commission declines to adopt this proposal.

3. Additional DCS Proposals

191. The *FNPRM* identified numerous other DCS proposals that involved changes to various Commission licensing, service, and engineering rules and policies. It also noted that some of the proposals related to the AM band were already being considered in a separate proceeding. The Commission also notes that DCS asks the Commission to clarify that the 18-month construction extension policy applies both to original construction permits (for the construction of new stations) and to construction permits for major modifications of authorized broadcast facilities (Proposal 17). This is not a new diversity-related proposal, but a request for a clarification of an existing policy, which has been provided herein. Moreover, the Commission notes that relaxation of the main studio rule—among other DCS proposals—is being explored in the AM Revitalization Proceeding. And while the Commission declines to adopt a specific waiver standard for the main studio rule in this proceeding, it notes that currently licensees are able to seek waiver of the rule under the Commission's general wavier standard. While some general support exists for the remaining proposals—primarily from MMTC—the Commission does not believe that the record establishes that these changes to Commission licensing, service, and engineering rules and policies would provide meaningful benefits to the intended beneficiaries. Commenters have had multiple opportunities to voice support for these proposals and explain the potential benefits that would arise from their implementation, but the record contains almost no support for the vast majority of these proposals.

192. The Commission has reviewed these proposals multiple times throughout the course of this proceeding. Those proposals that, based on Commission analysis, warranted additional consideration have been explored in relevant proceedings, such as the AM Revitalization Proceeding. However, upon review, the Commission determines that many of these proposals would be ineffective or insufficient to address the diversity issues under consideration in this proceeding. Despite multiple opportunities for comment, the record reflects little support for the majority of these proposals or evidence that would cause the Commission to reconsider its determination that these proposals warrant additional consideration or adoption. Accordingly, consistent with the tentative conclusion in the *FNPRM,* the Commission declines to adopt these proposals: (1) Bifurcate Channels for Share-Times with SDBs; (2) Use the Share-Time Rule to Allow Broadcasters to Share Frequencies to Foster Ownership of DTV and FM Subchannels; (3) Extend the Three-Year Period for New Station Construction Permits for Eligible Entities and SDBs; (4) Create Medium-Powered FM Stations; (5) Authorize Interference Agreements; (6) Harmonize Regional Interference Protection Standards; Allow FM Applicants to Specify Class C, CO, C1, C2 and C3 Facilities in Zones I and IA; (7) Relax the Limit of Four Contingent Applications; (8) Create a New Local L Class of LPFM Stations; (9) Redefine Community of License as a Market for Section 307 Purposes; (10) Remove Non-Viable FM Allotments; and (11) Issue a One-Year Waiver, on a Case-by-Case Basis, of Application Fees for Small Businesses and Nonprofits.

193. In the *FNPRM,* the Commission also tentatively concluded that certain DCS proposals are outside the scope of this proceeding. The Commission explained that some of those proposals extend into areas that are beyond the Commission's authority and ultimately would require legislative action or action by other federal entities aside from the Commission to create changes in rules or policies. The Commission further explained that other proposals involve non-broadcast services that are outside the scope of the quadrennial review proceedings. While the Commission stated that it did not anticipate taking further action on these proposals within this or successive quadrennial review dockets, it also noted that some of these proposals may warrant further consideration.

194. MMTC challenged the Commission's decision not to consider

these 24 proposals in its appeal of the *FNPRM.* In the course of the *Prometheus III* litigation, the court issued a letter asking MMTC to address which, if any, of the 24 proposals . . . met *both* of the following criteria: (1) The FCC can adopt them without actions by Congress or other regulators and (2) they relate to the broadcast industry. In response, MMTC identified 17 proposals that it asserted met both criteria; in a reply letter to the court, the Commission indicated that it would address the proposals in this item. In *Prometheus III,* the court declined to act on MMTC's challenge, but indicated that it expected the Commission to adhere to its representations to the court.

195. Following the release of *Prometheus III,* MMTC met with Commission staff to discuss the 17 proposals identified for the court. Following these discussions, MMTC now requests that the Commission address five of these proposals in this Order; the remaining 12 proposals are being withdrawn from consideration in the context of this proceeding, though MMTC asserts that it may pursue some of these proposals in other proceedings. The five proposals are: (1) Examine How to Promote Minority Ownership as an Integral Part of All FCC General Media Rulemaking Proceedings; (2) Extend the Cable Procurement Rule to Broadcasting; (3) Mathematical Touchstones: Tipping Points for the Non-Viability of Independently Owned Radio Stations in a Consolidating Market and Quantifying Source Diversity; (4) Engage Economists to Develop a Model for Market-Based Tradable Diversity Credits as an Alternative to Voice Tests; and (5) Create a New Civil Rights Branch of the Enforcement Bureau. The remaining 12 proposals presented to the Third Circuit are: (1) Collect, Study and Report on Minority and Women Participation in Each Step for the Broadcast Auction Process; (2) Increase Broadcast Auction Discounts to New Entrants; (3) Require Minimum Opening Bid Deposits on Each Allotment for Bidders Bidding for an Excessive Proportion of Available Allotments; (4) Only Allow Subsequent Bids to Be Made Within No More than Six Rounds Following the Initial Bid; and (5) Require Bidders to Specify an Intention to Bid Only on Channels with a Total Minimum Bid of Four Times Their Deposits; (6) Grant Eligible Entities a Rebuttable Presumption of Eligibility for Waivers, Reductions, or Deferrals of Commission Fees; (7) Designate a Commissioner to Oversee Access to Capital and Funding Acquisition Recommendations; (8) Develop an Online Resource Directory to Enhance Recruitment, Career Advancement, and Diversity Efforts; (9) Study the Feasibility of a New Radio Agreement with Cuba; (10) Must-Carry for Certain Class A Stations; (11) Create a Media and Telecom Public Engineer Position to Assist Small Businesses and Nonprofits with Routine Engineering Matters; and (12) Conduct Tutorials on Radio Engineering Rules at Headquarters and Annual Conferences. In addition, MMTC is also withdrawing from consideration in this proceeding the seven proposals that it did not identify to the Third Circuit, which largely were legislative recommendations. These legislative recommendations include: (1) Legislative Recommendation to Expand the Telecommunications Development Fund (TDF) Under section 614 and Finance TDF with Auction Proceeds; (2) Legislative Recommendation to Amend section 257 to Require the Commission to Annually Review and Remove or Affirmatively Prohibit Known Market Entry Barriers; (3) Legislative Recommendation to Clarify section 307(b) to Provide that Rules Adopted to Promote Localism are Presumed to be Invalid if They Significantly Inhibit Diversity; (4) Legislative Recommendation to Amend the FTC Act (15 U.S.C. 41–58) to Prohibit Racial Discrimination in Advertising Placement Terms and Advertising Sales Agreements; (5) Legislative Recommendation to Amend section 614 to Increase Access to Capital by Creating a Small and Minority Communications Loan Guarantee Program; (6) Legislative Recommendation to Amend section 614 to Create an Entity to Purchase Loans Made to Minority and Small Businesses in the Secondary Market; (7) Legislative Recommendation to Provide Tax Credit for Companies that Donate Broadcast Stations to an Institution Whose Mission is or Includes Training Minorities and Women in Broadcasting. Consistent with the direction from the Third Circuit and the revised request from MMTC, the Commission will now address the five remaining proposals. While these proposals were originally submitted in this proceeding as part of the DCS Supplemental NPRM Comments, the Commission notes that MMTC submitted the comments on behalf of DCS; accordingly, the Commission finds that relying on MMTC's assertions regarding the preferred treatment of these proposals in this proceeding is appropriate. Moreover, consistent with the Third Circuit's letter, the Commission is generally limiting its consideration of these proposals to the extent that they relate to the broadcast industry.

196. *Proposal 5.* MMTC requests that the Commission consider how to promote minority ownership as part of all of its media-related proceedings. At the outset, the Commission notes that OCBO currently provides outreach services to assist small businesses and new entrants into the communications industry and input on how the Commission's proposed rules impact minority ownership. While OCBO already plays an important role in this process, the Commission finds room potentially to do more to help inform the Commission's consideration of these important issues. Accordingly, going forward, the Commission will consider how to promote minority ownership in relevant media-related rulemaking proceedings and include an inquiry in any appropriate rulemaking to inform that question.

197. *Proposal 10.* MMTC also proposes that the Commission extend the cable procurement requirements to broadcasters and other regulated communications industries. Pursuant to section 634 of the Communications Act, as amended, the Commission adopted what DCS and MMTC refer to as the cable procurement rule, which generally requires that a cable system encourage minority and female entrepreneurs to conduct business with all parts of its operation, for example, by recruiting as wide as possible a pool of qualified entrepreneurs from sources such as employee referrals, community groups, contractors, associations, and other sources likely to be representative of minority and female interests. The Commission notes that the Commission's OCBO has already implemented various initiatives consistent with this proposal, holding multiple supplier diversity conferences and a government advertising workshop—and the Commission anticipates that there will be more such events in the future. However, the Commission finds that merit exists in exploring whether, and if so, how, to extend the cable procurement requirements to the broadcasting industry. Therefore, the Commission will evaluate the feasibility of adopting similar procurement rules for the broadcasting industry.

198. *Proposal 33.* MMTC proposes two formulas it asserts are aimed at creating media ownership limits that promote diversity. Specifically, it suggests a Tipping Point Formula that would be applied in the local radio rule context, and a Source Diversity Formula that appears to be more broadly applicable. The Tipping Point Formula

would be applied in the local radio rule context to determine the tipping point in the distribution of radio revenue in a market between independent owners and owners of multiple stations in that market. The theory is that the independent stations would no longer be able to survive once the combined revenues of the owners of multiple stations exceed the tipping point. The Source Diversity Formula is based on the premise that increases in consumer utility flow from their access to additional sources, with diminishing returns to scale, and is intended to express the consumer benefit derived from marginal increases in source diversity. At present, neither of these proposals is sufficiently defined. As MMTC itself notes, the Tipping Point Formula rests on admittedly rough assumptions, and the record does not provide the Commission with sufficient information to justify or refine the formula for general application across all radio markets. Similarly, the Source Diversity Formula would require field-testing before it could be applied, and the Commission does not believe that the record provides it with the information necessary to rely on the formula to adopt media ownership limits. The Commission therefore directs the Media Bureau to consider these proposals further and to solicit input on these ideas in the document initiating the next quadrennial review of the media ownership rules.

199. *Proposal 37.* MMTC also proposes that the Commission engage economists to develop a model for market-based tradable diversity credits that would serve as an alternative method for adopting ownership limits. Broadly speaking, this proposal involves issuing Diversity Credits that could be traded in a market-based system and redeemed by a station buyer to offset increased concentration that would result from a proposed transaction. While the Commission's authority to adopt such a system is, at best, unclear, the Commission finds merit in evaluating the underlying proposal. The Commission therefore directs the Media Bureau to consider this proposal further and to solicit input on this idea in the document initiating the next quadrennial review of the media ownership rules.

200. *Proposal 40.* MMTC recommends the creation of a new Civil Rights Branch of the Enforcement Bureau that would enforce Media Bureau Equal Employment Opportunity rules, as well as other rules impacting the broadcasting, cable, satellite, wireless, and wireline industries. The Commission has evaluated this proposal and finds that it warrants further consideration. Though the Commission does not see a need to denominate a separate branch, enforcement of the Media Bureau Equal Employment Opportunity rules, which is presently handled by the Media Bureau, might be more appropriate as a function of the Enforcement Bureau, given the Enforcement Bureau's existing mission and expertise in the enforcement of the Commission's regulations. The Commission in no way, however, believes that the Media Bureau has failed to effectively enforce these rules. Accordingly, the Commission directs the appropriate Commission Bureaus and Offices, including the Media Bureau, Enforcement Bureau, and Office of the Managing Director, to discuss the feasibility, implications, and logistics of shifting the enforcement of the Media Bureau Equal Employment Opportunity rules from the Media Bureau to the Enforcement Bureau.

4. AWM Proposals

201. In response to the *NPRM,* AWM proposed that the Commission (i) prepare a primer on investment in broadcast ownership for smaller and regional lenders willing to provide loans to new broadcast entrants; (ii) prepare a primer for new entrants that provides guidance on how to find financing; (iii) establish a link on the Commission's Web site to provide information on stations that may be available for sale to small businesses; and (iv) allow sellers to hold a reversionary interest in a Commission license in certain circumstances. The Commission sought comment on these proposals in the *FNPRM.*

202. The Commission believes it has acted to achieve the purposes of these proposals to the extent appropriate for the industry and the regulatory agency. As noted in the *FNPRM,* OCBO currently engages in a number of activities that provide broadcasters and potential investors with resources that are similar in substance to primers on investment and financing. Beyond those activities, the Commission continues to believe that specific advice about investment and financing is more appropriately provided by private parties that are directly involved in the financial marketplace than by the Commission.

203. With regard to the proposal to allow sellers to hold reversionary interests in Commission licenses in certain circumstances, the Commission previously noted that AWM's proposal does not address the Commission's historical concerns about reversionary interests and is insufficiently developed to warrant departure from the Commission's longstanding policy against the holding of such interests. The Commission has traditionally held that no right of reversion can attach to a broadcast license and that a station licensee is fully responsible for the conduct of the station and its operation in the public interest—a responsibility that cannot be delegated by contract. While NAB notes that it has previously urged the Commission to allow sellers to hold reversionary interests in certain circumstances, NAB does not address the specific concerns the Commission discussed in the *FNPRM* regarding this proposal. The Commission declines to adopt these proposals. If presented with appropriate evidence or analysis regarding the Commission's historical concerns, the Commission may consider in a future proceeding a general review of its reversionary interest policy, subject to resource constraints.

V. Shared Service Agreements

A. Introduction

204. With this Order, the Commission brings transparency to the use of sharing agreements between independently owned commercial television stations. Through these agreements, competitive stations in a local market are able to combine certain operations, with effectively the same station personnel handling or facilities performing functions for multiple, independently owned stations. While such combined operations no doubt result in cost savings—savings that could be reinvested in improved programming and other public interest-promoting endeavors—the Commission has an obligation to ensure that these agreements are not being used to circumvent the Commission's broadcast ownership rules and are not otherwise inconsistent with the Commission's rules and policies. Specifically, the Commission adopts a comprehensive definition of SSAs and a requirement that commercial television stations disclose these agreements by placing them in the stations' online public inspection files. This method of disclosure will place a minimal burden on stations, while providing the public and the Commission with easy access to the agreements. Accordingly, the Commission finds that the benefits of this rule outweigh the minimal burdens associated with disclosure.

B. Discussion

205. The Commission finds that commenters have raised meaningful concerns regarding the potential impact of sharing agreements involving

commercial television stations on the Commission's competition, localism, and diversity policy objectives, particularly with respect to its local broadcast ownership rules. At the same time, resource sharing can deliver meaningful public interest benefits, and the sharing of certain resources may have no negative impact on any of the Commission's policy goals. At present, however, consideration of these issues is impeded because so little is known by the Commission and the public about the content, scope, and prevalence of sharing agreements. Therefore, the Commission adopts a clear definition of SSAs—substantially similar to the definition proposed in the *FNPRM*—to identify the agreements between stations that are relevant to the Commission's improved understanding of how stations share services and resources, and a mechanism for making such arrangements involving commercial television stations transparent to the public and the Commission. Specifically, commercial television stations will now be required to disclose these agreements by placing them in the participating stations' online public inspection files. Through this action, the public and the Commission will be able to better evaluate the impact of these agreements, if any, on the Commission's policy goals.

1. Definition of Shared Service Agreement

206. *Scope of definition.* The Commission finds that the definition proposed in the *FNPRM,* with a minor modification, best comports with the informational needs that support its efforts to define SSAs. Contrary to broadcaster assertions, the Commission does not believe excluding certain resource sharing, such as administrative support or other back-office services, from the definition based on premature assessments of the potential future regulatory treatment of such activities is appropriate. In addition, the Commission agrees with Free Press that a definition narrower than the one adopted would invite legal gamesmanship whereby parties would be able to draft sharing agreements to fall outside of the established definition to avoid disclosure. For this reason, the Commission will not adopt exclusions from the definition of SSA, such as those based on the duration of the agreement or a set dollar amount.

207. To address concerns expressed by certain commenters, however, the Commission emphasizes that the adopted definition limits the scope of agreements to those that involve station-related services. The Commission also provides non-exhaustive examples in the definition for guidance, consistent with the proposal in the *FNPRM.* Station-related services include, but are not limited to, administrative, technical, sales, and/or programming support. Indeed, the Commission's goal is not to adopt a definition of SSAs that encompasses station interactions that do not relate to station operations or that are incidental in nature. For example, community service initiatives and charity events, while worthwhile in their own regard, do not relate to the operation of the broadcast station; accordingly, charitable collaborations involving independently owned broadcast stations would not fit within the adopted definition of SSAs.

208. Similarly, the Commission clarifies that ad hoc or on-the-fly arrangements during breaking news coverage are also outside the definition of SSAs. While such interactions may involve a station-related service, namely news-gathering, such informal, short-term arrangements are typically precipitated by unforeseen or rapidly developing events. Absent a covering agreement that facilitates such cooperation, the Commission does not believe that these types of interactions demonstrate that the stations are working together; rather, they are acting in a manner that allows each station to separately pursue its own ends (*e.g.,* the production of an independent news story). For example, if two news trucks from independently owned broadcast television stations arrive at the scene of an accident at the same time and agree to set up their camera shots from different angles or to rely on the footage shot by only one of the stations due to limited space and safety concerns, this agreement does not evidence actual collaboration between the stations to produce the news segments. Instead, the news teams are reacting to unforeseen circumstances and ensuring that each news team can safely and effectively create its own news story. By contrast, such conduct would be evidence of collaboration, and included in the definition of SSAs, if the stations were parties to an LNS agreement (or similar agreement) that governs the terms of news coverage, even if the stations retain the ability to produce their own segments.

209. *Text of Definition.* While the Commission finds that a clear definition of SSAs is appropriate, one technical change to the text proposed in the *FNPRM* is necessary. In the *FNPRM,* the proposed definition of SSAs was designed to identify the universe of agreements for the provision of station-related services involving stations that are not under common control. Stations under common control do not share services or collaborate in the same way as stations that operate independently for purposes of this definition.

210. Accordingly, the Commission defines an SSA as any agreement or series of agreements, whether written or oral, in which (1) a station provides any station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not directly or indirectly under common *de jure* control permitted under the Commission's regulations; or (2) stations that are not directly or indirectly under common *de jure* control permitted under the Commission's regulations collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations. For purposes of this rule, the term *station* includes the licensee, including any subsidiaries and affiliates, and any other individual or entity with an attributable interest in the station. The Commission emphasizes that sharing agreements to which non-licensee entities are a party (*e.g.,* an operating subsidiary of the ultimate parent company) fall within the adopted definition. The Commission finds that including such entities within the term *station* is necessary to foreclose the possibility that stations could use operating subsidiaries or similar entities to evade the SSA disclosure requirement. This is consistent with the proposal in the *FNPRM* that the Commission should not limit the definition of SSAs to only those agreements to which licensees are parties. Consistent with previous Commission rules, the substance of oral agreements shall be reduced to writing.

2. Disclosure of Shared Service Agreements

211. *Justification for disclosure.* The Commission requires the disclosure of SSAs in each participating station's online public inspection file. The SSA disclosure requirement shall apply regardless of whether the agreement involves stations in the same market or in different markets. This approach follows the approach taken with the public file disclosures for JSAs and LMAs and is consistent with the Commission's intent to learn more about how commercial television stations use these agreements. The Commission finds that this disclosure requirement is tied to a clear regulatory purpose. Commenters in the proceeding have

raised meaningful issues regarding the potential impact of the joint operation of independently owned commercial broadcast television stations pursuant to SSAs on the Commission's rules and policy goals, including, but not limited to, the Commission's local broadcast ownership rules and rules regarding unauthorized transfer of control. These commenters have identified specific provisions in sharing agreements that, according to the commenters, convey a significant degree of influence over the core operating functions of an independent commercial television station (and potentially *de facto* control over the station). In addition, commenters have also provided examples of markets in which sharing agreements have been executed and of the asserted impact of these agreements on the market (*e.g.,* job losses and reductions in independently produced local news programming). According to these commenters, such sharing agreements impact the Commission's competition, localism, and diversity goals, as well as suggest violations of the Commission's rules against unauthorized transfers of control. The disclosure of these agreements is necessary for the public and the Commission to evaluate these potential impacts.

212. Moreover, the Commission's rules have long required that television and radio broadcast stations enable public inspection of certain documents to provide information both to the public and to the Commission about station operations. The public and the Commission rely on information about the nature of a station's operations and compliance with Commission rules to verify that a station is meeting its fundamental public interest obligations. The Commission has consistently found that disclosure requirements facilitate the Commission's regulatory purposes while imposing only a minimal burden on licensees.

213. Additionally, the Commission disagrees that it must first address the appropriate regulatory status of sharing agreements (*e.g.,* make them attributable) before requiring their disclosure. The Commission agrees with public interest commenters in rejecting NAB's assertion that back-office or administrative agreements—agreements that clearly relate to station operations within the adopted definition of SSAs—should be excluded from disclosure because they currently do not raise any attribution or other regulatory concerns. Disclosure itself informs such decisions, and the Commission has wide latitude to impose such a requirement. Moreover, such agreements may also help inform allegations involving unauthorized transfers of control. In the past, the Commission has first required the disclosure of certain agreements that relate to station operations before making a determination that such agreements should be subject to additional regulation. The Commission's action in this *Order* is consistent with this precedent. Indeed, the Commission could hardly fulfill its obligation to ensure that station operations are consistent with Commission rules and policies if it were required to determine the regulatory status of certain agreements *before* obtaining the information necessary to evaluate the agreements. The Commission does not think the public interest would be served by adopting such a constricted view of the Commission's authority. The Commission notes that its action does not predetermine that any additional regulation will be forthcoming for SSAs; rather, the disclosure is necessary for the Commission to make such a determination.

214. Furthermore, the Commission is not persuaded that the adopted disclosure requirement will discourage stations from entering into SSAs. First, the adopted method for disclosure minimizes the cost of compliance and utilizes a procedure with which commercial television broadcasters already have extensive experience. It cannot be credibly stated that the burden associated with disclosure would exceed the benefits of the agreements. Second, the Commission finds it instructive that no evidence exists showing that the disclosure requirements for JSAs and LMAs, specific types of SSAs, have inhibited the formation of those agreements. To the contrary, the Commission first required the public filing of television JSAs in 1999, and the prevalence of these agreements increased significantly after the disclosure requirement was adopted. Ultimately, the Commission does not find any evidence to support the contention that disclosure of SSAs would discourage stations from executing such agreements, particularly if the agreements are as beneficial as broadcast commenters contend.

215. Finally, the Commission rejects NAB's assertion that the SSA disclosure requirement would violate the First Amendment because the Commission is immersing itself in broadcasting stations' day-to-day operations. The cases cited by NAB in support of its theory are readily distinguishable from the adopted disclosure requirement, as neither case involves simply requiring disclosure of contracts relating to station operations. Contrary to NAB's claims, the Commission is not interfering with broadcasters' editorial discretion. Rather, the Commission is simply requiring that commercial television stations place certain contracts in their public file, just as the Commission has done numerous times in the past. In particular, the Commission is not restricting broadcasters' discretion to determine what content to offer, nor is the Commission mandating or prohibiting any particular contractual terms. Thus, the disclosure requirement does not burden broadcasters' speech. In particular, the Commission is not compelling broadcasters to express a message or viewpoint. Further, no evidence exists that previous disclosure requirements have resulted in such involvement. Indeed, the Commission has a long history of deferring to a licensee's good faith discretion in programming decisions—particularly news programming—and the Commission believes that the SSA disclosure requirement is consistent with this precedent. In this case, the Commission is not even proposing to regulate SSAs beyond the bare disclosure requirement.

216. NAB further argues that the disclosure requirement fails to satisfy the constitutional standards for regulations that require businesses to disclose factual information, stating that the agency must show that a substantial government interest exists that is directly and materially advanced by the restriction and that the restriction is narrowly tailored to achieve the government interest. On the contrary, even assuming that the disclosure requirement burdens broadcasters' speech to any extent (which the Commission concludes above is not the case), the requirement would be subject, at most, to rational basis review, which is the same standard that courts have applied to the Commission's ownership rules. Under this standard of review, a rule does not violate the First Amendment if it is a reasonable means of promoting the public interest in diversified mass communications.

217. The Commission's SSA disclosure requirement satisfies this standard. SSAs relate to a broadcast station's core operational functions and thus could have the effect of lessening competition, diversity, or localism by creating a commonality of interests. They could also have beneficial effects. Public interest commenters and broadcasters have conflicting viewpoints about whether SSAs should be deemed attributable for purposes of the Commission's ownership rules and whether they negatively or positively

affect the Commission's public interest goals of competition, diversity, and localism. Without an industry-wide disclosure rule, the Commission lacks the information necessary to determine the extent to which SSAs may affect diversity, competition, and localism and whether SSAs in fact confer significant influence or control warranting attribution for purposes of its ownership rules or raising unauthorized control concerns. Although broadcasters have disclosed SSAs in connection with individual license assignments/transfers of control applications, the Commission does not know what types of SSA are in place between stations that are not parties to such pending Commission applications, nor does the Commission know the extent to which broadcasters across the industry utilize SSAs that are not already required to be disclosed. Thus, the Commission believes industry-wide disclosure is necessary to allow the Commission and public to evaluate in a comprehensive manner the extent to which broadcasters use various types of SSA, the nature of the contractual relationships, and the manner in which specific types of agreements affect competition, diversity, or localism. Broadcasters hold licenses issued by the Commission and are obligated to operate in the public interest, and thus they have no right to withhold from the Commission or the public agreements that may significantly affect their service to the public. Therefore, the Commission's rule is a reasonable means of promoting the Commission's diversity, competition, and localism goals and assuring that SSAs do not raise unauthorized control concerns and satisfies the criteria for First Amendment rational basis review.

218. The case law NAB cites in support of a higher standard of review concerns requiring a regulated entity to undertake new speech, and presents the question of whether a restriction on commercial speech, normally subject to intermediate scrutiny, satisfies the criteria for rational basis review under the exception applicable to compelled commercial speech that is strictly factual. Ultimately, NAB seems to be relying on *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557 (1980), for the proposition that restrictions on commercial speech are subject to intermediate scrutiny. In *Central Hudson,* the Court invalidated a state regulation that prohibited public utilities from promoting the use of electricity in their advertising and marketing materials. Here, in contrast, the Commission is simply requiring broadcasters to publicly disclose contracts they have already executed, not undertake new speech. Further, although the SSA disclosure rule does nothing more than require placement of SSAs in the broadcasters' public inspection file, it is subject to rational basis review for a different reason (*i.e.,* because it is a content-neutral rule that furthers the Commission's scheme of broadcast ownership regulation and the policy goals supporting such regulation). Thus, if the SSA disclosure requirement burdens speech at all, the rational basis review applicable to structural broadcast regulations—not the intermediate scrutiny standard applicable to commercial speech—applies to the disclosure requirement.

219. Finally, even assuming that the intermediate scrutiny standard of *Central Hudson* applies, which the Commission concludes is not the case, the rule directly and materially advances governmental interests that the Supreme Court has recognized in *Turner Broadcasting System, Inc.* v. *FCC,* 512 U.S. 622, 663 (1994), as substantial. The purpose of the rule is to provide information that is directly relevant to the Commission's regulation of broadcast ownership and the policy goals that underlie its ownership rules. The filing of SSAs will further the Commission's goal of collecting the necessary information. The Commission has tailored the requirement to exclude agreements that are already subject to disclosure in a station's public file and to exclude agreements that are not likely to implicate the Commission's policy concerns. The rule does not restrict or dictate the ways in which broadcasters may share resources but simply requires them to disclose contracts that already exist. The filing requirement is therefore narrowly tailored to achieve the regulatory objective, and the burden is minimal. Accordingly, the Commission finds that the disclosure requirement does not violate the First Amendment even under the higher standard of review that NAB advocates.

220. *Disclosure in station's online public inspection file.* The Commission will require commercial broadcast television stations to post SSAs to each participating station's online public inspection file that is hosted by the Commission. The Commission finds that the online public filing requirement, pursuant to § 73.3526 of the Commission's rules, best facilitates the disclosure of SSAs. In the *Enhanced Disclosure Order* (77 FR 27631, May 11, 2012, FCC 12–44, rel. Apr. 21, 2012), the Commission updated the disclosure requirements to make information concerning broadcast service more accessible to the public by having stations post their public files online in a central, Commission-hosted database. Consistent with its findings in that order, the Commission finds that an online public filing requirement best comports with Commission policy to modernize the procedures that television broadcasters use to inform the public about how stations are serving their communities. Having stations post their SSAs online in a central, Commission-hosted database utilizes existing technology to make information concerning broadcast service more accessible to the public and reduces broadcasters' costs of compliance over time. The Commission is not convinced that other disclosure methods, such as an ECFS docket or filing with the Commission pursuant to § 73.3613 of the Commission's rules, are less burdensome than the online public file requirement or that such methods provide meaningful advantages to the public and the Commission in terms of identifying and accessing SSAs.

221. The Commission declines to adopt NAB's proposed alternative to require that stations submit an aggregate list of SSAs as part of the biennial ownership reports. The Commission agrees with comments that a mere list of agreements would be insufficient for the purpose the Commission seeks. Such a limited disclosure would not permit the public or the Commission to develop a full and complete understanding of SSAs and their impact on the broadcast television industry. Simply submitting a list of agreements would not provide the public or the Commission with any information about the nature and scope of the agreements, only that the agreements exist. While the prevalence of SSAs is of some importance, the terms of the agreements and their impact on station operations are far more critical to an analysis of the potential impact of SSAs on the Commission's rules and policy goals. In addition, disclosure only in biennial ownership reports would not result in timely disclosure of these agreements, which would frustrate continued efforts to study SSAs. Moreover, searching for SSAs disclosed in biennial ownership reports would be a more laborious task for the public and the Commission than searching the online public files. Indeed, a significant benefit of the online public file is that it improves public access to documents while minimizing burdens on stations. NAB's proposal ignores this significant benefit without identifying any meaningful benefits in return.

222. *Disclosure by noncommercial stations, radio, and newspapers.* The

Commission declines to expand the SSA disclosure requirement beyond commercial television stations, as commenters have not provided sufficient justification for such an expansion at this time. Commenters provided the Commission with numerous examples of sharing agreements involving commercial television stations. Based on these examples, commenters raised meaningful concerns about the potential impact of such agreements on the Commission's public interest goals. The evidence in the record, however, does not demonstrate that SSAs involving noncommercial stations, radio stations, or newspapers are common or that they present the same kinds of potential public interest concerns. However, the Commission may revisit its decision to limit disclosure to commercial television stations in the future if evidence suggests that additional disclosure may be appropriate.

223. *Redaction of confidential or proprietary information.* As part of the SSA disclosure requirement, the Commission adopts provisions that permit stations to redact confidential or proprietary information, just as the Commission has for LMAs and JSAs. The Commission notes, however, that the redacted information must be made available to the Commission upon request. The redaction allowance directly addresses the concerns of commenters that oppose the disclosure of SSAs on the grounds that it will require stations to disclose sensitive, confidential business information.

224. The Commission rejects NAB's argument that the redaction allowance will not be sufficient to protect broadcast stations' business interests because the disclosure of the mere existence of these agreements will provide useful information to competitors. All broadcasters have long been required to attach copies of transaction-related SSAs to a license assignment or transfer application, including placing the application and relevant agreements in the station's public inspection file until final action has been taken on the application. No evidence in the record indicates that this requirement has resulted in any competitive harm. In addition, the Commission notes that broadcast commenters have failed to provide evidence that the business interests of television broadcast stations have been inhibited by the adoption of the LMA and JSA disclosure requirements or that such interests are likely to be inhibited by the substantially similar SSA disclosure requirement adopted in this *Order.* Furthermore, the Commission finds that NAB's argument is at odds with its own proposed alternative for stations to submit aggregate lists of SSAs as part of their biennial ownership reports, which would disclose the existence of such agreements. The Commission concludes that the adopted redaction allowance sufficiently balances the informational needs of the public and the Commission with the business interests of broadcasters to keep proprietary information confidential.

225. *Cost of compliance.* Consistent with Commission precedent, the Commission finds that an online public filing requirement minimizes the cost to broadcasters while ensuring that the public has easy and convenient access to the information. As the Commission has previously stated, the Commission finds that the electronic upload or scanning and upload of SSAs is not unduly burdensome. The Commission does not find arguments to the contrary to be persuasive or supported by evidence. Aside from general statements that disclosure will be too costly, commenters opposing disclosure provide no cost estimates to support their assertions. Moreover, because of the clarifications above, the Commission finds that it has adequately addressed concerns that the definition of SSAs is overly broad and would result in a significant increase in the number of agreements stations would be required to upload to their public inspection file. Television broadcasters should also be well versed in uploading documents to the Commission's online public inspection file database, as they have been required to use the database since 2012.

226. *Duplicative filings.* As the Commission already requires broadcasters to submit JSAs and LMAs in accordance with its public file disclosure requirements, the Commission confirms that, to the extent that the SSA disclosure requirement would duplicate established JSA and LMA disclosures, a broadcaster would have to place these agreements in their public inspection file only once. A broadcaster will not be required to file additional copies of JSAs and LMAs for the SSA disclosure requirement if the broadcaster's public inspection file already contains a copy of the agreement. This clarification reduces the burden of compliance to broadcasters and is consistent with previous Commission decisions regarding duplicative filings.

227. *Procedural matters.* Each station that is party to an SSA executed before the effective date of the adopted disclosure requirement, which is subject to OMB approval, shall place a copy of the SSA in its public inspection file within 180 days after the disclosure requirement becomes effective, provided that the agreement is not already in the station's public inspection file. The Commission will seek OMB approval for the disclosure requirement, and, upon receiving approval, the Commission will release a Public Notice specifying the date by which SSAs must be placed in the stations' online public files. The Public Notice will also provide further details on how the SSA files are to be designated within each station's online public file. SSAs that are executed after the disclosure requirement is effective must be placed in the stations' online public files in a timely fashion, and stations are reminded to maintain orderly public files.

3. Attribution

228. Finally, in response to the *FNPRM,* multiple commenters assert that the Commission should immediately make SSAs attributable based on the existing record and the Commission's experience with SSAs in the context of assignments/transfers of control of station licenses. The Commission declines to make SSAs attributable. As noted in the *FNPRM,* and as confirmed herein, the Commission believes that first defining SSAs and requiring their disclosure is necessary before making any decisions regarding attribution or any other regulatory action that may be appropriate based on review of these agreements. Unlike the resource sharing provided for in LMAs and JSAs—which are specific types of SSAs involving discrete, easily defined activities with a clear impact on a station's core operating functions—the types of resource sharing in other SSAs are not easily categorized and their potential impact on a station's core operating functions is not well understood at this time, largely due to the lack of a definition of SSAs and lack of disclosure. Accordingly, the Commission's action in this *Order* is a necessary step before the Commission can consider whether attribution of any additional types of SSAs or any other regulatory action is appropriate. The Commission has traditionally taken an incremental approach in determining whether and how to attribute agreements between and among broadcasters. In these circumstances, the Commission finds that proceeding in this fashion, one step at a time, when addressing these complicated issues is appropriate and reasonable. The Commission notes also that the court in

Prometheus III rejected the argument that the Commission acted arbitrarily and capriciously by not attributing all . . . SSAs in the *JSA Order,* finding instead that the Commission was justified in its sequential approach in addressing this issue. Though the Commission reiterated that its action in this *Order* is not intended to prejudge whether attribution or any other regulatory actions are appropriate for SSAs. Once the Commission has had an opportunity to evaluate the potential impact of SSAs on the Commission's rules and policy goals, it will be able to consider whether attribution or other regulatory action is warranted.

VI. Procedural Matters

A. Final Regulatory Flexibility Analysis

229. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules addressed in the *Second Report and Order.*

230. *Need for, and Objectives of, the* Second Report and Order. The *Second Report and Order* concludes the 2010 and 2014 Quadrennial Reviews of the broadcast ownership rules, which were initiated pursuant to section 202(h) of the Telecommunications Act of 1996, Public Law 104–104, section 202(h), 110 Stat. 56, 111–12 (1996) (1996 Act) (codified as amended at 47 U.S.C. 303 note) (1996 Act). The Commission is required by statute to review its media ownership rules every four years to determine whether they are necessary in the public interest as the result of competition and to repeal or modify any regulation the Commission determines to be no longer in the public interest. The media ownership rules that are subject to this quadrennial review—the Local Television Ownership Rule, the Local Radio Ownership Rule, the Newspaper/Broadcast Cross-Ownership Rule, the Radio/Television Cross-Ownership Rule, and the Dual Network Rule—are found, respectively, at 47 CFR 73.3555(b), (a), (d), (c), and 73.658(g). Ultimately, while the Commission acknowledged the impact of new technologies on the media marketplace, it concluded that some limits on broadcast ownership remain necessary to protect and promote the Commission's policy goals of fostering competition, localism, and diversity.

231. Specifically, the *Order* retains the Local Television Ownership Rule, which allows an entity to own two television stations in the same Nielsen Designated Market Area (DMA) only if no Grade B contour overlap exists between the commonly owned stations, or at least one of the commonly owned stations is not ranked among the top-four stations in the market (top-four prohibition) and at least eight independently owned television stations remain in the DMA after ownership of the two stations is combined. The *Order* modifies the Local Television Ownership Rule by updating the contour provision for the rule's application to reflect the digital television transition. The *Order* also clarifies that the top-four prohibition applies to transactions involving the sale or swapping of network affiliations between in-market stations that result in an entity holding an attributable interest in two top-four stations in the same DMA.

232. The *Order* retains the Local Radio Ownership Rule, which specifies the maximum number of commercial radio stations that can be owned depending on the total number of full-power commercial and noncommercial radio stations in the market. The Order makes minor modifications to the Local Radio Ownership Rule to assist the Media Bureau in processing license assignment and transfer applications. Specifically, the *Order* (1) clarifies the exception to the two-year waiting period for certain Nielsen Audio Market changes; (2) adopts an exemption from the Note 4 grandfathering requirements for intra-Metro community of license changes; and (3) redefines the Puerto Rico market.

233. The *Order* adopts a revised Newspaper/Broadcast Cross-Ownership Rule, which prohibits certain newspaper/television and newspaper/radio combinations subject to a case-by-case waiver. The *Order* updates the Newspaper/Broadcast Cross-Ownership Rule's contour provision to consider digital television contours consistent with the switch to digital television. The Order also eases application of the cross-ownership prohibition by adopting new market criteria for the rule's application and an explicit exception for failed/failing properties.

234. The *Order* retains the Radio/Television Cross-Ownership Rule, which restricts common ownership of television and radio stations in a local market based on the number of independently owned media voices in the market. The *Order* updates the Radio/Television Cross-Ownership Rule's contour provision for the rule's application from analog to digital to reflect the digital television transition. First, consistent with the update to the NBCO Rule, a television station's digital PCC will be used instead of its analog Grade A contour when determining the rule's trigger. Second, a television station's digital NLSC will be used instead of its analog Grade B contour when counting the number of media voices remaining in the market post-merger.

235. The *Order* finds that the Dual Network Rule, which permits common ownership of multiple broadcast networks, but prohibits a merger between or among the top four networks (ABC, CBS, Fox, and NBC), continues to be necessary to promote competition and localism and should be retained without modification.

236. The *Order* readopts the Television Joint Sales Agreement (JSA) Attribution Rule, which was vacated on procedural grounds by the Court of Appeals for the Third Circuit in *Prometheus III.* The Commission has found that certain JSAs between in-market television stations rise to the level of attribution as they afford the brokering station the potential to unduly influence or control the brokered station. The Television JSA Attribution Rule attributes same-market television JSAs in which the broker sells more than 15 percent of the brokered station's weekly advertising time. In such circumstances, the brokered station will be counted towards the brokering station's permissible broadcast ownership totals for purposes of the Local Television Ownership Rule. The Television JSA Attribution Rule also requires the filing of attributable television JSAs with the Commission pursuant to 47 CFR 73.3613 and authorizes the Media Bureau to amend certain forms that are impacted by the FCC's action to attribute certain television JSAs. The *Order* preserves the existing grandfathering legislation (which grandfathered until Sept. 30, 2025 those television JSAs that were in effect as of March 31, 2014) and allows for the transferability of such grandfathered television JSAs, consistent with congressional guidance.

237. The *Order* reinstates the revenue-based eligible entity standard and associated measures to promote the Commission's goal of encouraging small business participation in the broadcast industry, which will cultivate innovation and enhance viewpoint diversity. In the *Order,* the Commission considers possible definitions that would expressly recognize the race and ethnicity of applicants but finds that the legal standards the courts have said must be met before government implementation of preferences based on such race- or gender-conscious definitions have not been satisfied.

238. The *Order* adopts a definition of shared service agreements (SSAs) and requires commercial television stations to disclose those SSAs by placing the agreements in each station's online public inspection file. The SSA disclosure requirement will lead to more comprehensive information about the prevalence and content of SSAs between commercial television stations, which will improve the Commission's and the public's ability to assess the potential impact of these agreements on the Commission's rules and policies. The method of disclosure by placing SSAs in the online public inspection file will apply a minimal burden on stations, while providing the public and the Commission with easy access to the agreements.

239. *Response to Public Comments and Comments by the Chief Counsel for Advocacy of the Small Business Administration.* The Commission received no comments in direct response to the IRFA or the SIRFA. The Chief Counsel for Advocacy of the Small Business Administration did not file any comments in response to the proposed rules in this proceeding.

240. *Description and Estimate of the Number of Small Entities to Which Rules Will Apply.* The SBA defines a television broadcasting station that has no more than $38.5 million in annual receipts as a small business. Census data for 2012 indicate that 751 television broadcasting firms were in operation for the duration of that entire year. Of these, 656 had annual receipts of less than $25.0 million per year and 95 had annual receipts of $25.0 million or more per year. Based on this data and the associated size standard, the Commission concludes that the majority of such firms are small.

241. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,387. According to Commission staff review of the BIA/Kelsey, LLC's Media Access Pro Television Database on June 2, 2016, about 1,264 of an estimated 1,387 commercial television stations (or approximately 91 percent) had revenues of $38.5 million or less. The Commission has estimated the number of licensed noncommercial educational television stations to be 395.

242. The SBA defines a radio broadcasting entity that has $38.5 million or less in annual receipts as a small business. Census data for 2012 indicate that 3,187 radio broadcasting firms were in operation for the duration of that entire year. Of these, 3,134 had annual receipts of less than $25.0 million per year and 53 had annual receipts of $25.0 million or more per year. Based on this data and the associated size standard, the Commission concludes that the majority of such firms are small.

243. Further, according to Commission staff review of the BIA/Kelsey, LLC's Media Access Pro Radio Database on June 2, 2016, about 11,386 (or about 99.9 percent) of 11,395 commercial radio stations in the United States have revenues of $38.5 million or less. The Commission has estimated the number of licensed noncommercial radio stations to be 4,096. The Commission does not have revenue data or revenue estimates for these stations. These stations rely primarily on grants and contributions for their operations, so it will assume that all of these entities qualify as small businesses.

244. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the SBA definition, business (control) affiliations must be included. The Commission's estimate, therefore, likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

245. In addition, an element of the definition of small business is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television or radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television or radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, as noted, an additional element of the definition of small business is that the entity must be independently owned and operated. The Commission notes that assessing these criteria in the context of media entities is difficult at times and the estimates of small businesses to which they apply may be over-inclusive to this extent.

246. The SBA has developed a small business size standard for the census category of Newspaper Publishers; that size standard is 1,000 or fewer employees. Census Bureau data for 2012 show that there were 4,466 firms in this category that operated for the entire year. Of this total, 4,378 firms had employment of 499 or fewer employees, and an additional 88 firms had employment of 500 to 999 employees. Therefore, the Commission estimates that the majority of Newspaper Publishers are small entities that might be affected by its action.

247. *Description of Reporting, Record Keeping, and other Compliance Requirements for Small Entities.* The *Order* adopts rule changes that will affect reporting, recordkeeping, and other compliance requirements. The need for and content of each of these rule changes is described in detail above in the summary of the action, and the Commission's efforts to minimize the impact of these rules is described in detail below. Additionally, the *Order* adopts a requirement that commercial broadcast television stations must place a copy of any SSA entered into between commercial broadcast television stations in their online public inspection files within 180 days after the filing requirement becomes effective. The Commission will seek OMB approval for the filing requirement, and, upon receiving approval, the Commission will release a Public Notice specifying the date by which SSAs must be filed. Going forward, commercial broadcast television stations must place copies of such agreements in their online public inspection files in a timely fashion following execution.

248. As a result of these new or modified requirements, the Commission does not believe that small businesses will need to hire additional professionals (*e.g.,* attorneys, engineers, economists, or accountants) to comply with the new reporting, recordkeeping, and other compliance requirements. Commercial television stations should already have staff capable of placing SSAs in the stations' online public files, given the existing public file requirements.

249. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* In conducting the quadrennial review, the Commission has three chief alternatives available for each of the Commission's media ownership rules—eliminate the rule, modify it, or, if the Commission determines that the rule is necessary in the public interest, retain it. The Commission finds that the rules adopted in the Order, which are intended to achieve the policy goals of competition, localism, and diversity, will continue to benefit small entities by fostering a media marketplace in which they are better able to compete and by promoting additional broadcast ownership opportunities among a diverse group of owners, including small entities. The Commission discusses below several ways in which the rules may benefit small entities as well as steps taken, and significant alternatives considered, to minimize any potential burdens on small entities.

250. The Commission finds that the Local Television Ownership Rule, as modified, will continue to help ensure that local television markets do not become too concentrated and, by doing so, will allow more firms, including those that are small entities, to enter local markets and compete effectively. The *Order* also addresses the competitive challenges faced by broadcasters that operate in small markets—including small entities—by retaining the existing failed/failing station waiver policy. In particular, the Commission notes that a review of recent transactions demonstrates that waivers under the failed/failing station policy are frequently granted in small and mid-sized markets, which often provides relief for small entities.

251. The *Order* concludes that, consistent with previous Commission findings, broadcast radio continues to be a viable avenue for new entry in the media marketplace, including by small businesses, minorities, women, and entities seeking to serve niche audiences. The Commission finds that retention of the local radio ownership limits, including the AM/FM subcaps, will help foster opportunities for new entry in local radio markets, including by small entities. Moreover, the Commission believes that by limiting the consolidation of market power among the dominant groups, the rule will help ensure that small radio station owners remain economically viable.

252. In several ways, the Commission's decisions regarding the NBCO Rule minimize the economic impact on small entities, namely small broadcasters and newspaper owners. First, retaining the prohibition on newspaper/broadcast combinations in local markets will help small entities compete on more equal footing with larger media owners that may have pursued consolidation strategies through cross-ownership. Second, by entertaining waiver requests on a pure case-by-case basis, taking into consideration the totality of circumstances surrounding a proposed transaction and the potential harm to viewpoint diversity, the Commission will have the flexibility to accord the proper weight to any factors that are particularly relevant for small media owners. The significant alternatives that the Commission considered, such as allowing combinations under either a bright-line rule or a presumptive waiver standard, would not have afforded the Commission the same degree of flexibility. Third, adopting a more lenient approach for proposed combinations involving a failed or failing broadcast station or newspaper will benefit entities in financial distress, which may be more likely to include small entities. Fourth, grandfathering existing combinations will avoid disruption of settled expectations of existing licensees and prevent any impact on the provision of service by smaller entities that are part of such combinations. Finally, requiring subsequent purchasers of grandfathered combinations to comply with the rule in effect at that time will provide opportunities for new entrants to acquire a divested media outlet.

253. By retaining the Radio/Television Cross-Ownership Rule, the Commission minimizes the economic impact on small entities. The Commission considered the significant alternative of eliminating the rule but concluded that it remained necessary to promote viewpoint diversity. Retaining the rule will benefit small broadcast stations by limiting the growth of existing combinations of radio stations and television stations in local markets. In addition, grandfathering existing combinations will avoid disruption of settled expectations of existing licensees and prevent any impact on the provision of service by smaller stations that are part of such combinations; requiring subsequent purchasers of grandfathered combinations to comply with the rule in effect at that time will provide opportunities for new entrants to acquire a divested media outlet. The Commission's decision also alleviates the concern expressed by commenters that further consolidation would harm small businesses because radio provides one of the few entry points into media ownership for minorities and women.

254. The Commission finds that the Dual Network Rule remains necessary to preserve the balance of bargaining power between the top-four networks and their affiliates, thus improving the ability of affiliates to exert influence on network programming decisions in a manner that best serves the interests of their local communities. The Commission believes that these benefits to affiliates are particularly important for small entities that may otherwise lack bargaining power.

255. The Commission finds that reinstating the revenue-based standard will help promote small business participation in the broadcast industry. The Commission believes that small-sized applicants and licensees benefit from flexible licensing, auctions, transactions, and construction policies. Often, small-business applicants have financing and operational needs distinct from those of larger broadcasters. By easing certain regulations for small broadcasters, the Commission believes that it will promote the public interest goal of making access to broadcast spectrum available to a broad range of applicants. The Commission also believes that enabling more small businesses to participate in the broadcast industry will help encourage innovation and expand viewpoint diversity. In addition, the Commission's intent in reinstating the previous revenue-based eligible entity definition—and in applying it to the construction, licensing, transaction, and auction measures to which it previously applied—is to expand broadcast ownership opportunities for new entrants, including small entities. Therefore, the Commission anticipates that these measures will benefit small entities, not burden them.

256. Although the Commission does not currently require the filing or disclosure of sharing agreements that do not contain time brokerage or joint advertising sales provisions, broadcasters are required to file many types of documents in their public inspection files. Therefore, broadcasters, including those qualifying as small entities, are well versed in the procedures necessary for compliance and will not be overly burdened with having to add SSAs to their public inspection files. In addition, the Commission considered various disclosure alternatives in the record, but determined that such measures would either be more burdensome than the disclosure method adopted in the *Order* or that the proposals would not adequately address the concerns raised by the Commission. Ultimately, as the Commission finds that the new SSA disclosure requirement will not be especially burdensome to small entities, adopting any special measures for small entities with respect to this new disclosure requirement is therefore unnecessary.

B. Final Paperwork Reduction Act Analysis

257. This Report and Order contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. The requirements will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the information collection requirements contained in this proceeding. The Commission will publish a separate document in the **Federal Register** at a later date seeking these comments. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of

2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees. In this present document, the Commission has assessed the effects of the SSA disclosure requirement, and finds that the disclosure requirement will not impose a significant filing burden on businesses with fewer than 25 employees. In addition, the Commission has described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA.

C. Congressional Review Act

258. The Commission will send a copy of this Second Report and Order to the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

VII. Ordering Clauses

259. Accordingly, *it is ordered,* that pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, 310, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, and 403, and section 202(h) of the Telecommunications Act of 1996, this Second Report and Order *is adopted.* The rule modifications attached hereto as Appendix A shall be effective thirty (30) days after publication of the text or summary thereof in the **Federal Register**, except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective on the effective date announced in the **Federal Register** notice announcing OMB approval. Changes to Commission Forms required as the result of the rule amendments adopted herein *will become effective* on the effective date announced in the **Federal Register** notice announcing OMB approval.

260. *It is further ordered,* that the proceedings MB Docket No. 09–182 and MB Docket No. 14–50 *are terminated.*

List of Subjects in 47 CFR Part 73

Radio, Reporting and recordkeeping requirements, Television.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer, Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications 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 § 73.3526 by adding paragraph (e)(18) to read as follows:

§ 73.3526 Local public inspection file of commercial stations.

* * * * *

(e) * * *

(18) *Shared service agreements.* For commercial television stations, a copy of every Shared Service Agreement for the station (with the substance of oral agreements reported in writing), regardless of whether the agreement involves commercial television stations in the same market or in different markets, with confidential or proprietary information redacted where appropriate. For purposes of this paragraph, a Shared Service Agreement is any agreement or series of agreements in which:

(1) A station provides any station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not directly or indirectly under common de jure control permitted under the Commission's regulations; or

(2) Stations that are not directly or indirectly under common de jure control permitted under the Commission's regulations collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations. For purposes of this paragraph, the term ''station'' includes the licensee, including any subsidiaries and affiliates, and any other individual or entity with an attributable interest in the station.

* * * * *

■ 3. Amend § 73.3555 by revising paragraphs (b) introductory text, (b)(1) introductory text, (b)(1)(ii), (c)(1)(i) and (ii), (c)(3)(i), and (d), and revising Note 4 and Note 5; and adding Note 11 and Note 12 to read as follows:

§ 73.3555 Multiple ownership.

* * * * *

(b) *Local television multiple ownership rule.* An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) if:

(1) The digital noise limited service contours of the stations (computed in accordance with § 73.622(e)) do not overlap; or

* * * * *

(ii) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. Count only those TV stations the digital noise limited service contours of which overlap with the digital noise limited service contour of at least one of the stations in the proposed combination. In areas where there is no DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations digital noise limited service contours of which overlap with the digital noise limited service contour of at least one of the stations in the proposed combination.

* * * * *

(c) * * *

(1) * * *

(i) The predicted or measured 1 mV/m contour of an existing or proposed FM station (computed in accordance with § 73.313) encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the principal community contour(s) of the TV broadcast station(s) (computed in accordance with § 73.625) encompasses the entire community of license of the FM station; or

(ii) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station (computed in accordance with § 73.183 or § 73.186), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the principal community contour(s) of the TV broadcast station(s) (computed in accordance with § 73.625) encompass(es) the entire community of license of the AM station.

* * * * *

(3) * * *

(i) TV stations: Independently owned and operating full-power broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license that have digital noise limited service contours (computed in accordance with § 73.622(e)) that overlap with the digital noise limited service contour(s) of the TV station(s) at issue;

* * * * *

(d) *Newspaper/broadcast cross-ownership rule.* (1) No party (including all parties under common control) may directly or indirectly own, operate, or control a daily newspaper and a full-power commercial broadcast station (AM, FM, or TV) if:

(i) The predicted or measured 2 mV/m groundwave contour of the AM station (computed in accordance with § 73.183 or § 73.186) encompasses the entire community in which the newspaper is published and, in areas designated as Nielsen Audio Metro markets, the AM station and the community of publication of the newspaper are located in the same Nielsen Audio Metro market;

(ii) The predicted or measured 1 mV/m contour of the FM station (computed in accordance with § 73.313) encompasses the entire community in which the newspaper is published and, in areas designated as Nielsen Audio Metro markets, the FM station and the community of publication of the newspaper are located in the same Nielsen Audio Metro market; or

(iii) The principal community contour of the TV station (computed in accordance with § 73.625) encompasses the entire community in which the newspaper is published; and the community of license of the TV station and the community of publication of the newspaper are located in the same DMA.

(2) The prohibition in paragraph (d)(1) of this section shall not apply upon a showing that either the newspaper or television station is failed or failing.

* * * * *

Note 4 to § 73.3555: Paragraphs (a) through (d) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for assignment of license or transfer of control filed in accordance with § 73.3540(f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, or to FM or AM broadcast minor modification applications for intra-market community of license changes, if no new or increased concentration of ownership would be created among commonly owned, operated or controlled media properties. Paragraphs (a) through (d) of this section will apply to all applications for new stations, to all other applications for assignment or transfer, to all applications for major changes to existing stations, and to all other applications for minor changes to existing stations that seek a change in an FM or AM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties. Commonly owned, operated or controlled media properties that do not comply with paragraphs (a) through (d) of this section may not be assigned or transferred to a single person, group or entity, except as provided in this Note, the Report and Order in Docket No. 02–277, released July 2, 2003 (FCC 02–127), or the Second Report and Order in MB Docket No. 14–50, FCC 16–107 (released August 25, 2016).

Note 5 to § 73.3555: Paragraphs (b) through (e) of this section will not be applied to cases involving television stations that are ''satellite'' operations. Such cases will be considered in accordance with the analysis set forth in the Report and Order in MM Docket No. 87–8, FCC 91–182 (released July 8, 1991), in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. An authorized and operating ''satellite'' television station, the digital noise limited service contour of which overlaps that of a commonly owned, operated, or controlled ''non-satellite'' parent television broadcast station, or the principal community contour of which completely encompasses the community of publication of a commonly owned, operated, or controlled daily newspaper, or the community of license of a commonly owned, operated, or controlled AM or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station, may subsequently become a ''non-satellite'' station under the circumstances described in the aforementioned Report and Order in MM Docket No. 87–8. However, such commonly owned, operated, or controlled ''non-satellite'' television stations and AM or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 4 of this section. Nor shall any application for assignment or transfer concerning such ''non-satellite'' stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated, or controlled newspaper is proposed to be transferred, except as provided in Note 4 of this section.

* * * * *

Note 11 to § 73.3555: An entity will not be permitted to directly or indirectly own, operate, or control two television stations in the same DMA through the execution of any agreement (or series of agreements) involving stations in the same DMA, or any individual or entity with a cognizable interest in such stations, in which a station (the ''new affiliate'') acquires the network affiliation of another station (the ''previous affiliate''), if the change in network affiliations would result in the licensee of the new affiliate, or any individual or entity with a cognizable interest in the new affiliate, directly or indirectly owning, operating, or controlling two of the top-four rated television stations in the DMA at the time of the agreement. Parties should also refer to the Second Report and Order in MB Docket No. 14–50, FCC 16–107 (released August 25, 2016).

Note 12 to § 73.3555: Parties seeking waiver of paragraph (d)(1) of this section, or an exception pursuant to paragraph (d)(2) of this section involving failed or failing properties, should refer to the Second Report and Order in MB Docket No. 14–50, FCC 16–107 (released August 25, 2016).

[FR Doc. 2016–25567 Filed 10–31–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL REGISTER

Vol. 81 Tuesday,
No. 211 November 1, 2016

Part V

The President

Proclamation 9529—Military Family Month, 2016
Proclamation 9530—National Adoption Month, 2016

Federal Register
Vol. 81, No. 211
Tuesday, November 1, 2016

Presidential Documents

Title 3—

The President

Proclamation 9529 of October 27, 2016

Military Family Month, 2016

By the President of the United States of America

A Proclamation

For generations, brave Americans have stepped forward and answered our country's call to serve in our Armed Forces. With honor and distinction, our Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen fight to defend the principles upon which our Republic was founded so that we might live in a freer and more prosperous world. Behind these courageous Americans stand spouses, children, and parents who give up precious time with their loved ones, bearing the burden of long deployments and difficult moves, and oftentimes putting their careers on hold. During Military Family Month, we salute the families of those who proudly are a part of our Nation's unbroken chain of patriots for their unwavering devotion, and we renew our sacred vow to uphold our promise to our troops, our veterans, and their families.

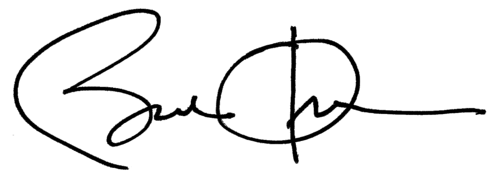
Our military would not be the greatest in the world without the strength and support of the loved ones who stand alongside our men and women in uniform. While our service members are fighting to secure the values we cherish and defend our homeland, their spouses keep their households running, sometimes through multiple deployments. Spouses of those in the military are often forced to relocate across our country or around the globe, leaving behind jobs they love and sometimes struggling to find new employment. They are our fellow citizens and neighbors; in their service to their families and their country, they represent the true strength of America.

Our Nation has a solemn obligation to support and care for the members of our military and their families—from their first day of training until they conclude their service—and my Administration has worked to ensure we uphold this promise. Through First Lady Michelle Obama and Dr. Jill Biden's *Joining Forces* initiative, we have worked with both the public and private sectors to ensure service members, veterans, and their families have the tools they need to succeed throughout their lives. Over the past 5 years, we have rallied businesses to hire more than 1.2 million veterans and military spouses. Today, every single State has taken action to streamline professional licensing and credentialing processes so that military spouses can continue their work when they move across State lines without having to re-certify for a job they are already qualified for. We are also working to provide the resources military families need to start businesses and pursue an education, and we are helping teachers and schools support military children from kindergarten through college. By partnering with the private sector, we have also helped expand access to essential science, technology, engineering, and math courses so that 60,000 more military children can be college-ready and prepared for 21st-century careers.

We must always be there for our service members and their families—just as they are there for us. Through the thickest of fights and the darkest of nights, our extraordinary military families—our heroes on the home front—stand alongside our patriots in uniform, and in their example we see the very best of our country's spirit. This month, let us thank them for their tremendous devotion to duty and for their unyielding sacrifice. Let us honor their resolve and patriotism and uphold our solemn responsibility to ensure the priorities of our Nation reflect the priorities of our military families.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 2016 as Military Family Month. I encourage all Americans to honor military families through private actions and public service for the tremendous contributions they make in support of our service members and our Nation.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of October, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.



[FR Doc. 2016–26525
Filed 10–31–16; 11:15 am]
Billing code 3295–F7–P

Presidential Documents

Proclamation 9530 of October 27, 2016

National Adoption Month, 2016

By the President of the United States of America

A Proclamation

Across America, adoptive parents welcome children into stable, loving families, providing a safe and comforting place for children in need to call home. Families who choose the life-changing path of adoption make a meaningful and lasting difference in the lives of some of the most vulnerable young people in our society. Regardless of sexual orientation, gender identity, race, or religion, devoted Americans who adopt help give more children the upbringing they deserve. Each November, we recognize the important role that adoption has played in the lives of children and families in our country and around the world, and we rededicate ourselves to ensuring every child can find their forever family.

Last year, more than 100,000 children were waiting to be adopted from foster care, and every year, too many older youth age out of the foster care system before they are able to find permanence. Without this support during the critical years of early adulthood, these youth are more likely than their peers to experience homelessness, unemployment, or incarceration. To make the possibility of adoption real for more children across our country, my Administration has eliminated barriers to adoption by extending tax credits and providing financial incentives to child welfare agencies in almost every State to maximize adoptions. I have also worked to strengthen Federal workplace flexibility policies to ensure more families, including adoptive families, can keep their jobs and care for their children as their family grows.

On the Saturday before Thanksgiving, we also recognize National Adoption Day, kicking off a week of reflection and gratitude for many adoptive families. Each year on this day, thousands of adoptions are finalized, including more than 4,000 children in 2015. This year, cities from coast to coast will host a variety of events to commemorate the occasion.

One of the most important jobs many of us will ever have is being a parent. Throughout National Adoption Month, we celebrate all those who have invited a child in need into their hearts and into their homes, and we express our profound appreciation for all who help make adoptions possible. Let us continue strengthening the adoption process so that all children can learn, grow, and thrive with the support of a devoted and permanent family.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 2016 as National Adoption Month. I encourage all Americans to observe this month by answering the call to find a permanent and caring family for every child in need and by supporting the families who care for them.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of October, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.

[FR Doc. 2016–26526
Filed 10–31–16; 11:15 am]
Billing code 3295–F7–P

Reader Aids

Federal Register

Vol. 81, No. 211

Tuesday, November 1, 2016

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.fdsys.gov.**

Federal Register information and research tools, including Public Inspection List, indexes, and Code of Federal Regulations are located at: **www.ofr.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

FEDERAL REGISTER PAGES AND DATE, NOVEMBER

CFR PARTS AFFECTED DURING NOVEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List October 19, 2016

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.

TABLE OF EFFECTIVE DATES AND TIME PERIODS—NOVEMBER 2016

This table is used by the Office of the Federal Register to compute certain dates, such as effective dates and comment deadlines, which appear in agency documents. In computing these dates, the day after publication is counted as the first day.

When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

DATE OF FR PUBLICATION	15 DAYS AFTER PUBLICATION	21 DAYS AFTER PUBLICATION	30 DAYS AFTER PUBLICATION	35 DAYS AFTER PUBLICATION	45 DAYS AFTER PUBLICATION	60 DAYS AFTER PUBLICATION	90 DAYS AFTER PUBLICATION
November 1	Nov 16	Nov 22	Dec 1	Dec 6	Dec 16	Jan 3	Jan 30
November 2	Nov 17	Nov 23	Dec 2	Dec 7	Dec 19	Jan 3	Jan 31
November 3	Nov 18	Nov 25	Dec 5	Dec 8	Dec 19	Jan 3	Feb 1
November 4	Nov 21	Nov 25	Dec 5	Dec 9	Dec 19	Jan 3	Feb 2
November 7	Nov 22	Nov 28	Dec 7	Dec 12	Dec 22	Jan 6	Feb 6
November 8	Nov 23	Nov 29	Dec 8	Dec 13	Dec 23	Jan 9	Feb 6
November 9	Nov 25	Nov 30	Dec 9	Dec 14	Dec 27	Jan 9	Feb 7
November 10	Nov 25	Dec 1	Dec 12	Dec 15	Dec 27	Jan 9	Feb 8
November 14	Nov 29	Dec 5	Dec 14	Dec 19	Dec 29	Jan 13	Feb 13
November 15	Nov 30	Dec 6	Dec 15	Dec 20	Dec 30	Jan 17	Feb 13
November 16	Dec 1	Dec 7	Dec 16	Dec 21	Jan 3	Jan 17	Feb 14
November 17	Dec 2	Dec 8	Dec 19	Dec 22	Jan 3	Jan 17	Feb 15
November 18	Dec 5	Dec 9	Dec 19	Dec 23	Jan 3	Jan 17	Feb 16
November 21	Dec 6	Dec 12	Dec 21	Dec 27	Jan 5	Jan 20	Feb 21
November 22	Dec 7	Dec 13	Dec 22	Dec 27	Jan 6	Jan 23	Feb 21
November 23	Dec 8	Dec 14	Dec 23	Dec 28	Jan 9	Jan 23	Feb 21
November 25	Dec 12	Dec 16	Dec 27	Dec 30	Jan 9	Jan 24	Feb 23
November 28	Dec 13	Dec 19	Dec 28	Jan 3	Jan 12	Jan 27	Feb 27
November 29	Dec 14	Dec 20	Dec 29	Jan 3	Jan 13	Jan 30	Feb 27
November 30	Dec 15	Dec 21	Dec 30	Jan 4	Jan 17	Jan 30	Feb 28